REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 466 OF 2013

RAMESHCHAND SHAMJI KARMAN SHAH ……………………..…………………………… **1ST PLAINTIFF**

AMRIT RAMESHCHAND SHAMJI SHAH ……………………………….....………………. **2ND PLAINTIFF**

Versus

PLAYFAIR ENTERPRISES LIMITED ………………………………….……..…………… **1ST DEFENDANT**

TRUST FINANCE LIMITED (IN LIQUIDATION) ……………………….……..………….. **2ND DEFENDANT**

RULING

Injunctive relief

[1] The Motion dated 29th October 2013 is seeking injunctive relief against the Defendant, and more specifically:-

a. ***A temporary injunction restraining the 2nd Defendant from advertising for sale, selling, Auctioning, disposing off, entering into, accessing alienating, transferring or interfering with and/or in any manner whatsoever dealing with the Applicant's property known as L.R No. 209/4584 on Kimbo Munyiri Road, Nairobi County pending the hearing and determination of the suit.***

b. ***A temporary injunction restraining the 2nd Defendant whether by themselves or servants' from exercising and/or invoking its rights whether accrued or otherwise under the charge dated 10th March 1995 and the Debenture dated 10th March 1995 as against the Applicants and in favour of the 2nd Respondent.***

[2] The Motion is supported by the Supporting Affidavit of **RAMESHCHAND SHAMJI KARMAN SHAH** sworn on the **29th October 2013** and the Annexures thereof. The Motion was canvassed by way written submissions as here under.

The Applicants' gravamen

[3] The Applicant submitted that they have satisfied the principles of granting injunctive relief set out in the case of ***Giella –vs- Cassman Brown*** which are thus;

a. ***A prima facie case.***
b. ***Irreparable loss and damage.***
c. ***Balance of Convenience.***

[4] According to the Applicants, *prima facie* case is established in the fact that this case raises fundamental issues touching on the integrity and legality of the Respondents right as contemplated in the Charge dated 10th March 1995 and the Debenture dated 10th March 1995. These were securities towards a loan facility granted to the 1st Defendant. The security comprises three properties namely, L.R No. 209/4584 on Kombo Munyiri Road, L.R No. 209/106/15 and 209/106/16 on 1st Avenue Parklands. The Plaintiffs contention is that the 2nd Defendant breached its statutory duty of care to the Plaintiffs and conspired with the 1st Defendant to fraudulently dispossess the Plaintiffs of their property. The particulars *inter alia* of the foregoing breach and conspiracy have been pleaded in **Paragraph 20** as follows;

a. ***Fraudulently applying the proceeds of sale of L.R No. 209/106/15 and L.R No. 209/106/16 to new and unauthorized A/C No. 0153-0003212 instead of the loan A/C no. 0153-0003212-0600 or the contracted account by the 1st Defendant since the grant of the loan facility.***

b. ***Failure to register their interest in terms of the Debenture as against the Distress for rent by M/s Princely House Limited thereby exposing the 1st Defendant to risk of loss of business and consequently prejudicing its obligations in terms of the Loan Agreement.***

c. ***Applying unauthorized and illegal interest rates of 35% contrary to the express provisions of Section 44 of the Banking Act.***

d. ***Acquiescing and/or countenancing to continued withdrawal on the loan account even after there was change in directorship of the Company and the unlawful transfer of shares thereby exposing the 1st Plaintiff to unbridled risks/liability.***

e. ***Opening a separate loan account bearing 0153-0003212-0601 without notifying the 1st Defendant or their directors and the guarantors.***

f. ***The Loan disbursements amounted to Kshs. 19,000,000/- or there about whereas the claim on account of the loan facility is premised on Kshs. 21,500,000/-***

g. ***Demanding illegal payments in contravention of Section 44A of the Banking Act.***

h. ***Allowing the 1st Defendant to continue utilizing the loan facility above the contractual limit of Kshs. 21,500,000/- or after breach of the terms of the debenture and the Charge instruments.***

[5] The 1st Plaintiff resigned as a director of the 1st Defendant and the Bank was notified of this fact but still continued providing financial facilities to the 1st Defendant. The Bank despite various irregularities in its dealings with the 1st Defendant failed to exercise a duty of care to the Plaintiffs in respect of the Charge. On illegal interest rates see the cases of **Suleiman vs Amboseli Resort Limited (2004) 2 KLR** and **Prof. David Ndetei vs. Daima Bank (2005) eKLR** where the court held in the latter case that;

> ***'……The evidential burden of disproving that the charges were not contrary to the requirements of the Central Bank of Kenya Act and the Banking Act were squarely on the Defendant….'***

[6] The Applicants submitted that the 2nd Defendant's defence of *Subjudice* under Section 6 and the Section 233 of the Companies Act is misplaced. In HCCC NO 1652 OF 1999 the Plaintiffs had filed a suit against the Director of the 1st Defendant, Mahesh Shah and Trust Bank Limited but the suit has since abated as the said director is deceased and Trust Bank went into liquidation. Filing this suit was necessitated by the change of capacity of the bank once it went into liquidation. The Court can also stay that suit pending the hearing and determination of this current one since there are issues of looking for the administrators of the Estate of the late Mahesh Shah. There is no prejudice occasioned to the 1st Respondent since they have never filed a defence in HCCC NO. 1652 OF 1999. On this see the case of **Daqare Transporters Limited vs Barclays Bank Of Kenya Limited (2008) eKLR** where the court held that;

> ***'Section 6 of Civil Procedure Act does not provide for the striking off of a later suit or of it's dismissal, if found to be directly or substantially similar as a previously***
>
> ***instituted suit…'***

They also addressed the issue of leave of the Court under Section 228 of the Companies Act and urged that one is only enjoined to seek leave of Court if the Liquidation is pursuant to a court order or sanctioned by the Court under Section 235 of the said Act**.** The Liquidation of the 2nd Defendant was ordered by the CBK through the Deposit Protection Fund under Section 35 of the Banking Act. Contrary to the allegation by the 2nd Defendant, this suit does not fall foul of Section 228 of the Companies Act in that the Plaintiff did not seek leave of court. According to the Applicants, the said Section does not apply. They relied on the case of **Euro Bank Limited vs. Meenye & Co. Advocates (2011) eKLR** where the court held that the provisions of Section 228 do not apply to Banking institutions under liquidation.

[7] On irreparable damage, they contended that the property subject of this suit has been the sole source of income for them and their means of livelihood is moored on this property. Therefore, the property is of great sentimental value to them. It is also a prime property and once the same is sold, the Plaintiffs cannot get another one in the same location and of the same value. On this see the following cases;

a. **Waithaka vs. Industrial & Commercial Development Corporation (2001) KLR.**

b. **Russel Co. Limited vs. Commercial Bank Of Africa Ltd & Another (1986) KLR.**

c. **Mwathi vs. Kenya Commercial Finance Co. (1987) KLR.**

[8] They concluded by stating that the balance of convenience tilts in their favour, for they have been in possession of the said premises for more than 15 years.

[9] They also filed supplementary submissions and Supplementary Affidavit of RAMESHCHAND SHAMJI KARMAN SHAH sworn on 28th March 2014 specifically to address issues raised in the Replying affidavit of MICAH NAIBORI sworn on 25th February 2014. The placed into perspective the Annexures marked as 'MLN14' and 'MLN 17' in the Replying Affidavit. The said correspondences were done on ''without prejudice'' basis and therefore cannot form part of the proceedings. Though on the face of it, they have not been indicated as being on a without prejudice basis, the contents of them reveal that the parties were negotiating the settlement terms especially in light of the suits filed by the Plaintiff i.e. HCCC NO 1652 of 1999 and HCCC NO 1896/96. The same cannot be taken as an admission on the part of the Plaintiff. The court should consider the circumstances under which these correspondences were made. On this score, see the case of **Rush & Tompkins Limited vs. Greater London Council and Others (1989) AC 1280.** As an example, they referred the court to Annexure 'MLN 4' in the 2nd Respondent's Affidavit. Whereas the 1st Respondent maintained loan Account No. 0152-0003212-0600, the 2nd Respondent unlawfully opened another account No A/C 450057-0601 to which more debits where

made without the knowledge of the 1st Plaintiff. From the said Annexure, it is also apparent that the interest are Kshs. 126,715,987.35/- which are obscenely high and in total contravention of the *in duplum* rule as espoused in Section 44 and 44A of the Banking Act. Surprisingly, *the sum of Kshs. 8,000,000/- which was partly realized from the sale of the two properties which formed part of the security were never reflected in the bank statements marked as 'MLN4' which lends credence to the Applicants' contention that the accounts in respect of the loan facility are saddled with irregularities.* They beseeched court to grant the application dated 29th October 2013 and thereof protect the Plaintiffs from the arbitrariness of the 2nd Respondent.

The Respondents opposed application

[11] The 2nd Defendant filed submissions. They stated that the application is seeking injunctive relief against the 2nd Defendant's exercise of statutory power of sale over the parcel of land known as L.R. No. 209/4584 (hereinafter referred to as "the charged property") as well as an order for accounts. They also filed a Replying Affidavit sworn on 25th February 2014. It was submitted that the Plaintiff has failed to show lawful cause to justify the issuance of the orders sought. Further, the present Application is devoid of merit and it is only an overt intention to deny or delay the 2nd Defendant's lawful and accrued right to realize its security. They stated that the Plaintiffs are estopped from challenging the 2nd Defendant's exercise of statutory power of sale over the charged property on the basis of letters of 29th July 1998 and 2nd February 2001, exhibited as **"MLN 14"** and **"MLN 17"** respectively. The Plaintiffs promised to pay by selling their charged property by private treaty and/or redeem the same in payment of the outstanding facility secured by the said property. On the strength of these promises, the 2nd Defendant stopped the intended auctions of the Plaintiff's charged property and thereby cancelled its intended exercise of its statutory power of sale. However, the Plaintiffs failed to keep their said promises to the detriment of the 2nd Defendant. To that extent, promissory estoppel arose in favour of the 2nd Defendant estopping the Plaintiffs from denying the amounts claimed by the 2nd Defendant. See the case of **Benjamin Ayiro Shiraku vs. Fozia Mohammed [2012] eKLR** where Justice Havelock observed that: -

> ***"Perhaps more pertinent still to the case before me was the dictum of Denning LJ in the case of the Combe v Combe (1951) 2 KB 215 when he stated (and such is very persuasive):***
>
> > ***"the principle, as I understand it, is that, where one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave a promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him …" Emphasis added***

[12] Therefore, according to the 2nd Defendant, applying this principle to the facts of this matter, the Plaintiffs cannot now be allowed to recant their promises. They must be held to their acquiescence to the amounts claimed by the 2nd Defendant as being due and acknowledgement of the chargee's statutory power of sale over the charged property. In the circumstances, the present Application does not lie in law and ought to be dismissed without further consideration. They did not stop there. The 2nd Defendant argued that, whereas the present Application is an interlocutory application, it seeks a final order in the nature of **a mandatory injunction to compel the Respondent to furnish and provide the Applicants with a complete and proper and accurate statement of account in respect of account number 0153-0003212-0600 in the name of the 1st Respondent."** This is contrary to law, and the wisdom in this legal principle is that if a court issues final orders at the interlocutory stage, it will in essence have determined with finality the rights and obligations of the parties thereby rendering the trial of the matter nugatory. The order sought by the Plaintiffs is not of an interim nature. See **Rajput v Barclays Bank of Kenya Ltd & 3 others [2004] 2 KLR 393** where Justice Emukule in dismissing an interlocutory application held as follows: -: -

"The application offends the cardinal principle that no final order may issue on an interlocutory application ..."

The Application in so far as it seeks a final order at the interlocutory stage is incompetent and/or fatally defective and ought to be dismissed forthwith.

[13] The Respondent urged that the Plaintiff cannot make out a *prima facie* case in this matter at least not as against the 2nd Defendant because the Plaintiffs admit that the 1st Defendant was afforded a credit facility by the 2nd Defendant whose repayment was *inter alia* secured by way of a charge over the charged property and that the 1st Defendant defaulted in making repayments of the said facility. The applicant does not carry a single grievance against the 2nd Defendant for any breach of a right or illegality. The 2nd Defendant has exhibited all the statutory notices contemplated under the law that were sent to the Plaintiffs over the years as well as proof of service thereof. No challenge has been made against the validity of the various statutory notices issued by the 2nd Defendant and service thereof is not denied. The only objection that the Plaintiffs are raising is an issue of the moneys due under the facility secured by the charged property; and so they are seeking for accounts of the loan account. It is now trite law that a dispute as to accounts is not sufficient grounds to injunct a chargee from exercising its statutory power of sale. See Ringera J, (as he then was) in the classical case of **Thathy v Middle East Bank (K) Ltd & another [2002] 1 KLR 595.**

[14] Therefore, the Plaintiffs have failed to establish a prima facie case and thus the present Application fails. On irreparable damage, the 2nd Defendant stated that the Plaintiffs have not adduced evidence to show that if the injunctive relief sought was not granted, they stood to suffer irreparable loss. An award of damages would be sufficient compensation to the Applicant. The 2nd Defendant is capable of raising or meeting the award if at all. In **Ooko V Barclays Bank of Kenya Ltd 2 [2002] KLR 394** Justice Ringera (as he then was) ruled as follows at page 398: -

"The second condition is that an interlocutory injunction will not normally be granted unless the applicant can show that he will suffer an irreparable injury which cannot be compensated by an award of damages. The onus is obviously on the applicant to do that. In the instant matter, the plaintiff did not even attempt to do so. She was content to submit that once a prima facie case had been made, it was not necessary to consider any other matters and that the defendant had not shown it could compensate her adequately in damages. To my mind, the plaintiff's submission was misconceived. The correct approach to the matter would have been for the applicant to show that she could not adequately be compensated in damages and that even if damages were an adequate remedy, the defendant could not meet the required amount. In the instant matter the applicant has not established any of the above matters. On the contrary, there is nothing to suggest that if the properties charged were sold and the plaintiff were to prevail at the trial the defendant which is as a matter of common notoriety of which judicial notice may be taken one of the Kenya's largest and most profitable Banks could not meet any award of damages. The plaintiff does not in the premises satisfy the second condition for grant of the temporary injunction." Emphasis added

[15] To the 2nd Defendant, the Plaintiffs have failed to prove the irreparable harm or loss that it stands to suffer. As such, since the Plaintiff has failed to establish a prima facie case and/or prove the irreparable loss he stands to suffer, it follows that the balance of convenience in the matter tilts in favour of the 1st Defendant. The Plaintiffs have engaged in inequitable conduct in this matter that disentitles them to the equitable remedy of injunction. See the promises they made but did not keep. This was exemplified in ***Thathy v Middle East Bank (K) Ltd & another*** *supra* where the court, at page 605, held that: -

"How about the plaintiff's conduct? It is apparent from the affidavit of Saya Dinamani of 18.3.02 and the annexures thereto that the history of the parties is characterized by several demands for payment of mortgage debt, and several unfulfilled promises by the plaintiff to pay the said debt. The defendant has extended a lot of indulgence to the plaintiff but the plaintiff has not made good

> ***his promises. … <u>In my judgment, when all the above factors are considered the conclusion is inescapable that the plaintiff's conduct disentitles him to the favour of equity</u>. He cannot get an injunction to restrain the Bank from realizing its security when he is heavily indebted, his promises of repayment have come to nought and he does not envince any intention to repay soon or at all. " Emphasis added***

[16] The Plaintiffs have also failed to disclose to this Honourable Court the essential and pertinent factual matters set out in paragraphs 12 – 44 inclusive of the 2nd Defendant's Replying Affidavit ostensibly in a bid to ensure injunctive relief is not declined. The Plaintiffs also misrepresented facts in their present Application with the apparent intention to mislead this Honourable Court as to the factual position and thereby unjustly obtain injunctive relief. The Plaintiffs stated that the sale of the other security property to the mortgage debt, L.R. No. 209/106/16 and L.R. No. 209/106/15, satisfied the entire debt with full knowledge that the same was not true. Further, the Plaintiffs alleged that the 2nd Defendant influenced them to withdraw High Court Civil Case No. 1896 of 1996 – Nairobi with full knowledge that the same was done at their instigation and with their consent. In such circumstances, this Honourable Court ought to decline the Plaintiffs any relief in the matter. On this issue, see the decision by the Court of Appeal in **Bao Investments and Office Management Services Ltd v Housing Finance Co. of Kenya Ltd [2006] eKLR** where the court held as follows: -

> ***"It was in a situation such as this that in <u>R. v. The Kensington Tax Commissioners</u> (supra) that the court said: where an ex parte application has been made to this Court for a rule nisi or other process, <u>if the Court comes to the conclusion that the affidavit in support of the application was not candid and did not fairly state the facts, but stated them in such a way as to mislead the Court as to the true facts, the Court ought, for its own protection and to prevent an abuse of its process, to refuse to proceed any further with the examination of the merits</u>. <u>This is a power inherent in the court, but one which should only be used in cases which bring conviction to the mind of the Court that it has been deceived</u>." Emphasis Added***

The Plaintiffs have filed a multiplicity of suits, to wit, High Court Civil Case No. 1966 of 1996 – Nairobi and High Court Civil Case No. 1652 of 1999 – Nairobi seeking the same relief. They are guilty of abusing court process. See the Court of Appeal decision in **Kieran Day & 4 Others v Ceres Estates Limited (In Receivership) [2011] eKLR** where at page 4, it was held that: -

> ***"As <u>the respondent had evidently abused the court process by filing several suits and applications </u>so as to prevent the appellants from recovering its just debts <u>it is undeserving of any relief</u>. This case is a classic example of how court process can be invoked to frustrate commercial institutions from recovering the loans they genuinely lend to their customers. The suit was first lodged nine (9) years ago in 2003 and is still not yet heard substantially save for interlocutory applications." Emphasis added***

On the basis of the above reasons, the 2nd Defendant urged the Court to dismiss the Plaintiffs' Application dated 29th October 2013 with costs.

DETERMINATION

Mandatory injunction issuable at interlocutory stage

[17] There are several and important issues which have arisen. Despite the fact that the decision of the court may turn on only one point, for the sake of fairness, I will determine all the issues herein. I see that the application seeks injunctive relief: temporary injunction and a mandatory injunction. The mandatory injunction is to compel the 2nd Defendant to give accounts. I should state that the threshold for temporary injunction is different from that for mandatory injunction and I will set out the respective thresholds below. Except I wish to dispel the notion held by the Respondents that a mandatory injunction which

grants a final order cannot be granted at interlocutory stage. On the contrary, the true position of the law is as postulated in the case of **Kenya Airport Authority vs. New Jambo Taxis NBI Civil Appeal No 29 of 1997 (C.A),** where the Court of Appeal, while applying the decision of Megary J. (as he then was) in **SHEPHERD HOMES V SANDHAM [1979] 3 WLR 348**, held that:

> ***"…an order which results in granting a major relief claimed in the suit, which may not be granted at final hearing, ought not to be granted at an interlocutory stage."***

But the Court of Appeal In the above case of **Kenya Airport Authority case** (ibid), cited with approval the passage in ***"Halsbury's Laws of England,"*** Volume 24, at paragraph 948 to the effect that:

> ***"A mandatory injunction can be granted on an interlocutory application, as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempts to steal a march on the plaintiff … a mandatory injunction will be granted on an interlocutory application."***

[18] Ringera J (as he them was) in the case of **Showind Industries Ltd vs. Guardian Bank Ltd & Another [2002] 1 EA 284 (CCK)** also gave a good rendition on the test in the grant of mandatory injunction as follows:

> ***''As I understand the law, an interlocutory mandatory injunction is granted very sparingly and only in exceptional circumstances such as where the applicant's case is very strong and straight forward. Moreover, as the remedy is an equitable one, it may be denied where the applicant's conduct does not meet the approval of a court of equity or his equity has been defeated by laches''.***

[19] Therefore, in law, a relief of mandatory and or permanent injunction may be granted at interlocutory stage even if it may result into granting the major or final relief sought in or which substantially or completely compromises the entire suit. Except, such relief should only be granted at interlocutory stage in exceptional cases which are clear, straight forward, strong or where it is clear the Defendant wants to steal a match from the Applicant. In such instances, it would be unfair and contrary to justice to allow a belligerent Defendant the advantage of time which ordinarily attends to a hearing. This is the test I will apply in this case on the request for mandatory injunction. What about temporary injunction?

Temporary injunction

[20] The law on grant of temporary injunctive relief has grown like any other law to cover situations not covered before. The entire circumstances of the case, including any peculiar circumstance as borne out by the material before the court should be considered by the court as it seeks to answer the traditional questions in **Giella vs. Cassman Brown:** Has the Applicant established prima facie case with probability of success? Will the Applicant suffer irreparable damages which cannot be compensated by an award of damages if the injunction is not granted? And, where does the balance of convenience lie? The court has always taken the view expounded by Justice Hoffman in the English case of **Films Rover International (1986) 3 All ER 772 at page 780-781** that:-

> ***"A fundamental principle is that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been "wrong"…."***

I will start with the request for temporary injunction to restrain exercise of mortgagee's statutory power of sale.

HAS PRIMA FACIE CASE BEEN ESTABLISHED?

Law on Guarantee

[21] The Plaintiffs are guarantors of the indebtedness of the 1st Defendant to the 1st Defendant arising out of a loan facility granted to the 1st Defendant by the 2nd Defendant. The guarantee was given in the form of a charge over their property herein. In law, a guarantee that is towards company's indebtedness is not a guarantee of the directors' indebtedness. Therefore, such guarantee is not affected by change of directors of the company. This argument throws me back to the best innovation of separate corporate legal personality of a company in **Salomon vs. Salomon.** I reject the contrary argument presented by the Applicants on this subject. The Plaintiffs do not deny that the 1st Defendant was advanced a loan facility by the 2nd Defendant and that the 1st Defendant defaulted in repayment of the loan. Their major complaint is that the actual amount owing is not as demanded because the 2nd Defendant allegedly:-

> ***a) Illegally opened a separate loan account No 0153-0003212-0601 without notifying the 1st Defendant or their directors and the guarantors, and fraudulently applied the proceeds of sale of L.R No. 209/106/15 and L.R No. 209/106/16 to the said new and unauthorized A/C of the loan A/C No. 0153-0003212-0600;***
>
> ***b) Applied unauthorized and illegal interest rates of 35% contrary to the express provisions of Section 44 of the Banking Act;***
>
> ***C) Acquiesced and/or countenanced continued withdrawals on the loan account even after there was change in directorship of the Company and the unlawful transfer of shares thereby exposing the 1st Plaintiff to unbridled risks/liability;***
>
> ***d) Allowed the 1st Defendant to continue utilizing the loan facility above the contractual limit of Kshs. 21,500,000/- or after breach of the terms of the debenture and the Charge instruments.***

Statutory Notices and without prejudice correspondences

[22] The Plaintiffs do not deny that statutory notices were issued. The Plaintiffs do not also deny that they made several requests for indulgence in order to enable them ensure that the loan is repaid in full. They wrote letters to the bank acknowledging indebtedness and offering to sell the suit property by private treaty in order to make good the company's indebtedness but all in vain. They have taken the defence that those letter were written on without prejudice even if they were not marked as such. They relied on the decision by the House of Lords in the case of **Rush & Tompkins Limited vs. Greater London Council and Others (1989) AC 1280** that;

> ***"The rule applies to exclude all negotiations genuinely aimed at settlement whether oral or in writing from being given in evidence. A competent Solicitor will always head any negotiating correspondence 'without prejudice' to make clear beyond doubt that in the event of the negotiations being unsuccessful they are not to be referred to at the subsequent trial. However, the application of the rule is not dependent upon the use of the phrase 'without prejudice' and if it is clear from the surrounding circumstances that the parties were seeking to compromise the action, evidence of the content of those negotiations will, as a general rule, not be admissible at the trial and cannot be used to establish an admission or partial admission.''***

The law Lords were very clear in the formulation of the rule on without prejudice correspondence or communication; where a letter is not marked ''without prejudice'' for it to enjoy the privilege of the rule, it must be ***clear from the surrounding circumstances that the parties were seeking to compromise the action.*** The position of the Plaintiffs is that of directors of the company and at the same time guarantors of the indebtedness of the company. Communication by such persons to, and in the relationship they have with the bank is an

acknowledgement of indebtedness of the company and proposal by the guarantor to make good the debt. I have considered the contents of the said correspondences, and in light of the law on guarantee, the nature of obligations and liability of a guarantor to the lender, unless it they are specifically marked ‘’without prejudice’’ the negotiations thereto are acknowledgement of indebtedness of the company and basis for liability against the guarantor. Also noting that the bank was already exercising its statutory power of sale under the law, the circumstances surrounding the writing of the letters may not support an inference that the correspondences were made on without prejudice basis. I dismiss that argument by the Plaintiffs on those correspondences.

Disputes on Amount Owed and Interest Charged

[23] Essentially, the disputes herein are on the amount of the loan and interest. The law is that disputes on the loan amount and interest will not be a basis for granting an injunction. See the decision by Ringera J, (as he then was) in the case of **Thathy v Middle East Bank (K) Ltd & another [2002] 1 KLR 595** that: -

> ***“Since it is settled law that <u>a dispute as to the amount owed would not of itself be a ground for injuncting the mortgagee</u> from exercising its statutory power of sale, <u>whether the accounts were supplied</u> (as sworn by the bank) <u>or not supplied</u> (as sworn by the plaintiff’s attorney) <u>would not have a decisive bearing on whether or not to grant an injunction as prayed</u>.” Emphasis added***

Except I should add that, if, on the face of the charge the amount being claimed is excessive or illegal, a mortgagor will be restrained by way of injunction from exercising the statutory power of sale without requiring the chargor to deposit the sum claimed in court. See **Mrao Limited v First American Bank of Kenya Limited & 2 Others (2003) KLR** where the Court of Appeal quoted a passage from ***Halsbury’s Laws of England*** that a Mortgagee:

> ***“…will be restrained, however, if the mortgagor pays the amount claimed into court, that is, the amount which the mortgagee claims to be due to him, unless, on the terms of the mortgage, the claim is excessive”.***

Excessiveness of the amount claimed should be easily discernible by looking at the charge instrument. Illegal interest as a basis for granting an injunction should be supported by clear and sufficient evidence tabled in court by the Applicant. Clear evidence on a claim of illegal interest should be in the form of the gazette notices which fixed the particular interest rate for the period in question, which, prima facie, the court will take judicial notice of. In the presence of such evidence, the work of the court is simple; it compares the rates prescribed therein with the rates charged by the bank. That is easily discernible when correct evidence is adduced in court, but it should not be left to conjecture or bare arguments. This has not been done here. If that were done, it would also support the argument that the sum claimed could be excessive. In the absence of that kind of evidence, the court cannot base its decision on unsubstantiated grounds. That ground also fails to meet the threshold.

[24] Before I determine whether leave is required to commence such proceedings against a company under liquidation, I must first comment on one argument that stands out; that the sum claimed exceeds the limit set in the charge. The Plaintiffs urged that at the 2nd Defendant allowed the 1st Defendant to draw on the loan facility above the contractual limit of Kshs. 21,500,000/- and also after breach of the terms of the debenture and the Charge instruments. At least from the material before the court, this could be a valid argument which would interest any person and the court to hear at the trial. But, I do not wish to say more on this point because there is yet another major hurdle lying ahead to be surmounted- effect of section 35(1) and 35(3) of the Banking Act as read with Section 228 of the Companies Act.

Need for leave to institute proceedings

[25] Ample judicial decisions exist on this subject. Parties have also cited relevant authorities on the matter. The question is: is there a legal requirement that leave of the court should be sought before a party files suit against a banking institution which has been placed under liquidation under section 35 of the Banking Act? The Plaintiffs contended that there is no need for leave because section 228 of the Companies Act does not apply to liquidation under section 35 of the Banking Act. They stated that Section 228 of the Companies Act only applies to liquidation with the sanction of the court and not those under section 35 of the Banking Act which is by Central Bank of Kenya and without the sanction of the court. On the other hand, the Defendant asserted that these proceedings as well as the suit are incompetent for lack of leave of the court under section 228 of the Companies Act.

[26] What does the law say? Section 35 (1) of Banking act states:-

> ***"If an institution becomes insolvent, the Central Bank may appoint the Board (Deposit Protection Fund Board) . . . to be a liquidator of the institution, and the appointment shall have the same effect as the appointment of a liquidator by the court under the provisions of Part VI of the Companies Act. . ."***

Part VI of the Companies Act deals with the procedures of Winding Up a company. Once a liquidator has been appointed under Section 35 of the Banking Act, the appointment shall have the same effect as the appointment of a liquidator by the court under Part VI of the Companies Act. Section 228 falls under Part VI of the Companies Act; it applies to and governs liquidation under the Banking Act. Section 228 of the Companies Act provides as follows:

> ***"228. When a winding-up order has been made or an interim liquidator has been appointed under section 235, no action or proceeding shall be proceeded with or commenced against the company except by leave of the court and subject to such terms as the court may impose."***

[27] For avoidance of any doubt I will deliberately rehash a number of decisions by the Court of Appeal and this court on this subject. The Court of Appeal held in the case of **JOSEPH KAARA MWETHAGA v THABITI FINANCE COMPANY LIMITED & OTHERS CIVIL APPLICATION NO. NAI. 120 OF 1998**, that a suit filed against a Company registered under the Companies Act undergoing an involuntary liquidation without leave being obtained in breach of the Mandatory provisions of sections 228 and/or 241 of the Companies Act (Cap 486) and/or section 35 of the Banking Act (Cap 488) renders the suit incurably defective and incompetent in law. The Court of Appeal rendered the following long rendition on section 228 of the Companies Act in the case of **KIRTESH PREMCHAND SHAH VS. TRUST BANK LIMITED CIVIL APPLICATION NO. NAI. 188 OF 2006** that;-

> ***"There is no dispute that Part VI of the Companies Act on Winding Up which encompasses sections 212 to 344 of the Act, applies to liquidation of banking institutions by the Central Bank of Kenya. Section 35of the Banking Act expressly provides for that application. By the time the liquidator of the Bank was appointed, there were numerous cases pending before courts either instituted by the Bank or against it and there were others which the Bank contemplated instituting. Along list of some of the matters is exhibited with the record and formed part of the orders issued by the superior court sanctioning either continuation or commencement of such matters. But those orders were sought by and granted in favour of the Bank. The issue is whether the benefit of the orders could inure to the benefit of other persons or parties and whether the orders are limited in scope to the proceedings specifically disclosed to the court or would extend to consequential proceedings and appeals...The fact that the Court has stayed the rigours of a winding up order cannot whittle down the provisions of section 228 of the Companies Act. Until the winding up order is set aside, leave of the court is still required for the continuation of the proceedings by the company. Where leave to institute an appeal has not been made and the applicant seeks a discretionary order, the cannot ignore the provisions of section 228 as any appeal without leave of the court would be incompetent...On the facts of the case the court was right in making such a***

finding since no application for continuation of the suit with leave of the court had been made in the superior although the matter was squarely governed by the provisions of section 228...Section 228 was lifted verbatim from the provisions of the English law relating to companies which was in force at least since the Companies Act 1862 was enacted. Its operation commenced in 1962 and, like most of the other provisions of the Kenyan Companies Act, it has remained unchanged since then. In passing, this is a sad commentary on this country's legislative reform agenda considering that the provisions of the mother Act has over the centuries drastically changed in England to accommodate the ever changing nature and environment of business companies and Company Law. Be that as it may, English decisions and commentaries on the construction and application of section 228 are relevant today as they were in 1862. Without indulging in any comprehensive discourse on the subject, the court is of the opinion that the rationale for the provisions of the section was to ensure that the court, the acknowledged neutral arbiter of disputes, takes control of the disabled commercial entities and ensures justice and fairness to all creditors, whether secured or unsecured, and the contributors. That is why the liquidator must answer to the court for all his activities, as he owes a statutory duty to the creditors and the contributories. The elaborate provisions and procedures under Part VI of the Act and the "The Companies (Winding Up) Rules" made thereunder attest to the jealous concern of the court in guiding the process of liquidation and it matters not that the words used in section 228 are "action" and "proceeding" and that they are not defined. The construction of the words must be wide enough to include any form of proceedings in court brought by any lawful procedure before such court...The object of the winding-up provisions of the Companies Act 1862 is to put all unsecured creditors upon an equality and to pay them pari passu. To accomplish this it is indispensable that proceedings against the company by way of action, execution, distress or other process should be suspended; otherwise the winding up would resolve itself into a scramble for the assets. Section 226 (of the English Act) gives the Court jurisdiction after presentation of the petition to retrain proceedings, and by section 228 and 231, on winding up order being made, or a provisional liquidator appointed, proceedings are automatically stayed and cannot be proceeded with without leave of the court. In this way creditors and others are compelled to come in and prove their claims in winding up, and a rateable and just distribution of the company's assets is effected. "Proceedings" under section 231 is given a wide meaning, and includes execution and interpleader summonses. The words "any other action or proceeding" in section 226 (b) likewise are general and not limited to actions in England but extend to actions and proceedings in Scotland; Northern Ireland being covered by section 226(c). The court can also, in a voluntary winding up on application under section 307, restrain executions and other proceedings. The foregoing, with necessary changes to suit local circumstances, underscores the rationale for the control of the winding up process by the court and also the wide construction of the actions and proceedings targeted in that process...The instant application is targeted at the Bank, which is in liquidation. Expenses are likely to be incurred in that process and that may be materially detrimental to the creditors and contributories. There is no provision in the Companies Act precluding applications and appeals to the Court of Appeal from the rigours of section 228. They are in category of "actions" and "proceedings" referred to in that section. It seems logical therefore that a party intending to proceed against the Bank in the Court of Appeal must seek the leave or sanction of the winding up court and it matters not that the superior court granted leave in the same matter earlier. The sanction or leave of the court is sought and granted on the basis of the facts and circumstances existing when the matter is laid before the court and the court exercises its discretion on those particular facts...For the foregoing reasons, the preliminary objection raised by the respondent is upheld and the application seeking stay of execution is incompetent and is struck out."

[28] From the above decisions, it is clear that a party intending to institute or continue with legal proceedings against a Bank in liquidation, must seek leave of the court to do so. I therefore find the

Plaintiff's argument that Section 228 of the Companies Act does not apply in this case not to be entirely defensible. From the judicial decisions cited and the provisions of the Banking Act and the Companies Act, leave of court must be sought to institute proceedings such as the ones before court. I have examined the record before the court and there is no evidence to show leave was obtained by the Plaintiff to commence these proceedings. None has been sought to even continue with these proceedings, if at all that is a feasible option. The failure to comply with the statutory provision of Section sections 228 and/or 241 of the Companies Act (Cap 486) and/or section 35 of the Banking Act (Cap 488) in my view will fatally affect the suit and all other applications which would saddle on such suit. I am concerned for now with the application for temporary injunctive relief, which I do not think in the premises the court can entertain for it lacks a foot on which to stand. For those reasons, I dismiss the application dated 29th October 2013 with costs to the Respondents. It is so ordered.

Dated, signed and delivered in court at Nairobi this 30th day of April 2015

F. GIKONYO

JUDGE