REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 293 OF 2014

ABONY DAIRIES LIMITED.....1ST PLAINTIFF

MARIBU AGRIBUSINESS COMPANY LIMITED.....2ND PLAINTIFF

VERSUS

CONSOLIDATED BANK OF KENYA LIMITED.....DEFENDANT

RULING

1. The application before me is for a temporary injunction to restrain the defendant from advertising for sale, selling, taking possession of, occupying, alienating, disposing of, transferring or in any other way whatsoever, interfering with the 2 properties, being **NYERI/MWEIGA/1694 and NYERI/MWEIGA/1170.**

2. MARIBU AGRIBUSINESS COMPANY LIMITED (hereinafter **"MARIBU")** is the registered proprietor of the suit properties.

3. MARIBU did offer the suit properties to **CONSOLIDATED BANK OF KENYA LIMITED** (hereinafter **"CONSOLIDATED BANK")** as security for a loan which the bank gave to **ABONY DAIRIES LIMITED** (hereinafter **"ABONY DAIRIES").**

4. The bank is accused of having advertised the suit properties for sale without having served the borrower and the guarantor with the requisite legal Notices.

5. The bank is also accused of clogging the Equity of Redemption, by refusing the professional undertaking of the plaintiff's advocates who had undertaken to pay to Consolidated Bank the sum of Kshs. 8,000,000/-.

6. The third accusation that the plaintiffs levelled against the bank was that the bank had not undertaken a current valuation of the suit properties.

7. There is no doubt that on 30th June 2014, there was an advertisement in the *"Daily Nation"* newspaper, notifying the whole world that **TIMELESS DOLPHIN AUCTIONEERS** planned to sell by public auction, the 2 suit properties. The advertisement indicated that the planned public auction would take place on 12th July 2014.

8. It is because of that threat to the suit properties that the plaintiffs rushed to court on 4th July 2014.

9. In the Plaint, the plaintiffs indicated, inter alia, that they had made arrangements to sell another property, so that the proceeds of sale would then be used to pay part of the loan and overdraft facility.

10. The property which was to be sold was identified as Title Number **NYERI/LUSOI/2671.**

11. Based on the Agreement for the sale of that property, the plaintiffs' advocates messrs **NGUGI MWANGI & COMPANY ADVOCATES** issued a professional undertaking to Consolidated Bank, that they would pay to the bank, the sum of Kshs. 8,000,000/-.

12. When Consolidated Bank rejected that professional undertaking, the plaintiffs concluded that the bank's action constituted a clog and a feter to the plaintiffs' equity of redemption.

13. But the defendant told a very different story. It said that the plaintiffs have never honoured their contractual obligation, which was to remit monthly repayments to the bank.

14. Instead of making payments, the plaintiffs are said to have sought and to have been granted extensions of time within which to make payments.

15. When the plaintiffs continued defaulting, the defendant says that it issued Demand Notices and, later, a Statutory Notice.

16. When the plaintiffs did not meet the terms of the Demand Notices and the Statutory Notice, the defendant says that it then instructed an auctioneer.

17. The auctioneer is said to have served the plaintiffs with a Redemption Notice as well as with a Notification of Sale.

18. In other words, the defendant's position was that they complied with all the requirements of the law. Therefore, the defendant believes that there should be no reason why the bank should be stopped from exercising its statutory powers of sale.

19. When canvassing the application for an interlocutory injunction, Mr. Masese, the learned advocate for the plaintiff, submitted that **MARIBU AGRIBUSINESS COMPANY LIMITED,** who are the guarantors, had never been served with the requisite Statutory Notice or any Demand Notice.

20. A perusal of the documents provided by the defendant shows that on 14th May 2013, Mark Murungaru wrote an email to the bank, requesting an extension of the moratorium for a period of 3 months. He explained that the request was being made because there had been a series of delays from delivery hiccups, with the supplier, as well as clearance issues with the Kenya Revenue Authority.

21. The equipment was eventually received in June 2013, but some of it was stolen whilst still on transit. However, the **ABONY DAIRIES** hoped that they would make the first repayment by 26th August 2013.

22. On 12th September 2013, **ABONY DAIRIES** wrote to the bank, acknowledging that they still had not yet made the first payment. They hoped to bring the account to a status which was current, by 16th September 2013.

23. However, the plaintiffs did not meet that target.

24. On 15th November 2013, the plaintiffs wrote to the bank, confirming that all the arrears would be cleared on or before 30th November 2013.

25. On 10th December 2013, the bank sent out a Demand Notice to the Directors of **ABONY DAIRIES,** requiring them to pay the Loan arrears of Kshs. 1,539,972/- within 7 days.

26. On that same date, the Bank issued a Demand Notice to the directors of **ABONY DAIRIES,** concerning the expired overdraft facility of Kshs. 6,393,917.50.

27. On 18th December 2013, the Bank issued Statutory Notices to both the plaintiffs. Pursuant to the Statutory Notices, the plaintiffs were informed that if they did not pay the sums demanded, within 3 months, the Bank would proceed to exercise its remedies in accordance with Section 90 of the Land Act.

28. In the light of the said Statutory Notices, it is clear, on a *prima facie* basis, that the Bank issued the Notices pursuant to Section 90 of the Land Act.

29. Thereafter, Messrs **TIMELESS DOLPHIN AUCTIONEERS** were instructed by the Bank to realize the security.

30. The auctioneers served both the plaintiffs with Redemption Notices and Notifications of Sale. I so find, on a *prima facie* basis, based upon the documents which the Bank made available to the court. Those documents appear to show that on 14th and 15th April 2014, the auctioneer served notices upon the 2 plaintiffs.

31. On 28th May 2014, **ABONY DAIRIES** wrote to the Bank indicating that they had talked to the **EQUITORIAL COMMERCIAL BANK,** who had agreed to take over the exercise of funding the project of **ABONY DAIRIES,** subject to **ABONY** clearing an existing facility and providing collateral in the form of the suit properties.

32. ABONY told **CONSOLIDATED BANK** that they had put up for sale one of their properties. Some of the proceeds from that sale were to be used by **ABONY** to fully meet the requirements of **EQUITORIAL COMMERCIAL BANK.**

33. In the light of those arrangements, **ABONY** said to **CONSOLIDATED BANK** that they had asked **EQITORIAL COMMERCIAL BANK** to confirm to Consolidated that Equitorial was actively working on Abony's request.

34. As a sign of the seriousness on the part of Equitorial, Abony wrote to Consolidated Bank on 4th June 2014, forwarding a copy of the letter from Equitorial Commercial Bank.

35. In their own letter, Abony told Consolidated Bank, *inter alia*, as follows;

> *"For the usual reasons ECB are not able to provide in writing a more binding commitment to the proposal at this stage".*

36. It was thus evident to Abony that what Equitorial was able to offer to Consolidated was not binding. And Abony was very right, for Equitorial (in its letter dated 3rd June 2014) said that they were reviewing the proposal from Abony. As Equitorial had just requested Abony to make available some documents, Equitorial made the following pertinent point to Abony;

> *"Please note this letter does not constitute an offer of credit facilities nor does it give rise to any legal obligation. The actual approval and disbursement of the facility shall be subject to positive review of the information requested above and at the absolute discretion of the bank".*

37. Consolidated Bank wrote to **ABONY** on 4th June 2014, informing them that if Equitorial Commercial Bank did not give a formal undertaking to Consolidated Bank, within the next 14 days, the Consolidated Bank would proceed to realize the securities.

38. The 14 day period lapsed without Equitorial Bank giving any formal undertaking to Consolidated Bank. Thereafter, Consolidated Bank initiated the process of selling – off the securities, by public auction.

39. If looked at simply from the perspective of the lack of payments, then Consolidated Bank could not be faulted for the decision to realize the securities.

40. The next question that needs to be addressed is whether or not Consolidated Bank complied with the legal requirements that would then validate the intended auction.

41. I have already found that the bank issued a Notice to the borrower. That Notice was dated 10th December 2013. It told the borrower that if the arrears were not cleared within 7 days, the bank would proceed with the necessary procedure for the immediate recovery of the full outstanding debt.

42. Assuming that that Notice was issued pursuant to Section 90 of the Land Act, the bank should have then waited for 2 months to ascertain whether or not there had been compliance with the Notice. That is because S. 90 (3) provides as follows;

> *"If the Chargor does not comply within two months after the date of service of the notice under subsection (1) the Charges may –*
>
> *a. Sue the Chargor for any money due and owing under the Charge;*
>
> *b. Appoint a receiver of the income of the charged land;*
>
> *c. Lease the charged land or if the charge is a Lease, sublease the land;*
>
> *d. Enter into possession of the charged land; or*
>
> *e. Sell the charged land".*

43. It is clear from the provisions of S. 90 (1) that the Notice under that section is to be served upon the chargor.

44. In this case, the chargor is **MARIBU AGRIBUSINESS COMPANY LIMITED.** However, the letter dated 10th December 2013 was not addressed to the Chargor. It was only addressed to the borrower, **ABONY DAIRIES LIMITED.**

45. On 18th December 2013, the bank issued a Statutory Notice, which was addressed to both the Borrower and the Chargor.

46. On the face of the said Statutory Notice, it appears to be compliant with the provisions of Section 96 of the Land Act.

47. However, considering that the Notice to the borrower had been issued on 10th December 2013, the bank had issued the Statutory Notice before waiting for the lapse of 2 months, as envisaged in Section 90 (3) of the Land Act.

48. The bank has also not demonstrated to this court that before it instructed the auctioneer to sell the securities, there had been a valuation of the said properties. Under Section 97 (2) of the Land Act;

> "*A chargee shall, before exercising the right of sale, ensure that a forced sale valuation is undertaken by a valuer".*

49. In effect, although the bank would appear to have been justified in taking steps to sell the securities by public auction, the bank failed to comply with some of the legal prerequisites as set out in the Lands Act.

50. For that reason, I find that the plaintiffs have established a *prima facie* case that would warrant the stoppage of the sale which would be founded upon the defective notices and on the absence of valuation

of the securities.

51. However, I would not venture as far as saying that the case made out could result in a permanent injunction to stop the sale altogether.

52. The borrower and the guarantor do not appear to servicing the loan or the overdraft. If that be factually correct, they could not expect the court to permanently bar the bank from realizing the security.

53. As the borrower and the guarantor were not servicing the loan, there was no doubt that they were in arrears. Therefore, on a *prima facie* basis, the plaintiffs were very unlikely to get the court to ultimately declare that the plaintiffs' accounts were not in arrears.

54. It therefore boils down to a situation where the only reason to warrant the stoppage of the sale is that the bank failed to comply with the legal requirements regarding valuation and also regarding the Notices.

55. Accordingly, the orders issued herein will not remain in force until the suit is heard. I direct that the defendant may, if there be default, have liberty to issue appropriate and compliant notices to the borrower and the chargor.

56. In effect, if no such default occurs, or if the bank does not issue new Notices which were compliant, there cannot be a realization of the securities.

57. But if there be default, the bank would be entitled to take steps to realize the securities, subject only to issuance of new Notices.

58. Finally, although the plaintiffs were successful in the application, I hold the considered view that their conduct, by failing to service the loan and the overdraft, disentitles them to costs. If they were awarded costs, it would be akin to rewarding them for their apparent defaults. I therefore order each party to bear his own costs.

DATED, SIGNED and **DELIVERED** at **NAIROBI** this **26th** day of **May** 2015.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Issa fro Masese for the 1st Plaintiff

.....for the 2nd Plaintiff

Njuguna for the Defendant.

Collins Odhiambo – Court clerk.