**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL & ADMDIRALTY DIVISION**

**MISC.CIVIL APPLICATION NO. 747OF 2012**

**ST. ELIZABETH ACADEMY-KAREN LIMITED ….....PLAINTIFF**

**VERSUS**

**HOUSING FINANCE OF KENYA LIMITED…….DEFENDANT**

**RULING**

1. The Notice of Motion dated **23rd February, 2015** was filed herein on **24th February, 2015** for orders:

***a) Spent***

***b) That to the extent that is necessary, this court do review the Ruling made on 7th March, 2013.***

***c)That pending inter partes hearing and determination of this suit, the court be pleased to grant a temporary order of injunction, restraining the Defendant whether by itself, its employees, servants, agents or auctioneers from doing any of the following acts; that is to say, from advertising for sale, selling whether by public auction or private treaty, disposing of or otherwise howsoever completing by conveyance or transfer of any sale concluded by auction or private treaty, leasing, letting, charging or otherwise howsoever interfering with the Plaintiff's ownership or title to all that parcel of land known as Land Reference Number 195/208 Karen;***

***d) That this court be pleased to exercise powers given to it by section 103, 104(2) and (3) and 105 of the Lands Act, 2012 to grant an order of re-opening and revising the terms of the charge by;***

***I. Revising the payment terms and effecting an amortization schedule that takes cognizance of the school fees collection and balance the interests of the chargor with those of the chargee.***

***II. Appointing an independent Valuer to re-value the suit premises and nullifying the valuation done by the Defendant's Valuer.***

***III. Apportioning the receivable income in St. Elizabeth Karen Academy between the chargor and chargee.***

***IV. The Plaintiff be allowed to repay the said loan through quarterly installments of Kshs. 1***

***Million payable in January, May and September until payment is made in full.***

***V. Amount otherwise illegally deducted as insurance premiums be credited in the mortgage account.***

***VI. Nullifying the requirement that the entire loan be repaid and in lieu thereof reschedule the loan over the remaining 5 years period.***

***e) An order that the Defendant render a true, proper and accurate account to the Plaintiff and the court on the actual status of the mortgage account.***

***f) That costs of and occasioned by this application be provided for.***

2. The application was based on the grounds contained in the application supported by the affidavit of **Anne Wanjiku Wado**, sworn on 2nd February, 2015. It was deponed that the Plaintiff borrowed a sum of Kshs. 30,000,000 sometime in June 2010 and offered its property namely L.R No. 195/208 Three Dee Lane Karen Nairobi as security. The deponent went on to add that the said property was her matrimonial home where she resided with her children and grandchildren. She also stated that the said property was comprehensively insured by ICEA Lions group. It was further contended that the plaintiff by December, 2013 had repaid the loan facility to the tune of Kshs. 9,818,814.00 as reflected in the bank statements supplied by the Defendant. The deponent additionally claimed that the Plaintiff did not receive the Loan Repayment Schedule as expected despite making several demands. The Deponent contended that as a director she attended several meetings with the representatives of the Defendants, sometime between November and December 2013, in which it was agreed that the Plaintiff do pay a sum of Kshs. 8,000,000/= in good faith on or before 31st December 2013, after which the Defendant would then reschedule the loan facility. That before the rescheduling of the facility, the Defendant requested the Plaintiff to submit audited accounts and its banks statements with other banks and that the same were duly remitted as requested.

3. The deponent went on to add that on various dates between 20th December 2013 to 17th February, 2015, a total of Kshs. 13,500,000/= had been remitted as repayment towards the loan balance; that the same were not credited in the statement of account but were deliberately omitted by the Defendant in order to create a scenario of non-payment. It was thus the Plaintiff's posturing that the Plaintiff had repaid an amount in excess of Kshs. 22,318,814 in five years for a ten year loan facility against a borrowed sum of Kshs. 30,000,000/=. That further the amount that ought to have been repaid as per the letter of offer is far much less than the amount already repaid in the four and half years that have elapsed. The deponent also averred that in a bid to repay the loan, she had sold her property known as Ngong/Block 2/235 for a sum of Kshs. 12,000,000/=. That Kshs. 3,000,000 was repaid to the Defendant whilst, the balance of Kshs. 12,000,000/= would be deposited directly to the Defendant by the purchaser once the transfer of the aforesaid piece of land was effected.

4. In sum, it was the Plaintiff's assertion that the Defendant had clogged and/or fettered the Plaintiff's equity of redemption by illegally and fraudulently manipulating the Plaintiff's account by inter alia failing to reflect the amounts credited in the account as payment and illegally charging insurance premiums in the loan account contrary to the letters of offer. The Plaintiff further contended that the suit property is now valued at Kshs. 80,000,000/= and the Defendant had gone ahead to instruct its auctioneers to sell the same at a forced value of Kshs. 32,000,000/=, which was far less than its true value. That furthermore the loan account in question had been loaded with hefty auctioneer's fees, amounts which ought to go towards the repayment of the loan. The Plaintiff however averred that it is willing and ready to repay any amount found due and legally owing to the defendants but on certain terms, namely seven million and installments of Kshs. 1,000,000 per term until full payment is made.

5. In opposing the application, the Defendant relied on the Replying Affidavit of the Defendant's Legal Manager, **Martin Machira**, sworn on 2nd March, 2015. It was averred therein that the application before the court is *res –judicata* and an abuse of the court process. That the court on its own motion, directed the Defendant to commence action to realize the suit process as stipulated under the section 165(2) of the

Land Act, 2012. In line with this directive, it was the Defendant's contention that it was merely complying with a valid court order when it issued a three (3) month notice dated 8th March, 2013 and a forty (40) days' notice dated 10th June, 2013 to the Plaintiff. The Defendant added that even after the service of these notices , the Plaintiff failed to regularize the loan account which as at 18th February, 2015 was in arrears of Kshs. 13, 840,334.15, which in turn caused the entire debt to build up to Kshs. 35,729,120/=.

According to the Defendant, it was the Plaintiff's default that precipitated the involvement of the auctioneers with a view of commencing the process of the sale of the property whereupon the same was advertised for sale and a notice to that effect issued to the Plaintiff. The Deponent added that the Plaintiff has not denied being indebted to the Defendant but has instead requested the court to re-write the terms of the contract between the parties. The Defendant's position is that sections 103, 104, 105 and 106 of the Land Act are all inapplicable to the circumstances of this case, as the Plaintiff herein is neither seeking to repay the loan ahead of time, nor is the suit property a matrimonial home for the purposes of sections 105 and 106 of the Land Act, 2012.

7. The Defendant did concede that it negotiated with the Plaintiff with regard to the repayment of the loan arrears, but pointed out that the Plaintiff agreed to pay the full and final settlement of the loan arrears at Kshs. 33,000,000on or before 31st December, 2013. That inspite of this commitment, the Plaintiff only paid Kshs. 8,000,000/= leaving a balance of Kshs. 25,000,000. The Defendant also averred that even the quarterly installments of Kshs. 1,500,000/= which were agreed upon by the parties were similarly not paid as arranged. It was therefore the Defendant's assertion that the Plaintiff has persistently been in arrears on its loan facility since inception.

8. Another aspect of the matter as brought out by the Defendant is that on 22nd July, 2013, the Plaintiff's account was zero rated in terms of interest to avoid further exposure, and that this is an aspect that the Plaintiff has not disclosed to the court. The Defendant further denied illegally charging insurance premium. According to it, in the terms and conditions of the offer letter together with charge, the Plaintiff agreed to insure the suit property and have the same paid as part of its loan repayment. That therefore the premiums charged to the loan account were contractually agreed upon. The Defendant further reiterated that it has always provided statements of accounts to the Plaintiff and any averment to the contrary by the Plaintiff was untrue. That further, the Plaintiff's assertion that the Defendant had not credited amounts paid towards offsetting the loan between the year 2013 to 2015 was erroneous, since statements of accounts duly exhibited offer the true reflection of the amounts paid by the Plaintiff, the arrears owed and the entire debt which is due. The Defendant added that in any case, the Plaintiff had failed to provide any proof towards these payments in its application. The defendant also contended that the sale of the property known as Ngong/Block 2/235 by the Plaintiff to help in the repayment of the loan was of no relevance to the instant suit as the Defendant was not privy to the said sale agreement or transaction. Further, the Defendant disputed the purported value of the suit property as being Kshs. 80,000,000/= since no valuation report was presented to the court.

9. In sum, it was the Defendant's case that the plaintiff had not attained the threshold to warrant the issuance of a temporary injunction. That further no undertaking for damages had been served on the Defendant. The Defendant averred that it was seriously aggrieved that the Plaintiff was attempting to block the Defendant's recovery process, which process was endorsed by the court vide a ruling dated 7th March 2013.

10. The application was argued by way of written submissions orally highlighted in court on 12th October, 2015. Learned Counsel Mr. Kingara appeared for the Plaintiff, while learned counsel Mr. Isinta appeared for the Defendant. A large part of these submissions dwelt on the issues contained in the affidavits.

11. Through the submissions dated 16th April, 2015, the Plaintiff argued that it had met the threshold for the grant of an injunction by this court as established in the case of ***Giella –Vs- Cassman Brown [1973] EA 358*.** Mr. Kingara told the court that the Plaintiff had amply demonstrated that the amount claimed by

the Defendant arises out of illegally charged interest. That further, the Plaintiff had established to the court that it was regularly servicing the loan. He stated that despite the Plaintiff's endeavors to redeem the property out of the clutches of the Defendant, the Defendant remained resolute on selling the property at a meager value. That from the foregoing the statutory power of sale of the Defendant had not arisen and any purported sale would be aimed at frustrating the Plaintiff's right to redeem the property. Mr. Kingara also endeavoured to convince the court that the Defendant was not likely to suffer any loss if the injunction sought was granted. He submitted that the suit properties were still mortgaged in favour of the defendant and if the suit does not succeed at the trial, the Defendant would still be at liberty to sell the same in accordance with the law. The cases of ***Joseph Mbugua Gichanga –Vs- Co-operative Bank of Kenya Ltd***, ***Lucy Njoki Waithaka –Vs- Industrial & Commercial Development Corporation***, ***Joseph Muriithi Gichobi –Vs- Kenya Commercial Bank Limited & Another*** *and* ***Dhariwal Hotels Limited –Vs- Southern Credit Banking Corporation*** were cited in support these submissions.

12. With regard to whether the Plaintiff is entitled to re-open the charge, it was the opinion of Mr. Kingara that section 106(3) of the Land Act, gives the court discretionary powers to re-open a charge if it is in the interest justice. According to the Plaintiff, in the present case, the defendant never disclosed the applicable interest rate on the loan facility, but the Plaintiff has paid in excess of a sum of Kshs. 22,000,000/= for a loan facility of Kshs. 30,000,000/= in less than four years. That further the defendant intends to dispose the property for less that its true value despite the plaintiff's willingness to clear the outstanding balance. Mr. Kingara therefore submitted that the Plaintiff is entitled to benefit from the discretionary power of the court to reopen the charge as contained in the Land Act. In a nutshell, the Plaintiff urged the court to allow the application and grant the prayers sought.

13. In a rebuttal to the above submissions, the Defendant filed written submissions dated 25th June, 2015. Mr. Isinta urged the court to dismiss the application as the same had no merit. In this submission, Mr. Isinta argued that the application herein was *res judicata* as the Plaintiff had sought injunctive orders through an application dated 4thDecember, 2012, which the court dismissed. Learned counsel to the Defendant also told the court that the Plaintiff, in seeking injunctive relief, had come to this court with unclean hands, since it had been in constant default in servicing the loan facility. Mr. Isinta , while citing the case of ***Maithya –Vs-Housing Finance Co. of Kenya & Another (2003 ) 1 EA 133*** , submitted that injunctive relief cannot issue in such circumstances. The Defendant was also of the opinion that the Plaintiff had not established a prima facie case against the defendant as it did not disclose any breach of statutory or constitutional rights. That further, the Plaintiff had failed to show that it would suffer irreparable damage which cannot be compensated by way damages. That on the contrary, the Defendant was a big financial institution that was capable of refunding any money beyond the value of the subject matter. In support of this argument, the Defendant cited the case of ***Bii –Vs- Kenya Commercial Bank Limited (2001) KLR 458.***

14. It was further alleged that the Plaintiff had failed to give an undertaking as to damages, a legal requirement and prerequisite in injunction applications. Mr. Isinta also pointed out that a dispute as to the amounts owing cannot restrain a mortgagee from exercising its statutory power of sale. In the circumstances, the Defendant sought to persuade this court that the orders for injunction cannot issue.

15. In response to the request for the court to re-open and revise the terms of the charge, it was Mr. Isinta's submission that the same should not be granted as the sections quoted cannot apply in the instant case. That section 103 and 104 of the Land Act relate to a scenario where the chargor seeks to repay a debt a head of its time, while section of 105 and 106 of the Land Act relate to matrimonial property. That the current case cannot fall under the two categories hence the same is not a proper candidate to warrant the orders sought. The case of ***Michael Ronoh Kimutai & 2 others –Vs- Consolidated Bank of Kenya Lts (2013) eKLR*** *and* ***Harroil Petroleum Ltd –Vs- Consolidated Bank Limited & Another (Eldoret E & L No. 335 of 2013)*** were relied on. In conclusion, the Defendant asked the court to dismiss the application with costs.

16. Having considered the Affidavit on record, submissions of counsel and authorities, the following is my opinion. Before assessing the merit or otherwise of the application, it is important to deal with a preliminary issue that has come to my attention. This is the fact that the current application presents itself

as a kind of omnibus application. I say so, because it seeks various orders that are governed by different rules of procedure. On the one hand, the applicant seeks injunctive orders under Order 40 Rule 1 (a) of the Civil Procedure Rules, while on the other it seeks an Order for review under Order 45, together with orders to re-open the charge between the parties governed by the provisions of the Land Act. The Applicant also seeks an order for accounts. Courts have frowned upon such applications. For instance, in the case of ***Pyaralal Mhand Bheru Rajput Vs Barclays Bank and Others Civil Case No. 38 of 2004*** this is what the court had to say;

> ***"There is no doubt the application is an all-cure, omnibus application. It is a wide net cast over a large body of water, and out of all the lake or sea, creatures caught in it, there will be one or two edible crabs or fish. It is not quite so. An omnibus application is incapable of proper adjudication by the court for each of the reliefs sought apart from being governed by different rules, is also subject to long established and different judicial principles which counsel need to bring to the attention of, and the court needs to consider before granting the entire relief sought. This alone makes the plaintiff's application incurably defective, and a candidate for striking out."***

Nevertheless, I will proceed to consider each prayer on the merits as the court is mandated to do by Article 159 of the Constitution with a view of administering substantive justice in so far as the technicalities do not affect the foundation of the application.

17. The issues for determination herein can be summarized as follows;

a) Whether the Plaintiff has attained the threshold for review of the court orders issued on 7th March, 2012;

b) Whether an injunction should be issued in the circumstances;

c) Whether the court should re-open the charge as invited to do; and

d) Whether the court can grant an order of accounts as prayed.

18. With regard to the first issue, it is noted that what is sought is a review of the court orders given in the decision of 7thMarch, 2013 by Kamau J. That decision was in respect of the application dated 4th December, 2012 that sought for the grant of a temporary injunction against the Defendant to restrain it from selling, advertising for sale, disposing of or otherwise completing a conveyance transfer of the suit property. Kamau J, dismissed the application after considering it on its merits and directed that the Defendant do commence action to realize its security as stipulated under section 162(5) of the Land Act, 2012.

19. The applicable law for review is Order 45 of the Civil Procedure Rules 2010 which provides as follows:

> ***"45(1) Any person considering himself aggrieved –***
>
> ***(a) By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or***
>
> ***(b) By a decree or order from which no appeal is hereby, and who from the discovery of new and important matter of evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the or der made or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for review of judgment to the court which passed the decree or made the order without unreasonable delay."***

20. The Applicant has based its application for review on discovery of new and important evidence. The

construction and application of that ground has been discussed in **Mulla's Code of Civil Procedure 15th Edition at page 2726**, where the learned authors state thus ;

> ***"Applications on this ground must be treated with great caution and as required by r 4(2) (b) the Court must be satisfied that the materials placed before it in accordance with the formalities of the law do prove the existence of the facts alleged. Before a review is allowed on the ground of a discovery of new evidence, it must be established that the applicant had acted with due diligence and that the existence of the evidence was not within his knowledge; where review was sought for on the ground of discovery of new evidence but it was found that the petitioner had not acted with due diligence, it is not open to the Court to admit evidence on the ground of sufficient cause. It is not only the discovery of new and important evidence that entitles a party to apply for a review, but the discovery of any new and important matter which was not within the knowledge of the party when the decree was made."***

21. The reason for care sounded in the above commentary is evident from the decision of the Court of Appeal in ***D.J. Lowe & Company Ltd Vs Banque Indosuez Civil Appl. Nairobi. 217/98 (ur)*** where the court stated as follows: -

> ***"Where such a review application is based on fact of the discovery of fresh evidence the court must exercise greatest of care as it is easy for a party who has lost, to see the weak part of his case and the temptation to lay and procure evidence which will strengthen that weak part and put a different complexion. In such event, to succeed, the party must show that there was no remissness on his part in adducing all possible evidence at the hearing."***

22. Bearing the above in mind, I am of the opinion that the Applicant has not shown that the new and important matter of evidence, after the exercise of due diligence, was not within its knowledge or could not be produced at the time when the order made by Kamau J. The information which the Applicant says is new and important evidence was all along within the reach of the Applicant or could easily have been obtained by itself from the Defendant. The new matters being raise are repayments purportedly made from 20.10.13 to 17.02.15, illegal premiums levied for insurance of the property, and the value of the property. These are issues that were all along within the grasp of the Applicant and/or could with due diligence be obtained by the Plaintiff/Applicant when the first application for injunction was presented, argued and ruling in respect thereof made.

23. In those circumstances, under Order 45 of the Civil Procedure Rule, the question of **'discovery'** of new evidence does not, therefore, arise. Looking at the averments by the Applicant and the circumstances of the case, this application may as well be a temptation to procure and lay evidence which will strengthen the weak part of its case and put a different complexion to it. It is also noteworthy that the Plaintiff did not point to which matters in particular that were not within its grasp when arguing its application before Kamau J. In the premises, the threshold for review as set out in Order 45 of the Civil Procedure Rule has not been met.

24. Turning now to the prayer for injunctive orders. The Plaintiff seeks a temporary injunction restraining the Defendant from, inter alia, advertising for sale or selling the suit property. In response to this prayer, the Defendant raised the argument that the same is *res judicata* pursuant to Section 7 of the Civil Procedure Act, Chapter 21 of the Laws of Kenya. It is now trite that the principle applies to suits as well as to applications with the same force whether the application be final or interlocutory.

25. The test to determine whether a matter is *res judicata* was well laid in the case of ***DSV Silo –Vs- The Owners of Sennar [1985] 2 All ER 104*** as applied in the Kenyan case of ***Bernard Mugo Ndegwa –Vs- James Nderitu Githae and 2 others [2010] eKLR.*** The applicant, alleging *res judicata*, must show that:

**(a)** The matter in issue is identical in both suits;

**(b)** That the parties in the suit are substantially the same;

**(c)** There is a concurrence of jurisdiction of the court;

**(d)** That the subject matter is the same; and finally.

**(e)** That there is a final determination as far as the previous decision is concerned.

26. Applying the above principles to the facts of this case, it is apparent that the parties are the same, the subject matter as well as the claim is the same and the jurisdiction of the courts which handled and is handling the matter is concurrent. It is the same Plaintiff who filed the previous application dated 4th December, 2012 who has filed the instant application. The subject matter of the previous application and the instant application is LR No. 195/208 Karen. It is also not disputed that the first application was heard and determined on the merits.

27. I have perused the Ruling of Kamau J dated 7th March, 2013. It is clear from the same that the Plaintiff had raised several issues that are identical to what is being raised in the current application. Issues such as the Defendant illegally levying interest rates, the loan account not being credited with the amounts remitted by the Plaintiff; whether the Defendant was provided with true proper and accurate statements of accounts on the status of the mortgage and whether the defendant's statutory power of sale had arisen; were issues that were touched on and deliberated upon by the learned Judge in her decision.

28. On the question of re-opening the charge document between the parties, I have considered all the arguments for and against the same. However, after perusal of the decision by Kamau, J, I am minded that the same was touched upon in Paragraph 43 of the ruling dated 7th March, 2015. The learned Judge stated as follows;

> ***"43. Courts should be very slow to interfere with contracts. Doing so would render the need to enter into contract voluntarily a waste of time as it would amount to courts re-writing contracts for parties. If parties consent to the defaulting party selling the mortgaged property by private treaty, the court should not interfere with such arrangement. If there is no such consent and the court is called upon to resolve the dispute, it must look at the terms and conditions agreed upon by the parties and determine the matter accordingly."***

29. From the above, it is clear that the learned judge rendered herself on the issue of re-opening and revising the terms of the charge. Though the Court has been invited to consider section 103, 104, 105 and 106 of the Land Act of 2012, I take the view that Kamau J made her decision on 7th March 2013 fully aware of the existence of those provisions. Accordingly, any party aggrieved thereby would be well advised to file an appeal instead, to avoid the untidy scenario of having a Judge re-visiting and reviewing decisions of a peer Judge with concurrent jurisdiction. This point was well articulated in the case of ***National Bank of Kenya Ltd Vs. Njau (1995-1998) 2 EA 249 (CAK).***

30. With regard to the prayer for accounts, I note that a copy of the statement of account of the loan account has been exhibited in pages 15 of the Defendant's Replying Affidavit sworn by Martin Machira on 2nd March, 2015. It therefore goes without saying that the same cannot issue as the document on the status of the account has been rendered by the Defendant. In the case of ***Scholastica Nyaguthii Muturi Vs. Housing Finance Co. of Kenya Ltd,*** the court made this same point thus:

> ***"The mortgagee will not be restrained from exercising his power of sale because the amount is in dispute or because the mortgagor has begun a redemption action or because the mortgagor objects to the manner in which the sale is being arranged. He will be restrained, however, if the mortgagor pays the amount into court..."***

31. In the result, I find the Notice of Motion dated 23rd February 2015 to be lacking in merit. The same is hereby dismissed with costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF NOVEMBER 2015**

**OLGA SEWE**

**JUDGE**