IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 560 OF 2013

TWIN BUFFALO SAFARIS LTD. ……. PLAINTIFF/APPLICANT

VERSUS

BUSINESS PARTNERS

INTERNATIONAL LTD. …….. DEFENDANT/RESPONDENT

R U L I N G

1. Before the Court for determination is the application filed by the Plaintiff dated 18th December, 2013. The application is brought pursuant to the provisions of **Order 40 Rule 4, Order 51 Rule 1** of the *Civil Procedure Rules*, **Sections 1A, 1B and 3A** of the *Civil Procedure Act* and **Sections 90, 98,103,104 and 106** of the *Land Act*. Following the Court's determination on 19th December, 2013, prayer 1 was dispensed with, leaving the other prayers seeking the Court's indulgence being inter alia:

> **"1. THAT a temporary injunction do issue restraining the Defendant and/or their servants, agents from selling by public auction or by any other way dealing with the property known as Title Number Dagoretti/Ruthimitu/835** ("the suit property") **pending the hearing and determination of this application inter parties;**
>
> **2. THAT a temporary injunction do issue restraining the Defendant and/or their servants, agents from selling by public auction or by any other way dealing with the property known as Title Number Dagoretti/Ruthimitu/835 pending the hearing and determination of this suit;**
>
> **3. THAT an order directing that the Plaintiff herein be given time to sell the property Title Number Dagoretti/ Ruthimitu/835 by private treaty;**
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> **4. THAT an order for accounts to be taken on the subject loan account concerning the suit property herein for the purpose of reconciling the penalties/interests against the royalties and that the amount taken was Kenya Shillings Fifteen Million (Kshs. 15,000,000/-) only and not Kenya Shillings Twenty Million (Kshs. 20,000,000/-) as per the Statutory Notice;**

5. Costs of the suit be provided for".

2. The application is predicated upon the grounds adduced and further by the affidavit of **Margaret Wamaitha Ruiyi**. The applicant contends that the amount claimed by the Respondent has neither statutory nor contractual standing, is levied against illegal interest and penalties, and that the notice of the intention to sell by public auction was issued after 25th December, 2013. Further, the applicant contends that it stands to suffer irreparable loss, and that it is ready and willing to pay the amount due to the Respondent if it be allowed to sell the suit property off through private treaty and a further undertaking for any damages suffered should the Orders be granted.
3. In the supporting affidavit sworn by **Margaret Wamaitha Ruiyi** on 18th December, 2013 the deponent avers that she, as one of the Directors of the applicant company, and being conversant with the facts of the case, was aware of correspondence between the applicant and respondent with regard to the payment of the loan installments, their arrears and interest payable since there was an attempt to arrive at settlement between the parties. It is further deponed that the applicant has nonetheless continued making monthly installments and payments in settlement of arrears totaling Kshs. 5,138,505/- and a further amount of Kshs. 1,834,616/- since the date of the Statutory Notice. It is contended that the applicant stands to suffer substantial loss and irreparable damage.
4. In response to the application, the Respondent by the affidavit of **Sally Gitonga**, the Respondent's Chief Investments Officer sworn on 16th January 2014, reiterated that the application is frivolous, vexatious, an abuse of the process of the Court and otherwise raises no triable issues for the determination of the Court. It is averred that the Applicant has approached the Court with unclean hands, in that there was inconsistency in the repayments, in that the amounts received by the Respondent from February, 2012 to August, 2013 amounted only to Kshs. 4,509,633.51 and not Kshs. 5,138,505/- as alleged. It is further reiterated that the Applicant only paid Kshs. 1,493,616/- and not Kshs. 1,834,616/- as alleged between June, 2013 and August 2013 and that interest continued to accrue regardless of the statutory notice issued. The deponent contends that the application is an afterthought, intended to delay the lawfully invoked statutory power of sale and further is an attempt to unjustly, irregularly and mischievously invoke the Court's discretion to dictate the terms by which the Respondent should realise the suit property, without regard to the vagaries of the law.
5. In the further affidavit of **Margret Wamaitha Ruiyi** sworn on 17th February, 2014 the deponent avers that the Plaintiff was not informed of the variance of interest and penalties accruing, but it admitted that payments were made. The deponent further requested for time to dispose of the property by private treaty and intended to fully pay all amounts due and accruing, together with interest and penalties thereto.
6. The Plaintiff/Applicant seeks for an injunction against the Defendant/ Respondent in order to prevent it from exercising its statutory power of sale over the suit property. The Applicant contends that the power of sale had not yet accrued and in any event, it sought to dispose of the property by way of private treaty. In this regard, it relied upon the case of **Orawo & Another v Mistri &Others Civil Case No.2776 of 1987**. It also relied on **Ihenya v Barclays Bank (1977) LLR 507 (CAK)** as to the contention that there was a dispute on the penalties and interest accrued on the principal amount borrowed. Further, it referred to **Section 44** of the *Banking Act* and **Sections 90(2), 97 & 97(2)** of the Land Act 2012 ostensibly to establish the principle of variation of rates by banks and the duty owed to the Applicant by the Respondent respectively. As pertains the valuation of the property, the applicant made reference to the cases of **David Gitome Kuhiguka v Equity Bank Ltd Civil Case No. 94 of 2013** and **Alice Awino Okello v Trust Bank Ltd & Another LLR No. 625 (CCK)** on the issue of balance of convenience. It contended that the application merited the prayers that the Applicant seeks.
7. The principles for the exercise of the Court's discretion in an application for interim injunction is well set out in the cases of **Giella v Cassman Brown (1973) E.A 358, Eleonora Cozzi v Ali Hussein Motors H.C.C.C Malindi No. 16 of 2001** and **E. Muiru Kamau & Another v National Bank of Kenya Ltd (2009) eKLR.** The Court, in exercise of its discretionary jurisdiction, has to do so with utmost caution, and further by fulfilling of the overall objective as provided under **Sections 1A and 1B** of the *Civil Procedure Act*. The Court must not only be seen to be just, expeditious and fair with regard to all the litigating parties, but must also act as such, hence the issuance of any such orders as may warrant the achieving of the Court's core mandate.
8. The Statutory demand notice issued by the Respondents dated 12th June, 2013 arises from the alleged default on the part of the applicant in meeting its loan repayment obligations as stated in

the loan agreement entered between the parties on 5th December, 2011. The Respondent summarises its case in this manner: the Applicant failed to settle arrears in default of payment as at June, 2012. It was given time to have the same settled by August, 2012 but still, by that date, it had failed to make good the debt. Despite exercising restraint and affording the Applicant ample time and opportunity to settle the debt (and to dispose of the property by private treaty), the Applicant had still failed to make any remittance towards the settlement of the outstanding amount of Kshs. 1,231,830/- as at 7th June, 2013. It therefore fell upon the Respondent to exercise its statutory power of sale as provided for under **Sections 90(3), 96(2) and 97(2)** of the *Land Act 2012*, having acted in good faith and exercised reasonable care. Having observed due diligence, the Respondent contended that the statutory power of sale had crystallised and it was, therefore, entitled to proceed to recover the debt from the Applicant as provided by the law.

9. **Section 90(1)** of the *Land Act* provides as follows:

> **"If a chargor is in default of any obligation, fails to pay interest or any other periodic payment or any part thereof due under any charge or in the performance or observation of any covenant, express or implied, in any charge, and continues to be in default for one month, the chargee may serve on the chargor a notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be."**

The Respondent contended that the Applicant was in default hence the issuance of the notice dated 12th June, 2013, as per **Section 90(1)** of the *Land Act*. Even though both parties admit that some payments were made in their averments, the Respondent further submitted that the same did not in any way divorce the agreed monthly repayment instalments plus interest from the accrued and outstanding debt. The Respondent submitted the cases of **Shah v Devji (1965) E.A 9**, **Kenya Commercial Bank Ltd v Harunani (2002) 2 KLR** and **Aberdare Investments Ltd v Housing Finance Company of Kenya & Another C.A No. 227 of 1998**. In the aforementioned cases, it was stated that for the chargee to be restrained, the chargor must pay the amount claimed. Further in **Halsbury's Laws of England, Vol. 32, 4th Edition** at **para 725** on the circumstances in which a chargee would be restrained from exercising its statutory power of sale, the same reads as follows:

> **"The mortgagee will not be restrained from exercising his power of sale because the amount due 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 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."**

10. According to this Court, the Respondent was in compliance with the provisions of **Section 96(2) and 97(2)** of the *Lands Act 2012*. It issued the notice dated 12th June, 2013 in accordance with the provisions of **Section 90(2)** of the aforementioned Act. Despite the Respondent indulging and engaging the Applicant in discussions to settle the outstanding debt by selling off the suit property by private treaty, the Applicant failed and/or neglected to meet its repayment obligations under the loan agreement as well as in complying with the Statutory Notice. In the documents annexed to the Supporting Affidavit and marked **"SG-4"** and **"SG-5"**, the Respondent gave certain pre-conditions to the Applicant as regards the exercise if its statutory power of sale, which were depicted in its email dated 25th October, 2013 in which it stated that it would keep the sale of the property in abeyance if the conditions detailed therein were met. The Applicant failed to satisfy the conditions as set out in the email and thus the Respondent proceeded, as per the law, to exercise its statutory power of sale as provided under **Sections 96 and 97** of the *Lands Act, 2012*.
11. As has been reiterated in **Aberdare Investments Ltd v Housing Finance Company of Kenya & Another** (supra) and **Mohammed Khalid Khashoggi v Equity Bank Ltd (2013) eKLR**; **Civil Case No. 481 of 2012**, the Respondent will only be restrained from exercising its statutory power of sale in instances where the claimed amount is paid into Court. In as much as the Respondent indulged the Applicant in allowing time to proceed with the sale of the property by private treaty, it nevertheless rejected the private treaty option vide its email dated 27th November, 2013. It

reiterated in its affidavit in reply to the Application that it could no longer rely on dishonoured averments and pleas, and could no longer indulge the Applicant in further deliberations and discussions. It would consequently proceed with the sale of the suit property. Even though the issue of interest and penalties was raised by the Applicant, the same was, to the mind of the Court, properly and conclusively considered and ruled upon in the case of **Sammy Thuo Kangea & Another v Housing Finance Company of Kenya (Nakuru) H.C.C.C No. 279 of 2005 (Unreported)** referred to in the ruling of **Ochieng, J** in **Daniel Kamau Mugambi v Housing Finance Company of Kenya (2006) eKLR**. Therein, **Kimaru, J** reiterated inter alia:

"In any event, the High Court has in the cases of Maithya v Housing Finance Company of Kenya & Another [2003] 1 E.A 133; Orion East Africa Ltd v Housing Finance Company of Kenya Ltd, Nairobi H.C.C.C No. 914 of 2001 (Milimani)(Unreported); and Francis Icatha v Housing Finance Company of Kenya Ltd, Nairobi H.C.C.C No, 414 of 2004 (Milimani), held that the fact that the penalty interest and default charges which were charged by the bank would not be sufficient ground to injunct a chargee from exercising its statutory power of sale, as damages would be an adequate remedy to compensate an aggrieved chargor if he proves that there was such illegal charging of the penalty interest and default charges.'

In any event, the Applicant was aware that the rate of interest was subject to change as provided in Clause 5.2 and Clause 5 of the General Terms and Conditions in the loan agreement dated 5th December, 2011.

12. From the foregoing, and in consideration of the principles governing the grant of interim injunction orders as propounded in **Giella v Cassman Brown** (supra), the Applicant has not, in my view, established a prima facie case with a probability of success. Further, it has not shown that it stands to suffer irreparable loss that could not adequately be compensated for by an award of damages. I am of the opinion that the balance of convenience would lean in favour of the Respondent. As reiterated by **Ochieng, J** in Moses **Ngenye Kahindo v Agricultural Finance Corporation H.C.C.C No. 1044 of 2001 (Unreported)** applied in the case of **Onyango Njago & Another v Savings & Loans (K) Ltd (2012) eKLR** determined by Makhandia, J an individual cannot seek an injunction when he was fully aware that he stood to lose the property to recover any outstanding debt occasioned by his own default in remitting repayments. The learned Judge thus addressed the issue of balance of convenience as follows:

"With regard to the balance of convenience, I would say that the same wholly falls in favour of the defendant. This is after taking into consideration the fact that the plaintiffs do not deny taking the loan, they do not deny their default nor do they deny receiving the statutory notice. The defendant should realize the security in order to recover the amount disbursed to the plaintiffs at their request and instance."

13. This is the same position in this matter and the upshot of the above is that the Applicant's application dated 18th December 2013 is unmeritorious and is hereby dismissed with costs to the Respondent.

DATED and delivered at Nairobi this 19th day June, 2014.

J. B. HAVELOCK

JUDGE