REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 161 OF 2014

AL-JALAL ENTERPRISES LIMITED .....PLAINTIFF/APPLICANT

VERSUS

GULF AFRICAN BANK LIMITED..... DEFENDANT/RESPONDENT

R U L I N G

1. By the **Notice of Motion** application dated **24th June 2014** the Plaintiff/Applicant seeks seven (7) injunctive orders named therein to protect the suit property being L.R. No. 36/VII/1057 and L.R. No. 36/VII/1058.

2. The application is premised on several grounds running from paragraphs (a) to (p) which I will not reproduce herein, and is supported by affidavit of Yussuf Mohammed Abdi dated 24th June 2014 with its numerous annextures.

3. The application is opposed vide replying affidavits sworn by **Amina Bashir** dated and filed in court on **5th May 2014** and one dated 9th May 2014 and filed in court on 12th May 2014. The application is further opposed vide a replying affidavit sworn on 2nd July 2014, by the same person.

4. The brief history of the application appears to be as follows. The Plaintiff is the registered owner of the suit properties known as L.R. No. 36/VII/1057 and LR. No. 36/VII/1058 upon which it has erected a shopping mall in Eastleigh Nairobi with an alleged value of over Kshs.650,000,000/=. On or about June 2012 the Plaintiff secured financial accommodation from the Defendant pursuant to which an amount of Kshs.220,000,000/= was advanced to the Plaintiff under a Letter of Offer whose terms are known to the parties and are in the pleadings. After the disbursement of the said funds, the Defendant claims that the Plaintiff has consistently defaulted in the repayment terms and despite many reconsiderations and re-negotiations, the Plaintiff continues to be in arrears and that the Plaintiff has in fact only paid Kshs.6,373,799.86 and continues to be in default. The above payment was in terms of profit payment and that there has been no payment on the principal debt of Kshs.220,000,000/=. Further failure led the Defendant to seek to exercise its power of sale over the Plaintiff's suit property which was used to secure the said borrowings vide a charge as security. The Defendant has now threatened through the firm of Garam Investments Auctioneers to sell the suit premises by way of public auction scheduled for 8th July 2014, but which was temporarily stopped by this court. The Plaintiff, has in the meantime alleged that the said sale must not only be stopped, but that the charge drawn herein does not comply with mandatory provisions of the law, is illegal and is demanding unlawful interest which under the Sheria Banking law is not applicable and that this court should relook into the terms of the charge with a view to re-writing the same.

5. Mr. King'ara counsel for the Applicant submitted that for reasons hereafter stated, the "**charge**" purportedly created over the subject property is null and void and thus the Defendant cannot legitimately exercise any power of sale under the said security for reasons that:-

i. ***The Charge as drawn does to comply with the mandatory provisions of Sections 80 (3) of Land Act and 56 of the Land Registration Act.***
ii. ***The charge is null and void and of no legal effect and not binding on, or enforceable against the Plaintiffs because it was created on 23rd July 2012 when the Plaintiff's Company was still under Receivership and the Directors lacked the requisite Authority and/or power to create any legally binding instrument in view of the provisions of the debentures, existing in favour of NIC Bank Limited, the Deed of Appointment of Receivers and by dint of the provisions of the Companies Act.***
iii. ***The charge and the letter of offer purport to charge profits on the loan amount which is illegal and does not apply in law.***
iv. ***In view of the express provisions of the law, the contractual stipulation that rates of profits were variable at the instance of the Defendant was null and void. Further, whilst the "charge" allowed the Defendant to vary the profits rate upon notification to the Plaintiff, no such notification was served on the Plaintiff and the various unilateral decisions to charge different profits rate are uncontractual and illegal.***

The Plaintiff avers that the sale slated for 8th June 2014 was premature in any event due to the failure to abide by the provisions of Section 96 of the Land Act in that:-

a. ***The Plaintiff's interest are two leases from the City Council of Nairobi for a period of 999 years with effect from 1.8.1969. The City Council of Nairobi in turn holds a lease from the President for 990 years. It is mandatory under the provisions of Section 96 (3) (b) that "the holder of the land out of which the lease has been granted if the charged land is a lease" be given a forty-day notice before sale. Neither the President (Commissioner of Lands) nor the City Council of Nairobi has been issued with the requisite notice by the Defendant or its auctioneers.***
b. ***The Plaintiff has 291 tenants who have been duly acknowledged in the Defendant's Valuer's report dated 14th January 2014. None of the said tenants have been served with a notification of sale as provided by Section 96 (3) (e) of the Land Act. No valid auction sale can proceed before such notices are effected.***

c. ***By its letter dated 5th June 2012, it was a pre-requisite before drawdown that the Plaintiff's Directors to wit:-***

a. ***Farah Mohammed Abdi.***
b. ***Yusuf Mohamud Abdi***
c. ***Hasssan Mohamed Abdi***
d. ***Kheira Omar Maalim***

do issue personal guarantees which was done , none of the guarantors have been personally served with the notice of sale required and envisaged by Section 96 (3) of the Land Act.

The sale is also premature due to failure of the Defendant to obtain the consent of the President to sell as mandatorily provided by Rule (2) of the Government Lands (consents) Rules which provide:-

"(2) In all case where Government lease . . . such consent must be obtained -

(b) before the land subject matter of mortgage is sold pursuant to a power of sale or by order of the court".

The charge in any event fail to meet the attestation requirements of the Law of Contract Cap 23

Laws of Kenya.

This onerous Clause on profits is uneforceabe, illegal and contrastatue and therefore inapplicable to the transaction in that it:-

i. ***It renders the agreed amortization scheme provided in the letter to offer unworkable.***
ii. ***It offends the provisions of Section 44 of the Banking Act which forbids the varying of Banking rates without the permission of the Minister for Finance.***
iii. ***It goes against the basic tenets of contracting in that the monthly payments becomes unknown and the borrowing contract becomes bad in law for lack of specificity.***

6. Mr. King'ara submitted that the property was valued at Kshs.500,000,000/= by Llyod Masika 10 years ago but has been undervalued to Kshs.450,000,000/- by M/s Accurate Valuers Limited yet all property prices are going up. The under valuation compromises the duty of care imposed on the charge by Section 97 of the Land Act and makes any resultant sale illegal. It is in the interest of justice that a fresh valuation be conducted before Third Parties acquire rights in the suit property.

7. It was submitted further that the suit premise is of unique character and peculiar and of location in the new business hub of Eastleigh. It will be impossible to replace it in the event of a sale and the Plaintiff would not be adequately compensated by damages. It is the Plaintiff's case that if the orders sought are not granted forthwith, the Defendant will move in to frustrate the Plaintiff's claim thereby rendering this suit nugatory and a mere academic exercise yet the Plaintiff has made out a *prima facie* case with a probability of success at the trial. The counsel submitted that the Defendant does not stand to suffer any prejudice since the suit property is charged in its favour and is still holding the title and in the event that it does, the same can be adequately compensated by an award of damages. The counsel submitted that the Plaintiff is in the process of selling a property belonging to one of its directors in order to raise the Kshs.30,000,000/= ordered by the court and requires a further 120 days to complete the sale, and that it is in the interest of justice that the orders sought be granted.

8. In response Mr. Ogunde for the Defendant/Respondent submitted that the Applicant has fully admitted the debt herein, and that all the instances of admissions of debt, default and unfulfilled promises to regularize the account are set out at paragraph 3 (p-s) of the Replying Affidavit. Regrettably, the Plaintiff reneged on its admissions and promises to settle the debt which continues to escalate. The counsel submitted that on 12th May 2014, this Court upon finding the Plaintiff to be in arrears ordered the Plaintiff to pay the sum of Kshs. 30,000,000.00 on or before 16th June 2014. To date, the Plaintiff has not paid a penny and continues to be in arrears to the great financial detriment and risk of the Defendant, a financial institution. Following default and unfulfilled promises, the Plaintiff was served with the statutory demand notices in full compliance with Sections 90(1) and 96 (2) of the Land Act 2012 and section 56(2) of the Land Registration Act 2012, as follows:-

a. ***3 Months statutory notice dated 6th August 2013,***
b. ***40 days statutory notice dated 19th February 2014. This notice was served upon all tenants of the charged property. A copy of the affidavit of service is at page 8 to 9 of the exhibit.***

9. After expiry of the Statutory Notice Period, the Defendant's Advocates instructed the Firm of Garam Auctioneers to sell the property on behalf of the Defendant. The said auctioneers similarly issued a 45 day notice to the Plaintiff dated 7th March 2014.

10. Mr. Ogunde submitted that in what is purely a fishing expedition, the Plaintiff has attempted, albeit unsuccessfully, to attack the validity of the Charge created over the suit property. At the heart of the Plaintiff's arguments is that the Charge was created at a time when the Plaintiff was under receivership.

Even though the Charge over the suit property was executed while the Plaintiff was under receivership, the said receivers were appointed by NIC Bank Limited who consented to the creation of the charge to the Defendant. NIC Bank Limited agreed that the Defendant would take over the debts that were owed to them by the Plaintiff when they received and accepted an undertaking from the Defendant. Evidence of

this has been produced by the Defendant as Documents exhibit "AB 3" and has not been controverted. Mr. Ogunde submitted that interestingly, the receivers who were in place over the Plaintiff when the Charge to the Defendant was created have not complained that there was no authority from them for the Charge, in favour of the Defendant to be executed. This is clear evidence that the Plaintiff is willing to raise any issue however hopeless just to frustrate the Defendant's attempt to realise the security.

The other argument that the Charge does not comply with provisions of the Land Act and Land Registration Act is mere smokescreen of the Plaintiff's default. The charge was duly registered and is valid.

11. I have carefully considered the application and submission of the parties. The issues which need determination herein are as follows:-

1. ***The effect of default in serving the loan.***
2. ***Whether the Plaintiff will suffer irreparable damages if injunction is not granted.***
3. ***Whether the charge is defective or invalid.***
4. ***Whether the doctrine of Lis Pendens applies.***

12. On the first issue of default in serving the loan, the case of **Maithya - vs - Housing Finance Co. of Kenya & Ano.** [2003] 1 EA 133 is relevant. In this case, Justice Nyamu addressed the common problem of debtors who persistently default in serving the loan. He dismissed the injunction application as he found that no prima facie case had been made out. He stated:

> ***'Those who come to equity must do equity. Failure to service the loan or to pay the lender or to pay into court what had been admitted took the Applicant outside the realm of exercise of the court's discretion.'***

Mr. Ogunde submitted that the Defendant was ordered by this Court to pay Kshs. 30,000,000.00 outstanding arrears. This submission is correct as the court record shows.

13. Further it is trite law that dispute as to the amount due is not a ground for an injunction. In Morris & Co. Ltd v Kenya Commercial Bank Ltd [2003] 2 EA 605, Justice Ringera dismissed an injunction application and held that:

a. ***It was well settled law that a dispute as to amount due cannot be a ground for an injunction to restrain a lender from appointing a receiver on grounds of default in payment obligations.***

b. ***The plaintiff's injury could be compensated in damages.***

14. The second issue I raised is whether the Plaintiff will suffer irreparable damages if injunction is not granted. In the case of **Bii - vs - Kenya Commercial Bank Ltd [2001] KLR 458,** Justice Ringera on dealing with an injunction application which he dismissed held as follows:

a. ***Once property is offered as security it by that very fact becomes a commodity for sale. There is no commodity for sale whose loss cannot be compensated in damages.***

In my view the Plaintiff is guilty of serious material non-disclosure and is not sincere by claiming at paragraph 14 of the Supporting Affidavit that the Plaintiff has "diligently repaid the loan"; by not adducing evidence to show it has 'diligently" repaid the loan; by failing to disclose why it did not honour its various promises to settle its debt; and by attacking the security without any basis in law and not in the past having challenged the security.

15. The third issue I raised is whether the charge is defective or invalid. To address it, the case of **Mrao Ltd v First American Bank (CA)[2003] KLR 125 comes to mind.** In that case, Justice Kwach J. A also addressed the same issue of challenging the validity of the instrument. The court quoted **Halsbury's Laws of England Vol. 32 (4th Edition)** paragraph 725 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 began 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 which the mortgagee claims to be due to him, unless, on the terms of the mortgage, the claim is excessive.

His Lordship Kwach's J.A noted as follows:

- On the alleged invalidity of the securities (just as in the present case) :

'***At no time in the course of argument did Mr. Wasuna indicate to the Court when this alleged invalidity first came to the knowledge of the appellant. The appellant took a large amount of money on the strength of these securities***. *It has not paid back a single cent. When First American asked for payment the appellant rushed to a court of equity and in effect told the judge, it is true I took the money, I have not paid it back but First American is precluded from realizing its security because both the charge and Debenture are invalid…. This kind of attitude, prima facie shows that when the appellant took the money on the strength of those securities it had no intention of repaying it under the terms agreed with First American. This was a clear case of default, and as the appellant admitted this, there was no basis, on the authorities, upon which the appellant could obtain an order of injunction against First American. I have looked at the charge document and on the face of it I cannot detect anything wrong with it.'*

- On the duty to get legal advice in large borrowing transactions;

'*I have always understood that it is the duty of any person entering into a commercial transaction particularly one in which a large amount of money is involved to obtain the best possible legal advice so that he can better understand his obligations under the documents to which he appends his signature or seal.* ***If courts are going to allow debtors to avoid paying their debts by taking some of the defences I have seen in recent times for instance challenging contractual interest rate, Banks will be crippled if not driven out of business altogether and no serious investors will bring their capital into a country whose courts are a haven for defaulters***.'

In my view the **Mrao** case is the *locus classicus* on the injunctions and is on all fours with the present circumstances we now face in the pending suit.

16. Further the absence of past allegations raised concerning the validity or otherwise of the charge gives the impression that the current allegations are an afterthought. This issue has been addressed by the Court of Appeal since 1966 where the court has found no sympathy for debtors who after executing valid security instruments later turn around and challenge the validity years later when the bank commences the sale of the securities. In the present case, it is unconscionable to turn and purport to use any baseless excuse to frustrate the bank from realizing its security after it has lent money to the Plaintiff.

The first Court of Appeal case that addressed this issue is **Coast Brick & Tiles v Premchand [1964] 187 at page 198 paragraphs E-I.** This matter went on appeal to the Privy Council [***see Coast Brick & Tiles Limited & Others v Premchand Raichand Limited [1966] EA 154***] which upheld the decision of the Court of Appeal. The Court of Appeal addressed the effect of registration of land under the Registration of Titles Ordinance [which became the Registration of Titles Act]:

"By s 32 upon registration the land specified becomes liable as security. In view of these provisions I think that anyone who challenges the validity of a duly registered instrument (if he can do so at all) must discharge a substantial onus. The second reason for my opinion that the onus is heavy is based upon the particular facts of this case. The mortgage was duly registered on February 27, 1956, and the plaint in the action is dated September 21, 1960; no hint of any alleged invalidity was given during those four and a half years. ..A case so presented cannot inspire confidence."

17. The fourth issue I raised is whether the doctrine of *lis pendens* applies to Charges/Mortgages. There are numerous authorities on the position that the doctrine of *lis pendens* does not apply to charges/mortgages. The doctrine as embodied in section 52 of the repealed Indian Transfer of Property Act has no application whatever to a mortgagor who has given, under that mortgage, an express power of sale and that, he cannot, by starting a suit, perhaps a perfectly useless suit for redemption, derogate from that which he has, in express terms, conferred on the mortgagee by the instrument, namely, the power of sale.

In **Aprotech Services Ltd v. Savings & Loan Kenya Ltd [2001] LLR 1498 (CCK)**

The court stated as follows:

> *"The plaintiff floated the idea that section 52 ITPA protected it and no sale of the suit premises would go on until and unless this courts so ordered. The section 52 as it appeared in the 1992 copy of ITPA available, reads.*
> *"51 During the active prosecution in any Court having authority in British India, or established beyond the limits of British India by the Governor –General in council, of a contentious sui or proceeding in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding as to affect the rights of another party thereto under any decree or order which may be made therein, except under the authority of the court and on such terms as it may impose "*
>
> *Although Mr. Machira invoked this section to apply here, and Mr. Bundotich did not so much allude to it, this court is not persuaded that Mr. Machira's point should be upheld in his client's favour. This section appears to have been intended to preserves any property, parties are litigating about in court, for one kind of relief or another.* ***It did not mean to be applied to situations of mortgages. If it were, it would be a great clog to commercial activities involving land as security. In any case section 52 does not says that notwithstanding any others provisions under ITPA, it shall apply. without more may that point rest there.***

18. B. B Mitra on the Transfer of Property Act, 1882 states as follows on the application of *lis pendens* (section 52 ITPA): "***This section does not apply to a suit for redemption brought by the mortgagor who has given to the mortgagee under the mortgage an express power of sale. Therefore, a private sale of the mortgaged property by the mortgagee in exercise of such power is not affected by the doctrine of lis pendens, and is valid though made during the pendency of a redemption suit filed by the mortgagor-Ramkrishna v. Official Assignee 45 Mad 774 (776), 43 MLJ 566, AIR 1922 Mad, 69 IC 407"***.

In **Fina Bank Ltd v. Ronak Ltd [2001] 1 EA 54,** the Court of Appeal allowed sale of the suit property in exercise of statutory power of sale despite pendency of the suit. For the foregoing reasons, I reject the submission that the doctrine of *lis pendens* applies in this particular case.

19. Finally, the Plaintiff has alleged that the suit property is of unique character and allocation and irreplaceable loss if sold by the Defendant. In my view, this allegation is of no consequence. Once a property is given to a bank as security, the same becomes a commodity that can be sold. This is because it is usually charged for a specific sum of money and as the value is ascertainable, any loss is remediable by an award of damages. This position has a statutory backing under S.99(4) of Land Act, 2012, which is to the effect that a person aggrieved by unauthorized or irregular power of sale has recourse to a claim for damages against the person exercising that power. The plaintiff herein can be compensated in damages. The defendant is also capable of paying damages.

In **Daniel Ndege Ndirangu v. Barclays Bank of Kenya Limited & Another** Nakuru High Court Civil Suit no 8 of 2012 'B', **Justice Emukule** referred to the case of **Sambai Kitur v Standard Chartered Bank & 2 others**, Eld. HCCC. NO.50 of 2002 where the court emphasized that:

"It must also be noted that when a chargor lets loose its property to a chargee as security for a loan or any other commercial facility on the basis that in the event of a default it be sold by a chargee, the damages are foreseeable. The security is henceforth a commodity for sale or possible sale without prior concurrence and consent of the charger. How can he, having defaulted to pay loan arrears prompting a charge to exercise its statutory power of sale, claim that he is likely to suffer loss and injury incapable of compensation by an award of damages? Such an argument is definitely misplaced and has no merit. It is immaterial that the property is a family residence, a fact well known to the Chargor at the time of offering it as security to the charge. The upshot of all these is that following the Giella principles, the loss of injury that the applicant stands to suffer should he succeed in this suit is capable of being compensated in damages adequately."

20. Arising from the foregoing I am not satisfied that the Plaintiff/Applicant has met the threshold for the grant of equitable remedy of injunction. That notwithstanding, this court, apart from being a court of equity, is also a court of mercy. Mercy however, is given to a party who does not deserve any remedy due to his or her culpable conduct. What kind of merry can this court then extend to the Applicant?

21. This court on 16th June 2014 ordered the Plaintiff/Applicant to pay Kshs.30,000,000/= by close of business on 17th June 2014, and to pay the outstanding auctioneer fees. This was an order which provided relief to the Plaintiff/Applicant, and which the Plaintiff ought to have complied with. The Plaintiff failed to comply. Instead, the Plaintiff paid only the auctioneers fees. The Plaintiff forgot that it was upon the condition of payment of the said amount that this court granted a stay of execution herein. Although the Plaintiff defaulted and/or neglected to obey that order, this court can still extend a hand of mercy and direct a compliance therewith. That order was flagrantly disobeyed by the Plaintiff. The order is still alive. It has not been set aside. It has not been stayed, and it has not been appealed. Pursuant to these considerations, and in the exercise of the mercy principle I talked of above, I make the following orders:-

a. ***Prayer number 3 of the Plaintiff's/Applicant's Notice of Motion application dated 24th June 2014 is herewith allowed on the following CONDITIONS:-***

i. ***The Plaintiff/Applicant shall within 10 days from the date of this Ruling pay the Defendant Kshs.30,000,000/=.***
ii. ***The Plaintiff/Applicant shall pay a further Kshs.30,000,000/= within 90 days from the date of this Ruling.***
iii. ***The Plaintiff/Applicant shall ensure that there is no outstanding arrears on account of the said loan on or before the end of 150 days from the date hereof.***

b. ***Failure by the Plaintiff/Applicant to abide by any one of the above conditions (a), (i) (ii) and (iii) the Defendant/Respondent shall be at liberty to fully exercise its rights under the charge including the statutory right of sale.***
c. ***The costs of this application shall be for the Defendant/Respondent.***

Orders accordingly.

READ, DELIVERED AND DATED AT NAIROBI THIS 17TH DAY OF OCTOBER 2014

E. K. O. OGOLA

JUDGE

PRESENT:

Mirie holding brief for Kinga'ra for the Plaintiff/Applicant

Ogunde for Defendant/Respondent

Irene – Court Clerk