



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

ELC NO. 422 OF 2012

TENET ENTERPRISES LTD.....1ST PLAINTIFF
CHOM CHOM ENTERPRISES.....2ND PLAINTIFF
ELCHIN GROWERS LIMITED.....3RD PLAINTIFF
SALOT ENTERPRISES LIMITED.....4TH PLAINTIFF

VERSUS

TRUST BANK LIMITED[IN LIQUIDATION]1ST DEFENDANT

AND 3 OTHERS

RULING.

1. By Chamber Summons dated 18th July, 2012 and filed in Court on 19th July, 2012, the 1st, 2nd, 3rd, and 4th Plaintiffs/ Applicants sought for various orders.
 - a. Spent
 - b. Spent
 - c. Spent
 - d. That pending the Hearing and determination of this suit, the 1st and 2nd Defendants by themselves or their servants or agents be restrained from Selling, Disposing off, alienating or effecting any transfer or interfering in **LR No. 209/13418, LR NO. 209/13419, LR NO. 209/13421** situated in Nairobi.
 - e. Pending the hearing and determination of this suit, the 3rd and 4th Defendants be restrained by themselves or their agents from registering, sale, transfer, ownership, alienation, disposition or any interference with **LR NO. 209/13418, LR NO. 209/13419, LR NO. 209/13420 and LR NO. 13421**, situated in Nairobi.
 - f. That Court do grant any other orders or relief it may deem just and expedient.
 - g. Costs of this application.

The application was premised on the grounds stated on the face of the application and on the supporting Affidavit of Jignesh Desai, one of the Directors of the four Plaintiffs Companies.

The deponent avered that the Plaintiffs properties are unconstitutionally and illegally being sold and they have not been issued or given a **demand notice**. He further deponed that the Plaintiffs have not been issued with **Statemets of Account** and that the Plaintiffs **right of redemption** has been interefered with

and that no **Statutory Notice of sale** has been issued. That the Plaintiff stand to suffer irreparable loss and damages if orders not issued.

The deponent further avered that in June, 2012, it was brought to his attention that on 5/4/2012 , the Daily Nation did an advertisement inviting sealed tenders for sale of the Plaintiffs' properties aforementioned. The said advertisement was placed by the liquidator of **Trust Bank Ltd** (In liquidation) for and on behalf of itself and the **Deposit Protection Fund Board**.

That the Plaintiffs being the legal owners of the four parcels of land **LR 209/13418, CR 209/13419, LR. 209/13420 and LR. NO. 13421,** now advertised for sale had entered into a Legal Charge /Mortgage over all the four parcels of land with Trust Bank ltd before liquidation .

He further deponed that no Demand letter , Statutory Notice for sale or Statements of Accounts have ever been sent or forwarded to any of the four Plaintiffs by **Trust Bank Ltd** or by the **Deposit Protection Fund Board**. The deponent further alleged that the action by the 1st and 2nd Defendants is unconstitutional , illegal, null and void and his right of redemption is being breached and the actions by the 1st and 2nd Defendants are against the rules of Natural Justice.

The Application is opposed by the 1st and 2nd Defendants herein- **Trust Banks Ltd**

(in liquidation) and the **Deposit Protection Fund Board**. In his Replying Affidavit , **Adam Boru**, the liquidation Agent of the 1st Defendant and duly appointed by 2nd Defendant, avered that the 1st Defendant which is a Bank under liquidation by dint of **Section 35(1) of the Banking Act** and **Part VI of the Companies Act** was not served with Leave of the Court allowing commencement of this action for an institution under liquidation.

The Respondents further deponed that the loan granted to the Plaintiffs' was an inside loan granted by 1st Defendant to companies associated with it.

He further deponed that each of the Plaintiffs was granted loans of **30 Million** as per the copies of the Charge Instruments . It was his contention that the Plaintiffs defaulted in their obligations to repay the loans as per the **Statements of Account Marked B**. Thereafter the 1st Defendant was unable to discharge and meet its obligations and was placed under Statutory Management by Central Bank. That the Loans advanced to the plaintiffs was classified as insider loans and Plaintiffs have made no effort to repay it despite several attempts by the **Statutory Manager** to recover it as per annexures marked D.

That the Bank now is under liquidation and the deponent as a liquidation Agent is tasked to recover outstanding loans and repayment of the money owing to **20,659** depositors which now stands at **Kshs. 3.963 Billion** . He further avered that when the Plaintiffs defaulted in their obligations to repay the loans advanced to them, **Statutory Notices** were sent to the Plaintiffs by **Oraro Advocates** as per annexure marked 'E'.

Further the Plaintiffs failed to repay the **Land Rates**, due to City Council of Nairobi which the second defendant paid to the tune of **Kshs. 8,413,611/=** as per annexures marked ' G'. Again the Plaintiffs failed to protect the Charged Properties and they were invaded by squatters and therefore the Plaintiffs have not met the conditions that would entitle them to the orders sought in their application. The Respondent avered that each of the lending was based upon separate contract and the filing of this one suit arising out of several contracts between different parties therein is a misjoinder of parties and of action. The deponent therefore prayed for dismissal of the instant application.

I have now considered the instant application and the pleadings attached therein. The issue for determination is whether the Plaintiffs herein have met the threshold to warrant grant of an Injunction as was laid down by the Court in the case of **Giella Vs. Cassman Brown Ltd (1973) EA 358.**

Firstly, the Applicant has to demonstrate he has a prima facie case with high probability of success .

Secondly, an injunction will not normally be issued unless the Applicant will otherwise suffer irreparable loss which cannot be adequately compensated in damages. Thirdly, if the Court is in doubt, it will decide the matter on a balance of convenience.

From the pleadings herein and the attached documents, there is no doubt that the Plaintiffs herein are the Registered owners of **LR NO. 209/13418, LR NO. 209.13419, LR. NO. 134290 and LR NO. 13421**, situated in Nairobi. There is also no doubt that the Plaintiffs herein borrowed **Kshs. 30 Million** each from the 1st Defendant by way of charge over the four parcels of land in favour of the 1st Defendant. It is also evident that the 1st Defendant got into financial difficulties and was placed under liquidation by Central Bank.

From the attached correspondences (Ref annexures E), it is evident that demand letters were sent out to the plaintiffs. The 1st and 2nd Defendants threatened to exercise their **right of sale under charge instruments**. Through annexure marked 'D' the Plaintiff were aware of the 1st Defendants right of sale and 3rd Plaintiff through a meeting of its Board of Directors held on 23rd March 2000 had authorized the 1st Defendant to sale the property charged forthwith without notice to them.

It is also evident through exhibit marked 'E' by the Respondent, the 1st Defendant through its Advocate Oraro & Co. Advocates, gave the Plaintiffs Notice of Sale of all the charged properties.

It is therefore evident that the 1st and 2nd Defendants had demanded for payment of the borrowed money by the Plaintiffs and the plaintiffs have not made any payment since the year 2000 when the notices were sent out.

Furthermore from the Replying Affidavit by the Respondent and the documents marked 'G' it is clear that the Plaintiffs neglected to pay the land rates to the City Council of Nairobi and same was paid by 2nd Defendant to the tune of **Kshs, 8,413,611/=**. The Plaintiffs each entered into a contract with the 1st Defendant and through their Directors signed a Legal Charge. The Charges were not consolidated charges but each was a distinct charge where each of the Plaintiff borrowed kshs. 30 Million from the 1st Defendants.

It was also evident that under clause No. 7 (b) of the charge Instruments, the provision of section 69 of the Transfer of Property Act were incorporated which gives the chargee the power to sell by way of Public Auction or by Private contract.

Having perused the Plaintiffs documents in support of the application, it is clear from **JDI** that 1st Defendants had put an advertisement for sale of the charged properties through Tenders. Out of that Tender Notice, the Applicants filed the Instant Application. Have the applicants met the threshold laid down in case of **Giella Vs. Cassman Ltd?**

The applicant's alleged that the intended sale was *unconstitutional and illegal*. However, it is evident that applicants have defaulted in repayment of the loan. Through numerous correspondences with the 1st Defendant it is evident that they were aware that 1st Defendant was intending to exercise its power of sale. 3rd Plaintiff had at one time resolved that 1st Defendants can sale the charged land for recovering of the debt without any notice to them. The 1st and 2nd Defendants through annexures **B,C,D E, and F** have demonstrated that they issued relevant **Demand Notice, Statement of Accounts and Statutory Notices of Sale** to the Plaintiffs.

The Plaintiffs did not attempt to pay any or part of the debt. The Plaintiffs even neglected to pay the City Council of Nairobi the land rates and the same were paid by the 2nd Defendant as shown by 1st and 2nd Respondents annexures "G". The Plaintiffs are in default and they did not dispute that they had neglected the charged properties to an extent that the same had been invaded by squatters.

The Plaintiffs have not demonstrated that by 1st Defendant exercising its **right of sale** as per the charge documents, the plaintiffs will suffer irreparable loss and that damages cannot compensate them.

The Plaintiffs have not made good the default and they have been in default for so long. They cannot be heard to say that they have a **prima facie case with high probability of success.**

Having considered the instant application and the written submissions by the parties herein, I am not satisfied that the Plaintiffs herein have met the threshold of Principles of granting an injunction.

The upshot of this matter is that the Plaintiff's **Notice of Motion** dated 18/7/2012 lacks merit against any of the Respondents . ***It is hereby entirely dismissed with costs to the 1st and 2nd Defendants/ Respondents.***

Dated, signed and delivered this 23rd day of August 2013

L.N. GACHERU

JUDGE

In the Presence of:-

.....for the Plaintiff/Applicant

.....for the Defendant/Respondent

Anne : Court Clerk

L. N GACHERU

JUDGE.