REPUBLIC OF KENYA

High Court at Nairobi (Milimani Commercial Courts)

Civil Case 638 of 2012

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JOHN KINYANJUI KANYA…….1ST PLAINTIFF

NEW VYBESTAR LIMITED….....2ND PLAINTIFF

VERSUS

BARCLAYS BANK OF KENYA LIMITED.....1ST DEFENDANT

THIKA INN LIMITED….....2ND DEFENDANT

RULING

1. The Plaintiff's application dated 5th October 2012 and filed on the same date has been brought under the provisions of Section Order 40 Rules 1 (a), 2, 4 and 10 of the Civil Procedure Rules Cap 21, the Land Act No 6 of 2012, the Land Registration Act No 3 of 2012 of the laws of Kenya and all other enabling provisions of the law. Prayers Nos (i) and (ii) are spent and I will therefore not deal with the same. The application sought the following prayers:-

i. **THAT** the application be certified urgent and the same be heard *exparte* in the first instance on account of the urgency.

ii. **THAT** pending *inter partes* hearing and determination of this application, this honourable court be pleased to grant a temporary injunction restraining the 1st 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 ownership or title to parcels of land known as land reference Numbers 4953/1990 and 4953/1991.

iii. **THAT** an order of injunction be granted restraining the 1st 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 ownership or title to parcels of land

known as Land reference Number 4953/1990 and Land Reference 4953/1991 pending the hearing and determination of the suit.

iv. **THAT** costs of and occasioned by this application be borne by the 1st Defendant.

2. The Plaintiffs listed nineteen (19) grounds on which they relied upon in support of their application. I will not set out the said grounds verbatim but will attempt to summarise the same as they appear to me.

3. In broad and general grounds, the Plaintiffs relied on the following grounds:-

a. **THAT** the guarantee and indemnity by the 1st Defendant and Elizabeth Wanjiku Kinyanjui as directors of the 2nd Defendant was null and void and of no legal consequence for the reasons that:-

i. It purported to guarantee a sum of Kshs 13,510,000/= yet only a sum of Kshs 10,000,000/= was disbursed to the 2nd Defendant

ii. The 1st Defendant purported to extend the liability of the guarantors to cover unspecified sums in terms of interest, fees, commissions, charges, costs and expenses yet the liability was limited to the amount disbursed.

iii. The guarantors issued a guaranteed on the understanding that the engagement between the parties would be governed by the terms contained in the letter of offer.

b. **THAT** it isthe base rate was what was variable. However, the 1st Defendant purported to increase the rate of interest and instalments contrary to the law relying on a provision that gave it absolute discretion to increase the rate of interest. The 2nd Defendant was not bound by the terms of the charge and further the 1st Defendant did not inform the 2nd Defendant of those variations as was required.

c. **THAT** the 1st Defendant clogged and fettered the 2nd Defendant's equity of redemption by unlawfully closing the loan account no 1189225 on 24th October 2000 and froze the overdraft facility account no 1189174 from which the 2nd Defendant operated a monthly standing order to the loan account. The 1st Defendant also amalgamated the loan account with the current account without informing the 2nd Defendant.

d. **THAT** the demand of 22nd December 2002 by the 1st Defendant for the payment of a sum of Kshs 16,412,488/= within thirty (30) days was unlawful in that:-

i. The amount demanded was not due and owing.

ii. The 1st Defendant intended to dispose of the property without making a formal demand to the 2nd Defendant.

iii. The 1st Defendant did not satisfy itself whether the 2nd Defendant was in a position to pay or not prior to seeking payment from the guarantor.

e. **THAT** the 1st Defendant had refused to take accounts as had been consented by the parties on 23rd July 2004 but had instead continued making the demands of sums which were not due and owing.

f. **THAT** the 2nd Defendant had overpaid the loan advanced to it by the 1st Defendant in the sum of Kshs 650,570/= and hence the sum of Kshs 64,514,439.45 claimed by the 1st Defendant was unlawful.

g. **THAT** the 1st Defendant failed to comply with the provisions of the Land Act, 2012 before realising

the securities herein. The forty five (45) days notice issued on 29th August 2012 by the auctioneers was not the notice envisaged under the Land Act, 2012.

4. The Plaintiffs reiterated the same grounds in the Supporting Affidavit of John Kinyanjui Kanya, the 1st Plaintiff herein sworn on 5th October 2012.

5. The brief facts as seen from the averments in the said Supporting Affidavit and the grounds in support of the said application are that the 2nd Defendant borrowed a sum of Kshs 12,000,000/= consisting of an overdraft of Kshs 2,000,000/ and a loan in the sum of Kshs 10,000,000/= from the 1st Defendant out if which a dispute arose between the Plaintiff and the 1st and 2nd Defendants.

6. The term of the overdraft was 12 months attracting interest at 4% per annum. The 1st Plaintiff offered his property L.R. No 4593/1990 as security for the overdraft taken by the 2nd Defendant.

7. The loan was for a term of 36 months and interest at above the Bank's base rate at 15% per annum calculated on day to day basis on actual balance and not on the cleared balance and debited monthly on arrears. The 1st Plaintiff offered his property L.R. No 4593/1991 as security for borrowing of the loan by the 2nd Defendant. The loan which was reducing at a sum of Kshs 278,000/=per month plus interest.

8. The loan facility was further purportedly secured by personal guarantee and indemnity by two of the 2nd Defendant's directors namely, the 1st Plaintiff herein and Elizabeth Wanjiku Kinyanjui. The guarantor's liability was said to be limited.

9. The financial accommodation was to enable the 2nd Defendant expand its business premises as well as to carry out its objectives.

10.In the said Affidavit, the deponent disclosed that his application for an injunction filed in HCCC No 246 of 2004, in which he was a party, was dismissed. The said application was dismissed by Ochieng J in a ruling dated 29th June 2006 as the Statutory Notice that the 1st Plaintiff was objecting to was withdrawn by the 1st Defendant herein causing the said application to be overtaken by events.

11.The 1st Plaintiff further stated that filed another application seeking injunctive orders in the same suit. In dismissing the said application on 21st May 2010, Njagi J held that the Plaintiff had not satisfied the conditions set out in **Geilla vs Cassman Brown [1973] E.A. 358.** In other words, the 1st Plaintiff had not made out a good case for a grant of interlocutory injunction.

12.On , Muga Apondi J also dismissed another application for injunctive orders that had been filed by the 2nd Defendant against the 1st Defendant herein in **HCCC No 669 of 2010** on the ground that the 2nd Defendant herein was not the registered owner of the subject properties and he could therefore not bring the said application.

13.In the Replying Affidavit of Roy Akubu, a Legal Counsel in the 1st Defendant's Business Support and Corporate Recoveries Department sworn on 15th October 2012, the 1st Defendant stated that the 2nd Defendant defaulted in its obligations to repay the monies it owed the 1st Defendant whereupon the 1st Defendant set in motion the process to realise the security under the facility as its statutory right of realisation had crystallised.

14.It was the 1st Defendant's case that the securities it had taken were lawful and perfected in accordance with the requirement of the law and consequently, the same were enforceable.

15.In addition, the 1st Defendant stated that it was under no obligation under the terms of the facility to give notice to the 2nd Defendant of the review of the interest rates and that in any event, it had published

the changes of the base rate in the daily newspapers. It added that the power to review the interest from time to time was reserved under the agreement as between the 1st Plaintiff and the 1st Defendant which agreement was documented in the charge instrument which had complied with all the legal requirements.

16.The 1st Defendant also stated that it had acted within its right and within the normal banking practise when it closed the 2nd Defendant's account. The 1st Defendant denied that it had fettered or clogged the 2nd Defendant's right of redemption or failed to take accounts as the 2nd Defendant failed to file its papers in HCCC No 246 of 2004. Further, the 1st Defendant stated that 1st Plaintiff had engaged it in several discussions but that the 1st Plaintiff had failed to honour the same.

17.It was the 1st Defendant's argument that the issues being ventilated in the application herein were canvassed in HCCC No 246 of 2004 and HCCC No 669 of 2010 as a result of which the application herein was *res judicata*.

18.The 1st Defendant was categorical that the 2nd Defendant had not overpaid the loan and that the sums presently demanded by the 1st Defendant were not in breach of Section 44 of the Banking Act. It was therefore entitled to realise the security.

19.On the other hand, the 1st Plaintiff was emphatic that he had satisfied the conditions set out in the **Geilla vs Cassman** case due to the following reasons:-

a. The 1st Defendant varied the rate on interest without informing the 1st Plaintiff.

b. The 1st Defendant had breached the law on guarantee. It stated that the 1st Defendant had not proven that the 2nd Defendant had been unable to pay the outstanding monies.

c. The 1st Defendant unlawfully dealt with the 1st Plaintiff's account when it froze the 2nd Defendant's overdraft account number 1189174 and amalgamated the loan account number 1189253 with the current account and closed the 1st Plaintiff's personal account number 1056301 yet this account was not among the accounts to be used in advancing and servicing the facility.

d. The Notification of Sale dated 29th August 2012 was defective for non compliance with the law.

e. The 1st Defendant failed to comply with Section 44A of the Banking Act in that it failed to determine the date the loan became non performing.

f. The 1st Plaintiff would suffer irreparable damage and injury if the injunction was not granted.

20.I will deal with each issue raised to establish it is was *res judicata* and if not, establish whether the 1st Plaintiff had satisfied the conditions for the granting of an temporary injunction set out in the **Geilla vs Cassman** case.

21.I find that the 1st Defendant did not contravene Section 44A of the Banking Act Cap 488 (laws of Kenya) which provides that "**no institution shall increase its rate of banking or other charges except with the prior approval of this Minister"**.

22.I would agree with the holding of Hon Emukule J in **HCCC No 261 of 2006 Daniel Kamau Mugambi vs Housing Finance** at page 13 when he said:-

" **… the question as to whether or not the provisions of Section 44 of the Banking Act limit the interest rates chargeable by banks and other institutions, appears to be uncertain."**

The key words in this Section are "**rate of banking or other charges**" with no specific mention of

"interest".

23.As has rightly been pointed out by the 1st Defendant's counsel, Section 52 of the said Act is clear that no contravention of the provisions of the Act shall affect or invalidate in any way any contractual obligation between an institution and any other person. In this regard, I find that there was no contravention of the Banking Act when the 1st Defendant varied the interest rates without approval from the Minister.

24. The 1st Plaintiff raised new issues about the guarantee. He argued that he had been discharged from the guarantee due to the 1st Defendant's conduct. The monies may have been for the benefit of the 2nd Defendant herein but the contracting party is clearly showed as the 1st Plaintiff who was a director in the 2nd Defendant company. He was also a guarantor of the facility. The 2nd Defendant serviced the loan from its account until it fell into arrears.

25.I have looked at **Patel & others vs National & Grindlays Bank Ltd (1970) EA 121** which the 1st Plaintiff relied on in support of this pointand find that the facts of that case are clearly distinguishable from the 1st Plaintiff's position. The said case dealt with a case of there having no agreement under which the guarantees ceased to be continuing guarantees. From the documentation before me, there is nothing that seems to suggest that the guarantors could be discharged before they had met their obligations in the transaction herein.

26.The case of **Muriithi Wambui & Another vs Housing Finance Company Limited HCCC No 247 of 2006,** also relied on by the 1st Plaintiff, is one that cannot also assist him as it relates to judgment on admission by a guarantor. Suffice it to say that Kasango J found that for a guarantor to be found liable, the court must be satisfied that there was a debt. She stated as follows:-

"**For the court to accept that the Plaintiff was admitting a debt that was in existence it was necessary for evidence to be placed before the court that the principal debtor was indeed indebted to the 1st Defendant…"**

27.In his ruling dated 21st May 2010, Njagi J considered and determined the counsels' arguments in respect of the amalgamation of the accounts, the variation of the interest rates and the issuance of the statutory three (3) month's notice. He found that clause 2 of the Charge Instrument reserved the right for the 1st Defendant to revise interest rates in its absolute discretion without reference to the 1st Plaintiff. He further added that provided that an Applicant was indebted to the Respondent in any way, the Respondent was entitled to its remedies, including realisation of the security and the court could not stand in its way.

28.In his ruling dated 31st July 2012 in respect of another application for injunction filed by the 1st Plaintiff, Havelock J said the following:-

"**On my part, I am not satisfied that this is a suitable case for injunction to be granted on a temporary basis pending appeal. As has been observed by counsel, this is the fourth if not the fifth occasion in which the plaintiff and indeed the guarantor/registered owner of the suit properties has tried to obtain orders to stop the defendant exercising its statutory power of sale under the Charge that it holds over the suit properties. It seems to me that the arguments put forward by counsel for the plaintiff in the application before me amount to the same arguments put before my learned brother Mr Justice Muga Apondi when he dealt with the Plaintiff's Notice of Motion application dated 6th October 2010…"**

29.In thepresent application,1st Plaintiff argued that was entitled to an injunction because the Charge Instrument was invalid as it did not contain a specific repayment date, it did not contain a specific rate of interest and it did not contain a workable amortisation scheme. Clause 2 of the Charge Instrument dated 21st July 1999 reproduced in Njagi J's ruling states in part:-

"**The Chargor shall pay commission, interest, fees and charges of date…at the rate and upon terms from time to time agreed with the bank or if not agreed, at such rate or rates (not exceeding any maximum amount permitted by law and subject to a minimum rate of six per cent per annum over the base rate of the Bank from time to time as the Bank, may in its absolute discretion determine with power for the Bank to charge different rates for different accounts…"**

30.It is evident from the Charge Instrument that the 1st Plaintiff entered into a written contract with the 1st Defendant in which the rate of interest was agreed upon. The 1st Defendant had the sole discretion to revise the rate of interest. The court cannot step in the dispute to re-write what they had contracted would govern their terms and conditions of the loan and overdraft facilities.

31.From the ruling by Njagi J, it is clear to me that he had dealt with the issue of the amortisation schedule which essentially deals with the computation of interest. I entirely agree with his holding that a dispute on the amount cannot be a reason to stop the 1st Defendant from realising its security.

32.A legal position has been taken that a Mortgagee will not be restrained from exercising its power of sale because the amount was in dispute. I am in total agreement with the position espoused in the Halsbury's Laws of England 4th Edition Vol 32 at page 725 cited in **HCCC No 10 of 2010 Scholastica Nyaguthii Muturi vs Housing Finance Co of Kenya Limited** on **page 8** and by the 1st Defendant in its submissionsthat:-

" **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, that is, the amount the mortgagee claims to be due to him, unless on the terms of the mortgage the claim is excessive."**

33.In further support of this issue, the 1st Defendant also quoted **Mulla** on the **Transfer of Property Act pg 791** in which it is stipulated as follows:-

" **An injunction will not issue restraining the mortgagee from exercising his power of sale because the amount is in dispute….But he will be restrained if the mortgagor pays the money into court."**

34.I am in agreement with counsel for the 1st Defendant that the issues of the variation of interest were canvassed and ventilated before Njagi J. The same are therefore *res judicata* and I cannot consider the same afresh.

35.From the facts before me, I would agree with the 1st Defendant's arguments that the 1st Plaintiff has not demonstrated what irreparable damage it would suffer if the injunction was not granted. On the other hand, the 1st Defendant submitted that it would be at a complete disadvantage if the injunction was granted because the unpaid amount which continues to accrue is likely to outstrip the value of the security that was provided by the 1st Plaintiff. The 1st Defendant contended that the 1st Plaintiff was not entitled to the equitable relief sought as it had failed to discharge its onus after the 2nd Defendant failed in its obligations.

36.In agreeing with the 1st Defendant's counsel on the issue of the value of the security, I have had due regard to the holding of Justice Ochieng in **Andrew Muriuki Wanjohi vs Equity Building Society Limited & 2 others [2006] eKLR** ,which I entirely agree with, where he was similarly apprehensive and stated as follows:-

"**Whenever the applicant offered the suit property as security, he was fully conscious of the fact that if the borrower did not meet his obligations, the suit property could be sold off… In my considered view, if the 1st and 2nd Defendants were restrained from selling off the property until the suit was heard and determined, there is a very real risk that the debt may outstrip the value of**

the property as the borrower has not made repayments for more than three years…"

37.In the same vein, I agree entirely with all the authorities cited by the 1st Defendant in support of their arguments as to why I should not grant an injunction herein. Financial Institutions must also be protected from borrowers who are completely unable to meet their financial obligations.

38. Having said that, if it were found at the final determination of this matter that the suit premises should not have been sold, the 1st Defendant would be able to compensate the 1st Plaintiff as it is a solid financial institution. I am not aware of any facts that make me believe of find that the 1st Defendant would not be able to compensate the 1st Plaintiff in the event the 1st Plaintiff succeeds in this suit.

39. If I was to grant an injunction at this stage on the grounds of variation of interest, amalgamation and freezing of the accounts and guarantee issued by the 1st Plaintiff, it would appear that I am sitting on appeal on a matter which was decided by a court with the same jurisdiction as this court. For all purposes and intent, the sad grounds are *res judicata*.

40. The 1st Plaintiff and the 2nd Defendant do not appear to have redeemed the facilities extended by the 1st Defendant. The balance of convenience in this case therefore tilts in favour of the 1st Defendant which should be permitted to realise its security provided that it complies with all the legal requirements in that regard.

41.I have taken into account the cases of **Gitau Muiruri vs Standard Chartered Bank (K) Limited [2005] eKLR** and HCCC No 52 of 2004 **Joseph Okoth Waudi vs National Bank of Kenya Limited** (unreported) and wholly concur with their findings that a Statutory Notice must be issued before a Chargee can realise its security. Njagi J dealt with this issue when he stated this in his ruling:-

" From the records available on the court file, the correspondence exchanged between the Bank and the Plaintiff shows the address used by the Defendant's advocates was the same address always used by the Defendant while communicating with the Plaintiff. I do not find that there was anything wrong with the address to which the notice was sent…"

42. It is evident that Njagi J found that the statutory notice had been issued and that it had complied with the law. Under ordinary circumstances, it would not have been necessary for the 1st Defendant to issue the 1st Plaintiff a fresh statutory notice to enable it realise its security. This is a position that has been held in several courts. In **Executive Curtains and Furnishings Limited vs Family Finance Building Society [2007] eKLR,** where Warsame J (as he then was) said as follows"-

"I am not aware of any law requiring the Defendant to repeat or re-issue the statutory notice once it is issued and served upon the borrower…"

43. The 1st Defendant's right to foreclose the suit premises commenced when it issued and served its Statutory Notice upon the 1st Plaintiff. It is therefore important for me to consider the 1st Plaintiff's contention that the 1st Defendant ought to issue a fresh Statutory Notice so as to comply with the new law. The 1st Plaintiff contended that the 1st Defendant could only proceed to realise the security according to the Land Act 2012 and Land Registration Act 2012. This is not an issue that has been ventilated before in the previous application and I will therefore address myself to the same.

44.The transitional clause in Section 162 of the Land Act 2012 is a useful guide in determining whether or not the 1st Defendant ought to issue a fresh Statutory Notice. The Statutory **power** of sale that **accrued** to the Defendant as envisaged in Section 162 of the Land Act 2012 was one that would continue being governed by the law applicable before the commencement of the Land Act 2012. Section 162 (1) of the said Act states that:-

(1) Unless otherwise is specifically provided in this Act, any right, interest, title, power, or

obligation acquired, accrued, established, coming into force or exercisable before the commencement of this Act shall continue to be governed by the law applicable to it prior to the commencement of this Act."

45. However, it is clear that the 1st Defendant initiated steps to foreclose the charge before the commencement of the Land Act 2012. Under this legislation, the Plaintiff very well has a right to apply to this court for an injunction to stop the continuation of any step in accordance with Section 162 (4) of the said Act which provides as follows:-

4. If a lessor or lender had initiated steps to forfeit a lease or to foreclose a charge, as the case may be, a court on the application of the lessee or the chargor may issue an injunction to the lessor or, to the lender to stop the continuation of any step.

5. If a court had issued an injunction under subsection (4), the lessor or

lender to whom the injunction has been issued may commence any

action under this Act to terminate the lease or bring that charge to an

end."

46. Having said that, an injunctive order cannot be a blanket one. This could explain why the drafters of the Act stated that the court "**may**" but not "**shall**" issue an injunction. While the section therefore gives the court wide and unfettered powers to issue an injunction where foreclosure has commenced, it is my view that this is anchored on the principle of non-discrimination.

47. The provision of Article 27 (1) of the Constitution, 2010 protects every person from any type of discrimination when it provides that:

"**Every person is equal before the law and has the right of protection and equal benefit of the law".**

48.Certain procedures must be followed in cases where properties are to be sold pursuant to the Land Act 2012. Since the 1st Defendant wishes to proceed with the sale of the subject property after the commencement of the Land Act 2012, the 1st Plaintiff must therefore enjoy the equal benefit of the law as other persons whose properties are being sold after the commencement of the said Act.

49.Taking into account all the facts of the case before me and in particular to the conditions set out in the **Geilla vs Cassman case**, I find that the 1st Plaintiff's Notice of Motion application dated 5th October 2012 is not merited as the 1st Plaintiff has not made out a *prima case* for a grant of a temporary injunction pending the hearing and determination of this suit. Accordingly, the said application is hereby dismissed with costs to the 1st Defendant.

50.Be that as it may, to enable the 1st Plaintiff enjoy the benefit of the law currently in place as provided for in the Constitution of Kenya, 2010, I hereby grant the 1st Plaintiff an injunction as provided for in Section 162 (4) of the Land Act, 2012. For the avoidance of doubt, I direct that the 1st Defendant do commence action to realise its security as stipulated under Section 162(5) of the Land Act, 2012.

51.Orders accordingly.

DATED and **DELIVERED** at **NAIROBI** this 14th day of March 2013

J. KAMAU

JUDGE