REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 184 OF 2011

DANIEL MBITI MATHIU …….…….PLAINTIFF

VERSUS

CONSOLIDATED BANK OF KENYA LIMITED……..……1ST DEFENDANT

GITONGA RINGERA T/A VIEWLINE AUCTIONEERS ……...…2ND DEFENDANT

RULING

1. I have before me the plaintiff's notice of motion dated 19th May 2011. The application is expressed to be brought under Order 40 of the Civil Procedure Rules 2010 and sections 1A, 1B and 3A of the Civil Procedure Act. The plaintiff prays for an injunction to restrain the sale of his property known as LR No Ntirimiti Settlement Scheme/244 pending the hearing of the suit.

2. The principal grounds are that the 1st defendant has failed to account for proceeds of sale of other securities held by the bank; that the bank has levied illegal interest and other charges; that the bank has engaged in fraud by falsely claiming to have made certain payments on behalf of the plaintiff; and that the plaintiff has met the threshold for grant of an interlocutory injunction. Those matters are buttressed further in the affidavit of Daniel Mbiti sworn on 19th May 2011. There is also his further affidavit sworn on 28th February 2012.

3. The application is contested by the defendants. There is filed a replying affidavit of Julius Gikonyo sworn on 28th June 2011. The defendants have submitted that the sale of LR No 3734/653 Lavington and Title No MN/V/1517 Mombasa was above board and that an account has been made to the plaintiff. Those are some of the securities the plaintiff says were sold and unaccounted for. The defendants aver that the plaintiff charged the suit property Ntirimiti settlement scheme/224 to the defendant to secure lending to Kiathi Trading Company Ltd. The defendants submitted that default occurred. A statutory notice as well as the 45 days redemption notice were issued to the plaintiff. A statement of account of Kiathi Trading Company Limited, the borrower, is annexed showing a debit balance of Kshs 75,931,156.75 as at 8th June 2011. The defendants' case is that the bank's right to sell has accrued. It is also submitted that the plaintiff has not made out a *prima facie* case and that in any event, damages would be a sufficient remedy. The defendants thus pray that the application be dismissed with costs.

4. My view of the matter is as follows. It is common ground that in 1994, the borrower, Kiathi Trading Company Limited, applied and was granted banking facilities for Kshs 8,840,022.25 and Kshs 7,150,000

to cover an open letter of credit and a guarantee to the Ministry of Finance for supply of fertilizer respectively. As a consideration, charges were created over Title No MN/V/1517 Miritini, Mombasa, LR No Ntirimiti settlement scheme/244, LR No Ntirimiti settlement scheme/529 and LR No 3734/653 Lavington, Nairobi. Some fraud seems to have been perpetrated against the borrower by a person known as Atul Patel. It is alleged the bank never paid the Ministry of Finance Kshs 3,150.000. The borrower claims to have paid the Ministry Kshs 4,000,000. In the end, default on the loans occurred. The borrower ran into financial difficulties and the bank redeemed the mortgage over LR No Ntirimiti settlement scheme/529, LR No 3734/653 Nairobi, Lavington and Title No MN/V/1517 Mombasa. The plaintiff states the properties were sold irregularly, at an undervaluation to powerful people and that a full account has not been made for the proceeds. The plaintiff says that with regard to the suit property LR No Ntirimiti settlement scheme/244 now remaining, he has not been given the mandatory statutory notice and 45 days redemption notice. Accordingly, the plaintiff's case is that the sale scheduled for 3rd June 2011 is unlawful. As I said earlier, the plaintiff takes up cudgels on the interest levied on the account and other irregular debits.

5. When one party such as the plaintiff approaches the court for injunction, he must rise to the threshold for grant of interlocutory relief set clearly in *Giella Vs Cassman Brown and Company Limited* [1973] E.A 358. Those principles are first, that the applicant must show a *prima facie* case with a probability of success; secondly that he stands to suffer irreparable harm not compensable in damages; and thirdly, if in doubt, the court must assess the balance of convenience. Being a discretionary remedy, there is also ample authority that a party who has misconducted himself in a manner not acceptable to a court of equity, will be denied the remedy. See *Kenya Hotels Limited Vs Kenya Commercial Bank and another* [2004] 1 KLR.

6. Fundamentally, parties are bound by commercial agreements to which they enter freely. I agree with Justice Ringera in *Morris & Company Limited Vs Kenya Commercial Bank* [2003] 2 E.A 605 that such parties must be held up to their bargain. It is also not the true province of the courts to rewrite contracts for the parties. See *National Bank of Kenya Limited Vs Pipeplastic Samkolit & another* [2001] KLR 112. See also *Salim Manji & another Vs Southern Credit Banking Corporation Limited* Nairobi HCCC No 515 of 2002 [2006] e KLR, and *Habib Bank A.G. Zurich Vs Pop in Kenya Ltd and others* Civil Appeal No 147 of 1989, Court of Appeal (unreported).

7. The Court of Appeal *in Joseph Okoth Waudi Vs National Bank of Kenya* Civil Appeal No 77 of 2004 [2006] e KLR has held;

"It is trite that a court will not restrain a mortgagee from exercising its 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. It 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 it, unless, on the terms of the mortgage, the claim is excessive. See Halsbury's Laws of England Vol. 32, 4th Edition page 725 and Lavuna & Others vs. Civil Servants Housing Co. Ltd & another Civil Appeal Nairobi No. 14 of 1995 (unreported), Middle East Bank (K) Ltd vs. Milligan Properties Ltd, Civil Appeal No. 194 of 1998 (unreported)".

A dispute over the interest or sums due is thus not a good ground for injunction. See *Mrao Limited Vs First American Bank of Kenya Limited and another* [2003] KLR 125.

8. In the instant case, I am satisfied on the face of it, that the borrower Kiathi Trading Company is in default. This I glean from the statement of account marked "JGB" to the replying affidavit of Julius Gikonyo showing a debit balance of Kshs 89,706,156.75 as at 7th March 2007. The deponent states that as at 8th June 2011, the amount due was Kshs 75,931,156.75. I have also looked at the letters of offer and the various charge instruments and I am unable to say at this stage that the rates of interest charged were outside the contract or that they are usurious or unconscionable. But those are matters best left to the trial court. What is clear from the law is that a dispute over the sums due or interest is not a good ground for injunction.

9. The replying affidavit does not answer in a clear and unequivocal manner over the proceeds of sale of the 3 properties that were sold. Nothing would have been easier than for the defendant to clearly itemize the sale proceeds and how they were employed to the charge debt. The issue is casually glossed over. For example, if as the defendant says at paragraph 10 that the sale proceeds of Title No MN/V/1517 were used to recover rates and land rent to Municipal council of Mombasa, the defendant could have provided the sale figures and the debts to the municipality. Again with regard to LR No 3734/653 that the plaintiff alleges was sold to a powerful personality, the defendant just states that "the plaintiff's innuendos and rumours" have no basis because "it was sold to a company at a public auction". Which was the company and at how much? The defendant leaves it hanging. While those are matters of evidence at the trial, I have to agree with the plaintiff there that the defendant is less than transparent.

10. With regard to the statutory notice, I am of the view that annexture "JG 1" is sufficient for purposes of section 74 of the Registered Land Act. See *Trust Bank Ltd Vs George Ongaya Okoth*Civil Appeal No 177 of 1998 Court of Appeal Nairobi (unreported), a decision dealing with the legal regime under the Transfer of Property Act but nevertheless clear on the point that the statutory notice has to be for 90 days. On the face of it, it gives the chargors 3 months from date of receipt. The 45 days redemption notice under rule 15 (d) of the Auctioneers Rules on the face of it is served on the chargors. However, the affidavit of service of Isaac Gitonga Ringera relates only to service of the 45 days redemption notice.

11. There is thus no cogent evidence of service of the mandatory statutory notice under section 74 of the Registered Land Act. The notice is dated 12th May 2010. At paragraph 13 of the replying affidavit, Julius Gikonyo depones;

"That however, the claim at paragraph 20 of the Plaintiff's affidavit that he was never served with a statutory notice is untrue. I am aware that the said notice dated 12th May, 2010 was duly served upon the Plaintiff by our advocates on record via registered post as provided under the charge instrument. Annexed and marked "JG-1" is a true copy of the Statutory Notice".

The deponent does not say who made him aware that the notice was served. It is a classic case of hearsay evidence. No evidence of postage is provided. I would thus find that there is no evidence of service of the statutory notice on the chargors. Accordingly, the statutory right of sale has not accrued and the auction sale scheduled for 3rd June 2011 or on any other date by the 2nd defendant is highly irregular and unlawful.

12. Granted all of those circumstances, I find that the plaintiff has made out a strong prima *facie case* with a probability of success. Having found so, I need not consider whether damages would be adequate. I also agree with my brother Justice Mohamed Warsame that damages are not an automatic remedy particularly for loss occasioned by breach of the law. In *Joseph Siro Mosiomo Vs Housing Finance Company of Kenya* Nairobi HCCC No 265 of 2007 [2008] e KLR the learned judge held;

"Damages [are] not and cannot be a substitute for the loss, which is occasioned by a clear breach of the law. In any case, the financial strength of a party is not always a factor to refuse an injunction. More so a party cannot be condemned to take damages in lieu of his crystallized right which can be protected by an order of injunction".

See also *James Njoroge Kamau and another Vs. Francis Njuguna and another* HCCC No.8 of 2011 (High Court, Nairobi, unreported), *Aikman Vs Muchoki* [1984] KLR 353 and *J.M. Gichanga Vs Co-operative Bank of Kenya Ltd* [2005] e KLR.

13. For all of the above reasons I order that an injunction do issue restraining the defendants jointly and severally and whether by themselves or through their agents or employees or managers from selling or disposing by public auction or private treaty or in any other manner dealing with all that property known as LR No Ntirimiti settlement scheme/244 pending the hearing of this suit.

14. The plaintiff shall file a suitable undertaking as to damages. I further order that the suit be determined within one year in default of which the order of injunction will lapse. The plaintiff shall have costs of the

application.

It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this 30th day of April 2012.

G.K. KIMONDO

JUDGE

Ruling read in open court in the presence of

Mr. Kimetto for Mr. Mungu for the Plaintiff.

Mr. Sang for Mr. Magut for the Defendants.