REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION – MILIMANI

CIVIL SUIT NO. 788 OF 2009

WESTERN PUMPS LIMITED .....1ST PLAINTIFF

STEPHEN KIHARA KAROBIO .....2ND PLAINTIFF

GRACE WANJIKU .....3RD PLAINTIFF

VERSUS

BARCLAYS BANK OF KENYA LIMITED .....DEFENDANT

R U L I N G

The application before the Court is brought by way of a Chamber Summons dated 26th October, 2009, and taken out under **Order XXXIX Rules 1, 2** and **3** of the **Civil Procedure Rules** and all other enabling provisions of the law. By the application, the Plaintiffs seek injunctive orders to restrain the Defendant, either by itself, its servants, employees and/or agents for advertising for sale, selling by public auction or private treaty Land Reference No. Eldoret Municipality Block 9/17 (border farm) 406 or otherwise deal with the same pending the hearing and determination of this suit.

The application is supported by the affidavit of Stephen Kihara Karobio sworn on 26th October, 2009 and is based on grounds that on 12th May, 2006, the 1st Plaintiff applied for a loan facility for a sum of Kshs.3 million together with an overdraft facility whereby the said loan facility was payable by sixty (60) equal monthly instalments of Kshs.50,000/=, and the overdraft facility was repayable strictly on demand. The 2nd Plaintiff offered his properties i.e. Land Reference Nos. Eldoret Municipality Block 13/312, Eldoret Municipality Block 12/413 and Eldoret Municipality Block 9/17 (border farm) 406 as security and the same were charged to secure the payments of the said facility and the overdraft. The 1st Plaintiff serviced both the term loan and overdraft facility as per the loan agreement as a result of which the Defendant discharged the 2nd Plaintiff's properties i.e. Eldoret Municipality Block 13/312 and Eldoret Municipality Block 12/413 and thereby remained with the charge only over the property No. Eldoret Municipality Block 9/17 (border farm) 406.

The 1st Plaintiff applied to the Defendant to renew the overdraft facility for the financial year 2009 in order to boost its working capital immediately after which the Defendant purported to demand the

payment of both the overdraft and term loan despite the fact that the period of sixty (60) months for repayment of the term loan had not lapsed and therefore the same was not due. The Defendant proceeded to consolidate both the overdraft account with the term loan and threatened to realize the security and also to take other unspecified legal actions against the Applicants.

It is the Plaintiffs' case that the Defendant created confusion by demanding different figures in respect of the outstanding loan and it is only fair that an order for injunction be issued pending the reconciliation of the accounts to enable the 1st Applicant to know the outstanding amount. It is also their case that the Respondents threats to realize the security is illegal as no Statutory Notice has so far been issued. Consequently, they contend that unless the orders prayed for are granted, the 2nd Plaintiff stands to suffer irreparable loss and damage as his property is likely to be disposed off while it is clear that the Defendant is yet to demand payment from the principal borrower before resorting to the 2nd and 3rd Plaintiffs as the 1st Plaintiff's guarantors.

Opposing the application, the Defendant filed a replying affidavit sworn by Nereah A. Okanga, its legal Counsel, on 9th November, 2009 in which she deposes that it was not disputed that the 1st Applicant was advanced securities secured by, *inter alia*, first charges registered over several parcels of land in the names of the 2nd and 3rd Plaintiffs. She further deposes that some of the operative terms of the agreement were set out in the letter of offer, and one of the terms was that the bank had reserved the right, without the necessity of notice, to combine and/or consolidate any of the borrower's account and set off or transfer any sum. Pursuant to that right, the bank combined the accounts for purposes of recovery in view of the default by the Applicants.

The Respondent's legal Counsel further deposes that the 1st Applicant wrote a letter dated 11th August, 2009, admitting being indebted in the sum of Kshs.1,250,000/= on the loan account and Kshs.912,346.60 on the current account. In further admission of the indebtedness, the Applicants made a payment through a cheque dated 18th September, 2009 and duly issued to the Bank. Contrary to the Applicants' contention, they have been served with the Statutory Notice for the balance due. As at the date of the filing of the suit and this application, the time given in the Statutory Notice had not elapsed and therefore the application was premature. For these reasons, the Respondent takes the position that injunction cannot issue as there is a debt due and a Statutory Notice has been issued. Furthermore, it is their position that a dispute as to amount is not a ground for the grant of an injunction, and that no loss has been demonstrated which cannot be compensated by damages.

Arising from these pleadings and the respective submissions of the parties, the issues for determination are whether the Plaintiff is truly indebted to the Defendant; whether the accounts were consolidated and, if so, whether the consolidation was proper; and whether the Defendant's demand was premature because the five year term had not expired. The Plaintiff's case is not that they are not indebted to the Defendant, but that the Defendant's demand of any sums was premature as the five year period over which the loan was repayable had not expired. With respect, this argument is based either on some misunderstanding or else it is an outright fallacy. Where a debt is repayable by monthly instalments over a given period of time, failure to repay even one instalment which is due and payable usually renders the whole amount outstanding due and payable. The borrower cannot, therefore, be heard to argue that the time for repayment of the whole debt has not yet expired. To adopt such an argument would be equivalent to saying that the total loan becomes payable only after the expiry of the loan period. Such an argument would render the provisions for repayment by monthly instalments superfluous. Provided, therefore, that there is any instalment which is due and unpaid, the lender is entitled to demand it as and when it falls due for payment and does not have to wait until the full term for the repayment of the loan has expired.

The next issue is whether there was a consolidation of accounts. The answer to this question is undoubtedly in the affirmative. However, the Plaintiffs' contention that the consolidation was improper is incorrect. One needs only to examine the Clause on set-off in the letter of offer addressed to the Plaintiffs by the Defendant Bank on 12th May, 2006. That Clause reads as follows –

"The Bank may at any time and without notice to the borrower combine or consolidate all or any of the borrower's accounts with the Bank and set-off or transfer any sum standing to the credit of any one or more of those accounts towards payment of any of the borrower's liabilities to the Bank."

The consolidation of the accounts was therefore expressly authorized in the letter by which the Bank extended the facility to the Plaintiffs and which the Plaintiffs duly signed. Indeed, the acceptance which the Plaintiffs signed states –

"We are pleased to accept the offer for the Facility on the terms and conditions contained in this Letter."
The Plaintiffs were therefore bound by the Clause by which the Bank reserved the right to consolidate the Plaintiffs' accounts.

The last issue is whether the Plaintiffs owe the Defendant any monies. The answer is also clearly in the affirmative. The Plaintiffs have frankly admitted that they are not contesting indebtedness, but breach of contract by the Defendants. That they are truly indebted to the Defendant finds support in the pleadings. In paragraph 13 of the supporting affidavit sworn by Stephen Kihara Karobio, the 2nd Plaintiff/Applicant on 26th October, 2009, the deponent avers as follows –

"THAT also and after receiving the 1st demand letter the 1st Plaintiff made a payment in the sum of Kshs.700,000/= in an attempt to clear the overdraft facility but despite the said payment the Defendant has persisted in its threats against the 2nd Plaintiff."

It is also not lost on the Court that in paragraphs (b) and (c) of the prayers for judgment, the Plaintiffs seek –

"(b) Recalculation of the outstanding sum using the contractual interest rates or mutually agreeable rates.

(c) The 1st Plaintiff be allowed to clear any outstanding loan as per the loan agreement and be given reasonable time to settle the account."

The above prayers are self evident as they can only be made by an indebted person. This means that all we have in this case is a dispute as to the amount due under the charge. Yet, as was held in the case of **CIVIL SERVANTS HOUSING CO. LTD. & ANOR v. LAVUNA & ORS, [1995] LLR 366 (CAK),** a Court should not grant an injunction restraining a mortgagee from exercising its Statutory Power of Sale solely on the ground that there is a dispute as to the amount due under a mortgage. On account of this observation, I find that the Plaintiffs have not established a *prima facie* case with a probability of success. To that extent, the Plaintiffs have failed to satisfy the 1st condition laid in **GIELLA v. CASSMAN BROWN & CO. LTD. [1973] E.A. 358** for the grant of an interlocutory injunction.

The second condition to be satisfied as set out in the aforesaid case is that an interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury. In respect of this condition, it is noteworthy that in paragraph 14 of the supporting affidavit, the 2nd Plaintiff/Applicant

deposes that if his land parcel No. Eldoret Municipality Block 9/17 (border Farm) 406 is sold in a public auction, an illegality will have been committed and he stands to suffer irreparable harm and loss. Unfortunately, he does not explain the nature of the illegality, or how the loss would not be compensated in monetary terms. Having offered that property as security for repayment of a time loan and an overdraft, the parties ought to have realized that in the event of their failure to repay the advances, the property would be up for sale. For these reasons, I find that the Plaintiffs have also failed to satisfy the 2nd condition laid down in **GIELLA'S CASE (supra)** for the grant of an interlocutory injunction. As I am not in any doubt as to the above findings, I need not consider the 3rd condition. If I had to do so, I will still find that the balance of convenience tilts in favour of declining to grant the injunction since the unpaid advances continue to attract interest rates and if the present debts are not paid as soon, the ultimate sum to be paid could possibly rise beyond the reach of the Applicants.

In sum, I find that the Plaintiffs are not entitled to the grant of the interlocutory injunction pending the hearing of the suit, and this application is hereby dismissed with costs.

It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this 14th day of October, 2010.

L. NJAGI

JUDGE