REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI COMMERCIAL COURTS

MISC APPLICATION NO. E105 OF 2021

LUCY KINA MUNYI .....1ST PLAINTIFF

ERASMUS PHARIS MUNYI.....2ND PLAINTIFF

-VERSUS-

AGRICULTURAL FINANCE CORPORATION....1ST DEFENDANT

LEGACY AUCTIONEERING SERVICES.....2ND DEFENDANT

R U L I N G

1. By a Motion on Notice dated 15/02/2021, brought under ***Order 40 Rule 2, 3 & 4 and Order 51 Rule 1 of the Civil Procedure Rules 2010 and Section 3A of the Civil Procedure Act and all other enabling provisions of the Law***, the applicants sought a temporary injunction to restrain the respondents from alienating or interfering with the properties known as **NAIROBI/BLOCK140/208 - NYAYO ESTATE EMBAKASI and L.R. NO. KYENI/KIGUMO/1959 – MURARI RESIDENTIAL AREA, EMBU COUNTY** ("the **suit properties"**).

2. The grounds for the application were set out in the body of the Motion and the supporting affidavit and supplementary affidavit of the 1st applicant sworn on 15/02/2021 and 17/03/2021, respectively. These were that; the applicants jointly obtained two loan facilities from the 1st respondent of Kshs. 9,500,000.00 and Kshs. 10,000,000.00 on 3/06/2016 and 5/11/2016, respectively. The same was to be repaid in monthly instalments of Kshs. 306,940/= at an interest of 10% per annum for 36 months from 20/11/2016. The loan facilities were to be secured by two charges registered against the suit properties.

3. They stated that the 1st respondent has now served them with a notification of sale of the suit properties for the repayment of the full amount despite the loan term not having ended. That the 1st respondent had modified the interest rate which had resulted in unlawful arrears on the applicants' account.

4. They are desirous of performing their obligations but have been detrimentally affected by low business turnover due to the Covid19 pandemic and other intervening circumstances. That the process leading to the auction was flawed as no valuation had been done and if so done, the suit properties had been grossly undervalued.

5. The application was opposed by the 1st respondent through the replying affidavit of **Margaret Mutsili** sworn on 10/03/2021. The 1st respondent admits the lending as pleaded by the applicants. However, it contends that the applicants have defaulted in the repayment of the loans. Notices to the respondents have yielded no positive results necessitating the 1st respondent's attempts to realize its security. In the circumstances, the application should be dismissed.

6. The Court has considered the record in its entirety. This is an application for an interlocutory injunction. The principles applicable are well known as set out in **Giella vs Casman Brown [1973] EA**. These are that, firstly, an applicant must establish a prima facie case with a probability of success. Secondly, an applicant must show that unless the injunction is granted, he might suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide the application on a balance of convenience.

7. On prima facie case, the Court of Appeal held in **Mrao Ltd –v- First American Bank of Kenya Ltd (2003) Eklr,** that: -

> **"A prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right and the probability of the Applicant's case upon trial. ...it is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter…. "**

8. It is the applicants' claim that the 1st respondent's statutory power of sale has not arisen. That the term of the loan is yet to expire and the 1st respondent cannot therefore claim the full repayment of the loan amount immediately.

9. Section 90(1) of the Land Act, 2012 provides that:

> **"If a chargor is in default of any obligation, fails to pay interest or any other periodic payment or any part thereof due under any charge or in the performance or observation of any covenant, express or implied, in any charge, and continues to be default for one month, the chargee may serve on the chargor a notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be."**

10. The loan was for 36 months from October, 2016. The said loan was therefore repayable in full by October, 2019 when the 36 months were to lapse. There was no contention that the term had been extended.

11. The only allegation was that the interest agreed upon was 10% per annum, the 1st respondent had varied the same upwards without the concurrence of the applicants thereby increasing the amounts of arrears on the applicants' accounts.

12. I have seen Clause 6 of the Letter of Offer dated 3/6/2016. It gave the rate of interest as at 10% per annum but reserved the 1st respondent's right to vary the rate without any notice or consent of the applicants. That being the case, the allegation of variation of interest rate fails.

13. The applicants admitted that, due to economic hardship and Covid-19 pandemic, they had fallen into arrears. The court finds that with default, for any reason other than that which is contemplated in the contract, the 1st respondent was entitled to seek to enforce its rights under the contract. A chargee's right of power of sale is codified ***under Section 90 and 96 of the Land Act***.

14. As regards to the disputed balance of Kshs. 26,000,000/-, it was the applicants' contention that the loans were consolidated and unlawful interest charged on the account. That the 1st respondent had failed to account for the same nor supply the applicants with the loan statement.

15. In **Halsbury's Laws of England Vol. 32 (4th Edition) paragraph 725,** the learned writers observe: -

> **"The mortgagee will not be restrained from exercising his 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 arranged. He 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 him, unless, on the terms of the mortgage, the claim is excessive."**

16. The foregoing is the position of the law. A dispute as to the amount would not entitle the applicants to any injunction.

17. The applicants contend that the suit properties should not be sold as they are matrimonial and ancestral land. This is an issue that the courts have already pronounced themselves on. In **Julius Mainye Anyega vs. Eco Bank Limited [2014] Eklr,** the court observed: -

> **"The true position of the law on matrimonial properties is that a Mortgage will not be created on such property without first obtaining the consent of the spouse. Similarly, no sale of the matrimonial property will be carried through without giving the necessary notices to the spouse or spouses of the Mortgagor. These protections once availed will not prevent sale of a matrimonial home where the necessary consents have been obtained and all notices given to all parties with an interest in the matrimonial home, which is given as security for a loan or credit facility. And many courts have expressed themselves as clearly on the subject. I am content to cite the case of HCCC Number 82 of 2006 Maltex Commercial Supplies Limited & Another –vs- Euro Bank Limited (In Liquidation) that;**
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> **"… Any property whether it is a matrimonial or spiritual house, which is offered as security for loan/overdraft is made on the understanding that the same stands the risk of being sold by the lender if default is made on the payment of the debt secured".**

18. There is no allegation that spousal consent was sought and obtained. The Court rejects that contention.

19. The applicants dispute that any valuation has been done to ascertain the actual value of the suit properties. That if any was done, the same was an undervaluation. The 1st respondent produced two valuation reports for each property both dated 21/02/2020 and marked as annexure '***MM13(a) & (b)***'. There was no alternative view or counter valuation that was placed before Court to suggest that the 1st respondent's valuation is either a gross undervalue or a breach of ***Section 97(2) of the Land Act.***

20. In **Consolidated Bank of Kenya Ltd Vs Jockbed Njeri Muriithi T/A Njesh Enterprises, Civil Appeal Number 27 of 2019** the court held that:-

> **"As regards the (under)valuation, the respondent did not put forth a counter to support her contention that the property was undervalued. In the circumstances the trial magistrate erred in restraining the Bank from excreting its statutory power of sale"**

21. In view of the foregoing, the applicants have failed to establish a prima facie case as the 1st respondent's right to exercise its statutory power of sale has crystalized owing to the outstanding debt. Being of that view, I do not consider it necessary to go to the other two principles.

22. However, if my view of them is sought, it is short and simple. There is nothing to show that the applicants will suffer any loss and damage that cannot be compensated by an award of damages if it is ultimately found at the trial that the 1st respondent was not entitled to sell the properties. The two properties had been offered as security thereby becoming commodities realizable in the event of default.

23. As to the balance of convenience, the same tilts in favour of the 1st respondent realizing its outlay. It is four years since the monies was lent to the applicants. Instead of the same reducing, the debt continues to spiral. The earlier it is brought to a halt the better for all concerned.

24. In view of the foregoing, the Court finds the application to be without merit and dismiss the same with costs.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF APRIL, 2021

A. MABEYA, FCI Arb

JUDGE