REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BOMET

CIVIL CASE NO. E001 OF 2020

BOMET TEACHERS TRAINING

COLLEGE LIMITED.....PLAINTIFF

VERSUS

BANK OF AFRICA LIMITED .....1ST DEFENDANT

MARY RITA WANJIKU

T/A MISTAN AUCTIONEERS.....2ND DEFENDANT

RULING

1. The Applicant, Bomet Teachers Training College Limited filed a Notice of Motion Application under Certificate of urgency dated 12th December 2020. The application was brought under Order 40 and Order 51 Rule 1 of the Civil Procedure Rules 2010 and sought the following orders:-

(i) Spent.

(ii) Spent.

(iii) **THAT** pending the hearing and determination of this suit, this Honourable Court be pleased to issue an order restraining the Defendants by themselves or their agents and assigns from selling, offering for sale, transfer or in any way disposing all that property known as **BOMET TOWNSHIP/114**.

(iv) **THAT** pending the hearing and determination of this suit, this Honourable Court be pleased to issue an order compelling the 1st Defendant and/or its agents to supply the Plaintiff with a current Statement of Account and a current Valuation Report in respect of **BOMET TOWNSHIP/114.**

(v) **THAT** the costs of this Application be provided for.

The Applicant's case

2. The Applicant's case is premised on the grounds on the face of the Application, the Supporting Affidavit sworn by Frankline Rono on 3rd December 2020 and a Further Affidavit dated 25th February 2021.

3. In summary, the Applicant states that it is the registered owner of all that property known as BOMET TOWNSHIP/114. That this property was charged by way of a Legal Charge as security for the advancement of a banking facility to the tune of Kshs.15,000,000 by the 1st Respondent. The Applicant contends that in satisfaction of its contractual obligations to the 1st Respondent, it has been making payments as agreed in the Letter of Offer in respect of the aforesaid facility and has in fact paid up to at least Kshs.36, 652, 894.20.

4. It is the Applicant's case that the 1st Respondent has purportedly in the exercise of its statutory power of sale instructed the 2nd Respondent to sell the suit property. That the 2nd Respondent advertised the property for sale in a public auction reserved for 26th November 2020. The Applicant states that it became aware of the intended sale through a Redemption Notice issued by the 2nd Respondent on 11th August 2020.

5. The Applicant contends that the 1st Respondent has failed to issue it with a current Statement of Account. That further, the 1st Respondent

has used and served it with a Valuation Report made in respect to BOMET TOWNSHIP/113 which belongs to Bernard Chepkwony Mutai.

6. The Applicant states that the intended sale of the suit property is fraudulent and illegal because the 1st Respondent has not issued the Statutory Notices under Section 90 (1), (2), (3), Section 96 (2) and (3) and Section 97 (1) and (2) of the Land Act. Additionally that the 1st Respondent seeks to auction the suit property before a proper forced sale valuation is undertaken by a valuer. That the 1st Defendant's efforts to procure a proper valuation report was only prompted by the filing of this suit and the instant application and was designed to pre-empt the outcome of this Application.

7. It is the Applicant's case that the amounts claimed by the 1st Respondent are not only usurious but are barred by law as they are in violation of the *in duplum rule.* The Applicant contends that it has actually paid at least Kshs.36,652,894 against the loan sum of Kshs.15,000,000.

The Respondents' case.

8. It is the Respondents' case that the Applicant had in the case of **Bomet HCC NO. 2 OF 2015, Bomet Teachers Training College Ltd Vs Bank of Africa and Another** sought orders for interim injunction restraining the Defendants from selling or transferring the land known as BOMET TOWNSHIP/114. That the learned Judge noted that all requisite notices including demand letters, statutory notices, notice to sell, redemption notice and valuation report were all issued and used. They state that the application was dismissed with costs to the Defendants.

9. The Respondents contend that after the said Ruling, they indulged the Applicant in good faith to pay the outstanding loan balance. That despite several correspondence between the parties, the Applicant did not honour the payments. As a result, the Respondents issued the Applicant with a 45 days Redemption Notice in a bid to realize the security. According to the Respondents, the same did not elicit a response.

10. It is the Respondents argument that failure by the Applicant to repay the outstanding amounts as and when due made the loan amount repayable on demand. That in any event, according to the terms of the offer letter and clause 9 of the Charge document, default of any one instalment by the Applicant renders the entire loan immediately due and payable on demand.

11. The Respondents contend that they are not in violation of the *in duplum* rule since the 1st Respondent is only seeking for the recovery of the loan balance of Kshs.8,801,999.97 and since the initial loan sum was Kshs.15,000,000, the *in duplum* rule does not apply.

12. It is the Respondents' case that Statutory Notices and the Notification of Sale that were initially issued by the Respondents were valid, proper and strictly complied with the provisions of Section 90(2) of the Land Act and that there was no need to re-issue the said notices. That once requisite Notices have been issued, there is no obligation in law for a Chargee to re-issue notices even where the sale is not conducted as initially scheduled.

13. The Respondents contend that the Applicant has not demonstrated any irreparable injury it will suffer that cannot be compensated by an award of damages.

Analysis

14. It is not in dispute that the Applicant is indebted to the 1st Respondent. In the pleadings before court, the Applicant was advanced a loan facility of Kshs.15,000,000 and the same was secured by a Legal Charge over the property known as BOMET TOWNSHIP/114. Along the way, the Applicant defaulted in payment of the loan facility and the 1st Defendant recalled the loan.

15. I have carefully perused and considered the Notice of Motion Application dated 12th December 2020 and its Supporting Affidavit and annextures, the Respondents Replying Affidavit dated 21st January 2021 and its annextures, the Applicant's Further Affidavit dated 25th February 2021, the Applicant's written submissions dated 25th February 2021 and the Respondents' written submissions dated 23rd March 2020. The two critical issues which arise for my determination are:-

(i) Whether the Applicant has made out a case for the grant of an interlocutory injunction.

(ii) Whether the 1st Respondent is in violation of the *in duplum* rule.

(i) Whether the Applicant has made out a case for the grant of an interlocutory injunction.

16. The principles governing the grant of an interlocutory injunction are well settled. In the case of **Ngurumani Ltd Vs Jan Bonde Nielsen & 2 Others (2014) eKLR,** the Court of Appeal restated the principles pronounced in the famous case of **Giella Vs Cassman Brown & CO. Ltd (1973) EA 358** where it was stated that:-

> ***"First, an Applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally ne granted unless the Applicant might otherwise suffer irreparable injury, which would not be adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide the application on the balance of convenience".***

17. Further, the court emphasized that the three conditions apply separately as distinct and logical hurdles to be surmounted sequentially by the Applicant. The Applicant who establishes a *prima facie* case must further establish irreparable injury, being injury for which damages

recoverable could not be an adequate remedy. And that where the court is in doubt as to the adequacy of the damages in compensating such injury, the court will consider the balance of convenience. Where no *prima facie* case is established, the court does not need to look into the question of irreparable loss or balance of convenience.

18. As to what constitutes a *prima facie* case, the Court of Appeal in the case of **Mrao Limited Vs First American Bank of Kenya Limited & 2 Others (2003) KLR 125,** stated that:-

> ***"In civil cases, a prima facie case is a case in which on the material presented to court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard, which is higher than an arguable case.***
>
> ***We adopt that definition save to add the following conditions by way of explaining it. The party on whom the burden of proving a prima facie case must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title it is enough if he can show that he has a fair and bona fide question as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than the court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed."***

19. The Applicant states that the intended sale of the suit property is illegal and fraudulent as the requisite notices under the Land Act had not been issued. In particular Section 90 (1), (2), (3), Section 96 (2) and (3) and Section 97 (1) and (2) of the Land Act. The Applicant submits that the Respondents never bothered to attach the said Notices or the purported Ruling of the Court where it was determined that the said Notices were issued.

20. On the other hand, the Respondents submit that the requisite notices including statutory notices and the Notification of sale were valid, proper and strictly complied with the provisions of Section 90 (2) of the Land Act. That once a valid notice has been issued there is no obligation in law that requires the Respondents to re-issue the notice even where the sale is not conducted as initially scheduled. They argue that this was the court's ruling in **Bomet Teachers Training College Ltd Vs Bank of Africa Ltd and Another, Bomet HCC NO. 2 OF 2015**.

21. A look at the pleadings reveals that the Respondents have failed to attach the Ruling referred to. Such a Ruling is not also in the present court file. They further neglected to attach the said Notices as evidence to support their claim that they issued the Applicant with the requisite Notices. The only Notice that this court finds was a Redemption Notice which both parties admit in their pleadings. In the absence of additional evidence, this court is not persuaded that the Respondents did issue the requisite Notice as contemplated under Section 96(2) of the Land Act which provides that:-

> ***"A Chargee shall before exercising the right of sale, ensure that a forced ale valuation is undertaken by a valuer."***

22. The Applicant further claims that the Respondents undertook a valuation in respect to property comprised in L.R NO. BOMET TOWNSHIP/113 which belongs to Bernard Chepkwony Mutai. The Respondents admitted to this fact when they stated that they realized the error on the Valuation Report and had since rescinded the initial valuation report. They further stated that they were in the process of conducting a fresh one.

23. It is my finding therefore that the Respondents have not attached any Valuation Report and therefore cannot proceed with realizing the security in the absence of a forced sale valuation conducted by a valuer. The requirements of Section 97(2) of the Land Act are not a mere formality but are intended to ensure that the charged property obtains the best price reasonably obtainable at the time of sale. Section 97 imposes a duty of care upon the Chargor to the Chargee whose breach may lead to the consequences set out in the section.

24. After reviewing the evidence on record, I am persuaded that the Applicant's complaints against the Respondents have merit. If the Respondents proceed to exercise their right of sale without following due procedure, the Applicant's right of redemption would be infringed upon. The Applicants have to this extent established a *prima facie* case.

25. With respect to whether the applicant would suffer irreparable injury which could not be adequately compensated by an award of damages, the Respondents submitted that they sought recovery for the loan balance to the tune of Kshs.8,801,999.97, a sum which the Applicant has not disputed. The attached Statement of Accounts confirms the same. It is not lost to the court that the 1st Respondent being in the business of banking, would be quite capable of compensating the Applicant should they be directed to do so by this court. However, I do agree with the court's findings in the case of **Joseph Siro Mosioma Vs. Housing Finance Company of Kenya Limited & 3 Others (2008)eKLR,** where it was held that:-

> ***"that damages is not an automatic remedy when deciding whether to grant an injunction or not. Damages is 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 effuse 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."***

26. In the upshot, it is my finding that though the Applicant's loss may be compensated by an award of damages, the justice of the case dictates that the Respondents ought not benefit from their breach of the law. The Applicants deserve to be protected by an interlocutory injunctive order from this court.

(ii) Whether the 1st Respondent is in violation of the *in duplum* rule

27. The duplum rule was elucidated by the Court of Appeal in the case of **Kenya Hotels Limited Vs Oriental Commercial Bank Ltd (Formerly known as Delphis Bank Limited) (2019) eKLR** thus:-

> ***"In duplum" is a Latin phrase derived from the word "in duplo" which loosely translates to "in double". Simply stated, the rule is to the effect that interest ceases to accumulate upon any amount of loan owing once the accrued interest equals the amount of loan advanced. Since the introduction of this principle on 1st May 2007 it has been applied by the courts with reasonable degree of consistency. See Lee G. Muthoga V. Habib Zurich Finance (K) Limited & another (2016) eKLR, Mwambeja Ranching Company Limited & another V. Kenya National Capital Corporation (2019) eKLR, along a host of many others where it has been invoked. The rationale for this rule was elucidated in the latter decision by this Court in the following passage.***
>
> ***"The In duplum rule is concerned with public interest and its key aim was to protect borrowers from exploitation by lenders who permit interest to accumulate to astronomical figures. It was also meant to safeguard the equity of redemption and safeguard against banks making it impossible to redeem a charged property. In essence, a clear understanding and appreciation of the in duplum rule is meant to protect both sides."***

28. The application of this rule was recently reiterated by the Court of Appeal in the case of **Housing Finance Company of Kenya Limited Vs Scholarstica Nyaguthii Muturi & Another (2020) eKLR** in the following terms:-

> ***"As we have shown section 44A of the Banking Act came into force on 1st May 2007. That provision of law sets up the maximum amount of money a banking institution that grants a loan to a borrower may recover on the original loan. The banking institution is limited in what it may recover from a debtor with respect to a non performing loan and the maximum recoverable amount is defined as follows in section 44A(2):***
>
> ***"The maximum amount referred in subsection (1) is the sum of the following-***
>
> ***a) The principal owing when the loan becomes non-performing;***
>
> ***b) Interest, in accordance with the contract between the debtor and the institution, not exceeding the principal owing when the loan becomes non-performing; and***
>
> ***c) Expenses incurred in the recovery of any amounts owed by the debtor".***
>
> ***By that provision if a loan becomes non-performing and the debtor resumes payment on the loan and the loan becomes non-performing again the limitation under the said paragraphs shall be determined with respect to the time the loan last became non-performing. In addition, by section 44A (6) it is provided:***
>
> ***"This section shall apply with request to loans made before this section comes into operation, including loans that have become non-performing before this section comes into operation."***
>
> ***Section 44A has retrospective effect and this as explained by this Court in the case of James Muniu Mucheru V. National Bank of Kenya Civil Appeal No. 365 of 2017***.

29. The Applicant submitted that it has paid at least Kshs.36,652,894.20 over the principle loan sum of Kshs.15,000,000. That the Respondents claim a further sum of Kshs.8,801,999.97 which if paid would mean that the amount paid over the principal loan amount of Kshs.15,000,000 would be Kshs.45,454,894.

30. The Respondents on the other hand submit that section 44 of the Banking Act was not available as a defence to the Applicant since it is related to bank charges which are distinct from the interest charges as they concern the price or cost of banking services or products, notably commissions. That interest rate adjustments are not regulated under section 44 and a bank that wishes to adjust interest applicable to a loan facility is not obligated to seek ministerial approval.

31. The Respondents further submitted that section 39 of the Act which required consultation with the Minister to determine and publish the maximum and minimum rates of interest chargeable for loans or advances were repealed in 1996 thus liberating interest rates to be determined by market forces. That the Applicant could not be assisted by the *in duplum* rule under section 44A of the Banking Act which placed a ceiling on interest charges to an amount not exceeding the principal sum lent, since the law became effective from 1st May 2007 after interest accrual had been applied.

32. This court notes that it has no way of verifying the assertions by the Applicant as the Applicant has not attached any Statement of Account to show the amount of money it has paid in service of the outstanding loan amount. Further, this court observes that both parties failed to attach the Letter of Offer and the Legal Charge in respect to the loan facility advanced to the Applicant. The court is therefore not in a position to verify when the loan was advanced, or the interest rates applicable as it is not privy to the clauses contained in the Charge

document.

33. It is this court's finding therefore that the issue whether or not the 1st Respondent is in violation of duplum rule can only be ascertained at the trial of the case as such determination calls for proof of the terms of the loan, actual amounts advanced and repaid and the applicability, if any, of Section 44 of the Banking Act.

34. In the final analysis, the evidence before this court *prima facie* shows that the Applicant's equity of redemption is under threat of infringement. The said equity would be permanently defeated if this court declines to halt the sale of the charged property pending the determination of the suit. The balance of convenience therefore lies in favour of the Applicant.

35. The court is persuaded, on the basis of the material before it to grant prayers (3) and (4) of the Application filed on 7th December 2020.

36. Costs shall be in the cause.

37. Orders accordingly.

Ruling delivered, dated and signed this 21st day of July, 2021.

.....

R. LAGAT-KORIR

JUDGE

Ruling delivered in the absence of Mr. Koech for the Applicant, Ms. Koske for the Respondents and in the presence of Kiprotich (Court Assistant).