REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. 154 OF 2018

ABDIKADIR ARAB MOHAMUD...1ST PLAINTIFF

MOHAMED ISSA BARE...2ND PLAINTIFF

-VERSUS-

FIRST COMMUNITY BANK LTD..DEFENDANT

RULING

BACKGROUND

The Plaintiffs' (herein **"Abdikadir Arab Mohamud** and **Mohamed Issa Bare")** through an Amended Plaint dated 20th April 2018 pursuant to **Order 8 Rule 1 (1) of the Civil Procedure Rules 2010**, instituted a claim against the Defendant (herein **"First Community Bank Limited").**

The plaintiff also filed under Certificate of Urgency on 17th April 2018 Notice of Motion seeking grant of interim/temporary injunction. The injunction was/is to restrain the defendant bank, its agents servants agents and or officers from selling by public action or otherwise dealing with suit property **LR 36/11/318;** by purporting to transfer ownership or possession or in any way interfering with the Plaintiff's quiet possession and enjoyment of the suit property pending hearing and determination of the application and/or suit.

That on or about 3rd October 2011, the Plaintiffs as Mortgagors entered into a Mortgage Agreement (**Diminishing Musharak Financing)** with the Defendant as the Mortgagee on the security of the property known as **Land reference Number 36/11/318** ("**the suit Property"**). The Mortgage was for the advancement of Ksh 40,000,000.00 to the M/S Golden Real Estate Limited as the Borrower to finance the Construction of Flats/Apartments on the Suit Property.

That on 19th October 2012, the parties entered into a Further Agreement for the advancement of a further Ksh 20,000,000.00 secured by a further Charge on the suit property. There was thereafter a further advancement of Ksh 10,000,000.00 making an aggregate of sum of Ksh 70,000,000.00. The said sum was to be paid in specified period as tabulated in the respective Master Musharakkah Agreements.

CERTIFICATE OF URGENCY OF 17TH APRIL 2018

By a Certificate of Urgency Application dated 17th April 2018, the Advocate for the Plaintiff/Applicant certified the application as extremely urgent and ought to be heard on priority basis for reasons;

1. That the Respondent issued the Plaintiffs/Applicants with a Statutory Notice dated 18th January 2018 informing them of the intended sale of the property known as Land Reference Number 36/11/318 by Public Auction soon after 19th April 2018 when the said Notice expired;

2. That the Borrower subsequently experienced challenges in servicing the facility and on or about 31st December 2014, the Borrower and the Defendant mutually agreed to refer the matter to First Community Bank Sharia Supervisory Board for Arbitration whose decision all the parties undertook to irrevocably and exclusively observe and abide by;

3. The Applicants made concerted efforts for the realization of the said decision of the First Bank Community Bank Sharia

Supervisory Board so that each apartment as a unit in the project may get a separate title document to allow economic benefits to be derived therefrom but the Defendant/Respondent has unreasonably frustrated the said efforts;

4. That the purported Statutory Notice dated 18th January 2018 was against the said decision of the First Community Bank Sharia Supervisory Board which effectively settled the matter of the indebtedness by the Borrower and/or the Plaintiffs to the Defendant.

5. That the Defendant is not in fact owed any sums of money at all by the Borrower and/or the Plaintiffs (chargors) and the Defendant's explanation for its intended unilateral action is that it seeks to sell the entire suit property then share the proceeds thereof on a 50/50 basis with the Borrower since the Defendant has allegedly been unable to sell its 14 Apartments as separate units.

6. The unilateral venture by the Defendant not being tenable in view of the fact that the Borrower has already sold ten (10) of its units/Apartments to third parties who have taken possession.

7. The Plaintiffs hasten to add that the Defendant is also stopped by the Arbitral Award from seeking to wholly sell the suit property as intended.

8. That the intended unilateral sale is therefore in bad taste and instant application is merited and deserving of the exercise of this Honorable Court's Intervention in order to preserve the substratum of this suit pending the final hearing and determination thereof.

REPLYING AFFIDAVIT

The application is opposed vide a Replying Affidavit dated 21st May 2018, sworn by Claris Ogombo Advocate for the Defendant/ Respondent. He deponed that the Borrower was first advanced a term loan in the amount of Ksh 40,000,000/- repayable in **thirty six (36)** months vide an offer dated 14th September 2011 which recorded additional terms and conditions under which the facility was advanced. Annexed to the offer letter was an Asset Financing Agreement the terms and conditions of which were incorporated by reference in the offer letter and were in any event accepted and acknowledged by the Borrower/Applicant who duly executed the same.

That the purpose of the diminishing Musharaka facility as stated at **clause 1** of the offer letter dated 14th September 2011 was to facilitate construction by the Borrower of 28 Apartments for sale on the suit property. It was an express term of the Financing Agreement that the Respondent's contribution to the project in the form of the loan facility would be a maximum of Ksh 40,000,000/- while the Borrower would contribute a minimum of Ksh 42,000,000/- towards the construction project.

That contrary to the agreed terms as recorded in the offer letter dated 14th September 2011, the Borrower was unable to raise their share of the funds required to complete the building and thereafter approached the Respondent with a request for additional funds and for a restructure of the existing facility. The Respondent in good faith acceded to this request and duly advanced an additional Ksh 20,000,000/- and restructured the outstanding balances vide an offer letter dated 25th January 2013.

That the dispute over the value of the party's contribution was referred to for mediation before the Bank's Sharia'h Supervisory Board (SSB). The narrow scope of the Sharia'h Board's mandate was clearly captured in their advisory opinion delivered on 2nd January 2015 in which it stated as follows at paragraph 3;

> ***"this matter is raised to the SSB to determine the share of each party in the said project to enable the Bank institute remedial steps".***

That the purported Arbitral Proceedings alleged by the Applicant were not and could not have been proper or valid arbitration proceedings in light of the following:

a) There was no arbitration agreement contrary to the mandatory provisions of **Section 4 (2) of the Arbitration Act 1995**. In fact the dispute resolution procedures under the Financing Agreement provided for referral of all disputes to Courts of competent jurisdiction.

b) There was no provision agreement or appointment of an arbitral tribunal contrary to **Section 12 of the Arbitration Act 1995.**

c) There was no agreement over the rules of Arbitration and procedure to be followed contrary to **Section 20 of the Arbitration Act 1995.**

d) There was no filing of a statement of claim and/or defence as required by **Section 24 of the Arbitration Act 1995.** Indeed **Section 26 (1) of the Arbitration Act 1995** clearly stipulates that an Arbitral Tribunal must terminate the Arbitration proceedings should there be a failure to file a statement of claim within the specified period.

e) In the absence of any valid Arbitration proceedings, no valid or enforceable arbitral award could have been issued.

That indeed the Applicant/Borrower following the issuance of the SSB Advisory Opinion continued to make proposals regarding the repayment of the outstanding liabilities including a proposal via email to the Respondent's Chief Executive Officer on 28th August 2016 where the Applicant reported that they were in the process of negotiating the sale of the entire suit property to some potential buyers in Dubai. This communication negates and completely contradicts the Applicants assertions regarding the scope of the SSB Advisory Opinion and is an admission on the part of the Applicants that they were aware that their obligations under the Financing Agreements were valid and

in full force and effect.

PLAINTIFF'S SUBMISSIONS

In their submissions the Plaintiffs referred to the authority in ***David Ngugi –vs Kenya Commercial Bank Limited [2015]eKLR*** where the court referred to ***Machakos HCCC No. 215 of 2008 Jopa Villas LCC vs Private Investment Corp & 2 Others***; where Lenaola J. (as he then was) stated that;

> ***"I am clear in mind that the Applicant is running away from the obligations lawfully imposed and with its knowledge and participation. Courts should not aid it in that quest…our Courts must uphold the sanctity of lawful commercial transactions."***

In the case of ***Kenya Planters Cooperative Union Ltd –vs- Kenya Commercial Bank Limited & 4 others [2016]eKLR*** the court cited the case of ***Esther Akinyi odidi & 2 Others –vs- Sugar Hardware Stores Limited and Another [2006]eKLR***, where it was held that:-

> ***"In essence, a person should always stand by his word or deed given to another and who believes and acts on that word or deed as the truth of the matter. And the person who gave that word or deed to be acted upon cannot be seen to deny the truth of it, is given to the other in any suit or proceeding involving the one to whom the representation was made and the one who represented it or his agenda great base indeed to bind people to their words or deeds said or done, believed as truth by whom the word or deeds are said or done and who act on the same thereby changing their positions/circumstances. If the truth of the deed or word is changed, those -who believed and acted in it stand prejudiced…"***

Further in the case of ***National Bank of Kenya Limited –vs- Hamida Bana & 103 others [2017]eKLR*** **the Court of Appeal** referred to the case of ***State of Punjab & Others vs Dhanjit Singh Sandhu – Civil Appeal No. 5698 – 5699 of 2009*** where the Supreme Court of India expressed itself as follows:-

> ***"The principle is based on the doctrine of election which postulates that no party can accept and reject the same instrument and that person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage.***
>
> ***The Supreme court in the Rajasthan State Industrial Development and Investment Corporation and Another –vs- Diamond and Gem Development Corporation Limited and Another AIR 2013 SC 1241, made an observation that a party cannot be permitted to blow hot and cold, fast and loose or approbate and reprobate. Where one knowingly accepts the benefits of a contract or conveyance or an order, is estopped too deny the validity or binding effect on him of such a contract or conveyance or order …"***

DEFENDANT/REPONDENT SUBMISSIONS

The Defendant submitted that the Applicant was not deserving of the orders sought since they stand to suffer no irreparable harm should the orders not be granted. The entire purpose of the facility granted to the Borrower was to construct apartments for sale. The Bank proposes to sell these apartments in exercise of statutory power to recover the outstanding balance. The Borrower shall certainly not suffer any harm that cannot be compensated by damages. See the case of ***Pius Kipchirchir Kogo –vs- Frank Kimeli Tenai [2018]eKLR*** the court stated as follows regarding irreparable harm;

> ***"Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The Applicant should further show that irreparable injury will occur to him by which he will protect himself from the consequences of the apprehended injury. The Defendant has been collecting rent since the year 2005 and therefore the issue of irreparable harm if injunction is not granted should not arise so long as the matter is fast-tracked for hearing".***

That it is settled once a property is offered up as security, it becomes a commodity of commercial value which can be realized. In ***John Nahashon Mwangi –vs Kenya Finance Bank Limited (in liquidation) [2015] eKLR***, Justice Gikonyo J, Stated;

> ***"Any property which is properly and lawfully given as security for a loan becomes a commodity for sale. And so, any ground based on those arguments does not in itself prove of prima facie case of possibility of suffering irreparable damage. See the case of C. A Civil Apeal No. 114 of 2009 Nyanza Fish Processors Limited –vs- Barclays Bank of Kenya Limited, where the court held that;***
>
> ***"The applicant itself as offered the property as security. No matter that the validity of the charge is being challenged. The conduct of the applicant in charging the same made it a commercial property the loss of which in an appropriate case would entitle the applicant to damages. The Respondent is a bank and there is no gainsaying that it will be able to satisfy the loss".***

In ***Kipchirchir Kogo -vs- Frank Kimeli Tenai*** (Supra), the learned Ombwayo J. summarized the principle of balance of convenience as follows;

> ***"The court should issue an injunction where the balance of convenience is in favor of the Plaintiff and not where the balance is in favor of the opposite party. The meaning of balance of convenience in favor of the Plaintiff is that if an injunction is not granted and the suit is ultimately decided in favor of the Plaintiffs, the inconvenience caused to the plaintiff would be greater than that which would be caused to the Defendants if an injunction is granted but the suit is ultimately dismissed. Although it is***

called balance of convenience it is really the balance of inconvenience and it is for the plaintiffs to show that the inconvenience cause to them would be greater than that which may be caused to the defendants. Should the inconvenience be equal, it is the plaintiffs who suffer. In other words, the plaintiffs have to show that the comparative mischief from the inconvenience which is likely to arise from granting it."

"On the balance of convenience there is no material before the court that the inconvenience caused to plaintiff would be greater than that which may be caused to the defendant. The application herein is dismissed with costs in the cause.

DETERMINATION

After considering the pleadings and submissions by parties through Counsel, the issues that emerge for determination are as follows;

a) Are the plaintiffs indebted to the Defendant?

b) Is the Defendant/Respondent entitled to exercise statutory power of sale?

c) Was/is there an agreement between the parties on settlement of the debt that vitiated the charger/charge relationship and/or rights?

d) Have the Plaintiffs established a prima case to warrant upholding grant of injunction?

ANALYSIS

The agreed uncontested facts are that on 3rd October 2011, the Plaintiffs entered into mortgage Agreement with the Defendant on security of the suit property **36/11/318**. The Plaintiffs as borrowers were to inject **Ksh 42 ,000,000/-** as construction finance and received from the Defendant bank **Ksh 40,000,000** to M/s Golden Real Estate Ltd.

On 19th October 2012, the parties entered into Further Agreement for advancement of **Ksh 20,000,000/-** secured by further charge**.** Thereafter the Defendant bank advanced the Plaintiffs **Ksh 10,000,000/-**

The Borrowers ran into financial challenges in servicing the facility in 2014. Parties mutually agreed to explore First Community Bank Sharia Supervisory Board with a view to restructure the facility**.**

On 2nd January 2015, First Community Bank Sharia Supervisory Board rendered their decision that in lieu of the Borrower repaying the loan facility; the Defendant acquired an equal proprietary interest in the subject project of **28 Apartments** being **50%** thereof which translates to **14 Apartments**.

Upon acquiring, a right to the said 14 Apartments, the Defendant Bank was entitled to rental income derived from the 14 Apartments which the Borrower deposited in its **Bank Account 0005-404-210104-00108105-000** with the Defendant and through which the Bank received its share of rental income.

The Borrower as owner of the balance of 28 Apartments sold 10 units/Apartments to individual 3rd parties.

The point of departure between the parties is as follows;

a) The Defendant issued Statutory Notice of 18th January 2018 informing Plaintiffs/Borrowers of intention to sell the suit property by public auction.

b) The Defendant based this decision on the following factors;

i) The letter of offer of 14th September 2011 the Borrower was to inject capital of Ksh 42,000,000/- and the Defendant to provide Ksh 40,000,000/- for development of construction of residential development on suit property 36/11/318. The borrower did not advance the Ksh 42m.

ii) Upon the First Community Bank Sharia Supervisory Board decision, the Borrower Golden Real Estate Ltd admitted that they pre sold 10 units /Apartments but the proceeds were not remitted to the Bank to offset the Loan Facility.

iii) The Defendant confirmed advancing the following funds to the Borrower;

a) Ksh 15,000,000/- disbursed on 27th November 2011

b) Ksh 15,000,000/- disbursed on 2nd February 2012

c) Ksh 10,000,000/-disbursed on 18th April 2012

d) Ksh 10,000,000/- disbursed on 29th September 2012

e) Ksh 10,000,000/- disbursed on 12th November 2012

f) Ksh 21,993,539.74 disbursed on 9th February 2013 vide letter of offer of 25th January 2013 upon restructuring the facility.

g) Ksh 8,000,000/- disbursed on 23rd February 2013 vide letter of offer dated 22nd February 2013 upon restructuring the facility.

h) Ksh 16, 837, 981 /- disbursed on 7th April 2014 upon restructuring the facility.

These transactions are reflected in Borrower's statement of **Account 00180810501.**

The Borrower paid Ksh 1,400,000/- on 18th July 2017 and 24th November 2017.

Account 00180810501 by the Borrower reflected remittance of rental income as follows;

a) Ksh 300,000/- remitted on 13th January 2018

b) Ksh 300,000/-remitted on 15th February 2018

c) Ksh 400,000/- remitted on 19th March 2018

As at 24th April 2018, the Borrower was/is indebted to the Respondent to the tune of **Ksh 100,033,202.83/-**

The Respondent deponed that the Plaintiffs /Applicant/Borrower were at all times in breach of their obligations under various **letters of** offer leading to requests of additional Finance and restructure of existing facilities which the Respondent acceded to in good faith.

The Respondent deposed that First Community Bank Sharia Supervisory Board opinion of 2nd January 2015 was to determine the share of each party in the said project to enable the Bank institute remedial steps.

The Respondent posited that the Financing Agreement between bank and client contained the following clauses;

a) Clause 13:10 The Financial Agreement between Bank and Client [did not make the parties] partners and no joint venture or partnership shall be deemed to exist arise between the parties.

b) Clause 13:12 The Agreement was/is governed by and shall be construed in accordance with Laws of Kenya,, All competent Courts in Kenya shall non –exclusive jurisdiction to hear and determine any action , claim or proceeding arising out of the Agreement.

c) Clause 13:13 The Respondent reiterated that no failure or delay on the part of the bank to exercise any power, right or remedy under this Agreement shall operate as a waiver thereof…….The remedies provided in this Agreement are cumulative and are not exclusive of any other remedies provided by law.

d) The agreement was not an arbitration as envisaged by Sections 4(2), 12,20 24 & 26(1) of Arbitration Act 1995.

The Plaintiffs/Applicants deposed that they have established a prima facie case with probability of success to warrant grant of interim/temporary injunction.

The plaintiffs relied on the landmark cases of ***Giella vs Cassman Brown [1973] EA 358 & Mrao vs First American bank of Kenya Ltd & 2 Others (2003) KLR 125.***

The Plaintiffs co-own the suit property with the Respondent pursuant to the First Community Bank Sharia Supervisory Board opinion of 2nd January 2015; each holding 14 Units /Apartments. There are 3rd Parties, purchasers of the 10 Units/Apartments who have stake/claim to the suit property and all stand to suffer irreparable loss, an award of damages would not adequately compensate them.

In ***Balbir Singh Sandhu & Another vsRose Detho Anor [2012] eKLR*** which held;

> ***"Parties are bound by commercial agreements and must keep their part of the bargain."***

In the case of ***David Ngugi Ngare vs Kenya Commercial Bank Ltd [2015] eKLR*** it was held citing ***HCCC 215OF 2008 Jopa Vilas LLC vs Private Investment Corporation & 2 Others***, the Court stated;

> ***"I am clear in my mind that the Applicant is running away from the obligations lawfully imposed and with its knowledge and participation. Courts should not aid it in their quest…. Our Courts must uphold the sanctity of lawful commercial transactions."***

On evaluation of these submissions, the Court finds the following;

The contracts; Indenture of Conveyance of 10th September 2009, letter of offer of 14th September 2011, Mortgage instrument of 3rd October 2011 and further Charge of 19th November 2012 bind the Plaintiffs/Borrower and the Defendant Respondent on the loan facilities provided by the Respondent and servicing of the facilities by the Plaintiffs/Borrowers. Neither of the parties has contested validity of the charge and mortgage documents.

The plaintiff'/applicants did not object/contest or deny receipt of funds in form of loan facilities as outlined by the Defendant in their Replying Affidavit. The Applicants admit financial challenges that emerged in 2014 and the Defendant bank facilitated restructuring negotiations in form of First Community Bank Sharia Supervisory Board is opinion.

It is admitted that the facilities have not been serviced; no documents of payments have been produced by the Applicants to show defraying of the debt. The Defendant Respondent has alluded to what has been paid so far in the pleadings.

The Plaintiffs/Applicants relied on the First Community Bank Supervisory Board Opinion delivered on 2nd January 2015, that essentially restructured the debt portfolio payment by proposing the Bank to hold and receive rent remittances from 14 Units/Apartments of the residential development on the suit property **LR 36/11/318.** Admittedly, the Plaintiff/Applicants collected rent remittances and banked in their account held with the Defendant Bank but how much has been remitted as rent to offset the loan facility is not disclosed to this court.

The First Community Bank Sharia Supervisory Board opinion of 2nd January 2015 was/is not an arbitral award culminating from proceedings conducted by an Arbitrator under the Arbitration Act 1995. At most; it was/is a gentleman's agreement to restructure the debt repayment process in light of current financial challenges. Therefore, the opinion did not/cannot subrogate the terms of valid contracts between the Plaintiff/Applicants and Defendant /Respondents housed in the charge and mortgage documents.

The Defendant secured its interest in recovery of loan facility by the plaintiffs through deposit and/or withholding of legal title of the suit property **LR 36/11/318**. In the absence of payment of the debt or servicing of the loans and /or redemption, the Defendant has legal mandate to exercise remedies of Mortgages among them exercising the statutory power of sale.

The plaintiffs contend that they owe no debt/loan/overdraft from the Defendant by virtue of release of 14 units to the Defendant to collect rent remittances. Unfortunately, there are no documents to confirm rent remittances to the Bank to offset the Loan. Secondly, the Plaintiffs sold 10 Units/Apartments to 3rd Parties**, there are; Flat 101,201,104, 202,301,304,403,303,301& 302.** The payments were not used to offset the Loan/Debt due and owing. The plaintiffs undertook to sell the Units /Apartment to foreign investors which did not happen.

So, the plaintiffs/Applicants have not established prima facie case because they contracted and obtained credit facilities from the Defendant to construct a residential development on suit property 36/11/318 which have not been repaid to date. The restructuring by First Community Bank Sharia Supervisory Board did not set aside valid charge and mortgage contracts that bind the parties. In the absence of the Plaintiff's exercising their right of, redemption, the Defendant as secured Creditor is legally entitled to pursue its right of statutory power of sale which shall be in compliance with **Sections 90, 96 & 97 of Land Act & Rule 15 of Auctioneers Rules.**

There is the issue of sale of 10 Units by the Plaintiffs to 3rd Parties and have attached documents of payments by the said parties of the Units in question. As elucidated in the case ***of Lawrence Mukiri vs AG & $ Others [2013]*** there are 3rd parties ***bona fide*** purchasers for value without notice of defective title (suit property charged to the Bank by Vendors) with a proprietary interest to be protected and they cannot be condemned unheard. These 3rd Parties were not served with the notice of intended sale as shown by the statutory notice served to the Plaintiffs under **Section 96(3) Lands Act.**

As was held in the case ***Bamboo Tree Holdings vs National Bank of Kenya Ltd HCCC 325 of 2018;***

> ***"The object of the requirement of [s 96 (3) Land Act] is that persons who in one way or the other have an interest in the charged property or debt ought to have notice of the intended sale."***

Therefore, as the Defendant exercises its right of statutory power of sale against the Plaintiffs, it can only relate for now to the suit property 36/11/318 and the 4 Units held by the Plaintiff not yet sold and those claimed to be rented out and the rent remittances made to the Bank.

The 3rd Parties Proprietary interests in **Flats Numbers 101,201,104,202,301,304,403,303,301& 302** are hived off and protected until the 3rd parties are served the statutory notices and their interest in the suit property subject of the sale is first heard and determined in court.

Lastly, The Plaintiffs/Applicants sought Comprehensive Statement of Borrower's Account before hearing and determination of the suit. It shall be availed before statutory power of sale is conducted.

DISPOSITION

> **1. The plaintiffs/Applicants have not established prima facie case to warrant grant of temporary injunction to stop the sale of the suit property LR 36/11/318.**

2. The application of 18th April 2018 is dismissed with Costs to the Respondent.

3. The Defendant shall exercise statutory power of sale over the suit property 36/11/318 except the 3rd parties interests subject to the following terms;

a) Within 30 days from today, the parties meet and agree on the debt due and owing

b) The Defendant to provide as per the Plaintiff's request Comprehensive Statement of Accounts outlining the facilities amounts and what has been paid from 2011 to date.

c) Compliance with Section 90, 96 &97 of Land Act and Rule 15 Auctioneers Act.

4. The statutory power of sale shall exclude the Flats numbers 101,201,104,202,301,304,403,303,301& 302 purchased by 3rd Parties *bona fide* purchasers who were not served with statutory notice or heard on protection of their proprietary interest in the suit property.

5. The interim injunction granted on 20th April 2018 and extended by Consent on 23rd April 2019 shall vacate after 30 days from today on the rest of the Suit property LR 36/11/318 and remaining Units/Flats save for those held by 3rd Parties bonafide Purchasers Flats numbers 101,201,104,202,301, 304,403,303,301& 302.

DELIVERED SIGNED & DATED IN OPEN COURT ON 7TH FEBRUARY 2020.

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF;

Ms MUGUKU H/B MR. OCHIENG FOR THE APPLICANT

MR. OCHIENG H/B MR. OMUSOLO FOR THE RESPONDENTS

COURT ASSISTANT- MR TUPETT