REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

CIVIL CASE NO.39 OF 2019

EASY PROPERTIES LIMITED.....1ST PLAINTIFF/APPLICANT

BROWSE INTERNET ACCESS LIMITED.....2NDPLAINTIFF/APPLICANT

VERSUS

DIAMOND TRUST BANK LIMITED.....DEFENDANT/RESPONDENT

RULING

(1) Before this Court the Notice of Motion dated **30th January 2019** by which **EASY PROPERTIES LIMITED, (**the 1st Plaintiff/Applicant and **BROWSE INTERNET ACCESS LIMITED** (the 2nd Plaintiff/Applicant) seeks the following Orders:-

> **"1. SPENT**
>
> **2. SPENT**
>
> **3. THAT this Honourable Court be pleased to issue temporary injunction restraining the Defendant whether by themselves, their servants or agents acting jointly or and severally from advertising, selling by public auction, private treaty and/or otherwise dealing or interfering with properties known as L.R. NO.12715/522 Northwest Athi River Township Machakos and L.R. NO.209/10964 Nairobi or in any manner whatsoever interfering with ownership and quiet possession and enjoyment of the Plaintiff/Applicants properties pending the hearing and deter-mination of this suit.**
>
> **3. THAT costs of this application be provided for.**

(2) The application was premised upon **Sections 1A, 3 and 3A** of the **Civil Procedure Act, Order 40 Rules 1(2)** and **4 of** the **Civil Procedure Rules 2010, Cap 21 laws of Kenya**. The **Land Act No.6 of 2012** and the **Land Registration Act No.3 of 2012** and all enabling provisions of the law. The same was supported by the Affidavit of even date sworn by **STEPHEN ONYAMBU** the Director of the Plaintiff/Applicants.

(3) The Defendant/Respondent **DIAMOND TRUST BANK LIMITED** opposed the application by way of the Replying Affidavit it dated **11th February 2019** sworn by **LWANGA MWANGI,** Debt Recovery Officer with the Defendant Bank. The application was canvassed by way of written submissions. The Plaintiff/Applicant filed their written submissions on **18th June 2019** whilst the Defendant/ Respondent filed its submissions on **5th July 2019**.

BACKGROUND

(4) Pursuant to several letters of Offer as set out in the Respondents replying Affidavit the Defendant bank advanced to the Plaintiff several construction facilities amounting to an aggregate sum of **Kshs.200 Million**. The facility was later enhanced to a construction loan of **Kshs.255,000,000** vide the letter of Offer dated **25th September 2017.**

(5) The two Construction Loans were secured as follows:-

> The construction Loan I was secured by;-

i. First legal (continuous) charge over property as **LR 209/1050** situated at **Villa Franka Estate Embakasi Nairobi** registered in the name of the owner of the piece of land, one **Pamela Bwari Buruchara** together with all present and future developments thereon and to be constructed thereon stamped in favour of the bank for **Kshs.33,000,000/=** (Kenya Shillings Thirty Three Million).

ii. Personal guarantee of the registered owner of the property one **Pamela Bwari Buruchara**.

iii. Rental assignment over property under (i) above.

iv. Joint, several and Personal Guarantors of the Directors of Browse Internet access Limited (2nd Defendant) namely **Stephen Onyambu** and **Pamela Bwari Buruchara**.

(6) The Construction Loan Facility II was secured by additional securities. The securities included the following:-

i. First legal (continuous) charge over property as **LR 209/1050** situated at **Villa Franka Estate Embakasi Nairobi** registered in the name of **Browse Internet Access Limited** (2nd Plaintiff) together with all present and future developments thereon and to be constructed thereon stamped in favour of the bank for **Kshs.7,000,000/=** (Kenya Shillings Seven Million).

ii. Rental assignment over property in (i) above.

iii. Joint, several and Personal Guarantees of the directors of Browse Internet Access Limited namely **Stephen Onyambu** and **Pamella Bwari Buruchara.**

(7) It is alleged by the Bank that the Plaintiff failed to make the scheduled monthly payments and the facility fell into arrears. Accordingly the Defendant/Respondent in exercise of its statutory Power of Sale issued statutory Notices to the Applicant and Guarantors vide letter dated **26th October 2018**, claiming arears of **Kshs.145,708,019.44**. The three month statutory period lapsed on **27th January 2017** without the Applicants having remedied the default. The Respondent through their Advocates issued the 40 day Notice of Sale dated **8th February 2019** pursuant to **Section 96** of the **Land Act**. The Applicants then moved to court with this application seeking Interim Orders of stay.

(8) The Applicants submit that the statutory notices were issued unlawfully given that they have repaid in full the loan facilities advanced to them. The Applicant contends that the Defendants have overcharged interest contrary to the Central Bank of Kenya Regulations and that the Bank failed to notify them of the changes of rates of interest applicable on their Accounts from time to time. Finally it is claimed that some of the units threatened by auction have long been sold to 3rd parties and no longer belong to the Defendant/Respondent.

(9) The Respondent contends that the Plaintiffs have not fully repaid the facilities advanced to them and that as at **7th February 2019**, the applicants were indebted to the Bank in the aggregate sum of **Kshs.294,313,141.66** which amount continues to accrue interest at the rate of 13% per annum.

ANALYSIS AND DETERMINATION

(10) I have carefully considered the rival submissions filed by both parties in this matter. The Applicants seek injunctive Orders pending hearing of the suit. The conditions precedent for grant of a temporary injunction were clearly set out in the oft cited case of **GIELA –VS-CASMAN BROWN [1973] E.A 358** where the court held as follows:-

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

(1) PRIMA FACIE CASE

(11) The definition of what constitutes a "**prima facie**" case was set out in **MRAO LTD –VS- FIRST AMERICAN BANK OF KENYA LTD (2003) eKLR** where the Court of Appeal held:-

> **"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 success of the applicant's case upon trial."**

(12) The fact that loan facilities were advanced to the Applicant in the amount of **Kshs.255,000,000/=** for purposes of construction is not in any dispute. It is also not in dispute that two properties were offered as security for the facility. The first security was **LR NO.209/11050** situated at Villa Franca Estate, Embakasi Nairobi "**together with all present and future developments thereon and to be constructed thereon**…" The second property which was to be charged to secure the loan was **LR NO.12715/522 NorthWest Athi river Township, Machakos**. However that security was not perfected because the Applicants failed and/or declined to avail to the Bank the original Title document for the same, despite demand having been made vide the letter from the Bank's Advocates dated **2nd October 2017**.

(13) Therefore it is clear that the parties entered into a contract as evidenced by the various charges referred to the Replying Affidavit dated **11th February 2019** (annextures **LM2, LM4, LM5, LM7, LM9, LM11, LM13, LM15** and **LM17** thereto) and both parties are bound by the terms of said contracts. It is trite law that courts will not re-write contracts entered into voluntarily by parties to a suit.

(14) The Defendant Bank insists that the Applicants failed to adhere to the schedule of payments set out in the charge and that as at **February 2019** they were in arrears to the tune of **Kshs.294,313,141.66**. Annexed to the Replying Affidavit dated **11th February 2019** is a copy of the loan schedule **("LM23").** The Applicant being thus in arrears the Respondents acted well within their rights in issuing the 90 day statutory notice under **Section 90** of the **Land Act** and upon the Applicant failing to make good the loan the Respondents were at liberty to proceed to issue the 40 day Notice of Sale.

(15) The Applicants appear not to take issue with the Statutory Notices and do not deny receipt of the same. The Applicants however insist that they have fully repaid the facility and take issue with the interest levied by the Bank. If the Applicants had fully repaid the facility as they insist, then nothing would have been easier than for them to tender proof of this fact by availing copies of credit slips etc to cover the entire sum being claimed. No proof of such payment has been placed before the Court.

(16) The Applicant have taken issue with the interest charged on the facility terming the same unlawful and excessive. The Courts have declared severally that a dispute as to accounts cannot form the basis for the grant of an injunction to restrain a party from exercising its statutory Power of Sale. In **JANE WANJA MIRITI –VS- FINA BANK LIMITED & Another [2012]eKLR**, the court held:-

> **"…Nevertheless, the issue of dispute as to accounts is not one that can find a basis for grant of injunction orders as was pointed out in the case of MRAO LIMITED –VS- FIRST AMERICAN BANK OF KENYA LIMITED [2003] KLR 125…"**

(17) Likewise in **JAMES OTIANG OKOTH & Another –VS- NIC BANK LTD [2017]eKLR, Hon Lady Justice Olga Sewe** held as follows:-

> **"…It is now settled that a dispute over the amount owing or the rate of interest per se is not a valid ground for restraining the chargee from exercising a crystalized power of sale."**

(18) **Halsbury's Laws of England Vol 32 (4th Edition) paragraph 725** states thus:-

> **"725 <u>When a mortgagee may be restrained from exercising power of sale</u>." 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 being arranged. He will be restrained, however, if the mortgagor pays the amount claimed into court, that is, the amount which the mortgagor claims to be due to him, unless, on the terms of the mortgage, the claim is excessive."**

(19) Similarly, in **Bharmal Kanji Shah and Another V Shah Depar Devji (Supra)** it was observed that:-

> **"…<u>the court should not grant an injunction restraining a morgagee from exercising his statutory power of sale solely on the ground that there is a dispute as to the amount due under a mortgage</u>.."[**own emphasis**]**

(20) The same standpoint was taken in **Fina Bank Ltd Vs Ronak Ltd [2001] 1 EA 54** where it was stated that:-

> **"As the charge documents which were in evidence before the High Court expressly reserved, in favour of the Appellant, the right to charge interest at variable rates in its absolute and sole discretion, the contractual relationship between the parties could not be impeached because the exact rate or rates had not been specified. Accordingly the Respondents had not made out a case for injunctive relief in their favour and the order of the High Court had no sound basis."**

(21) Likewise in this case the dispute over interest due which forms the bulk of the Applicant's submissions is not in my view sufficient grounds for the grant of an interlocutory injunction. Accordingly I find that the Applicants have failed to establish a prima facie case.

<u>IRREPARABLE HARM</u>

(22) The Applicants are required to demonstrate to the court that they stand suffer irreparable harm if the orders sought are not granted. Irreparable harm refers to the that harm that cannot be adequately compensated by an award of damages. In **NGURUMAN LIMITED –VS- JAN BONDE NIELSEN & 2 Others [2014]eKLR,** it was held:-

> **"…the court must be satisfied that the injury the Respondent will suffer, in the event the injunction is not granted, will be irreparable. <u>In other words, if damages which are recoverable in law is an adequate remedy and the Respondent is capable of paying no interlocutory order of injunction should normally be granted, however strong the applicant's may appear at that stage</u>**."[own emphasis]

(23) The Applicants land and any units erected thereon can be quantified in monetary terms. The bank being a financial institution is capable of paying any damages that may be ordered by the court. The decision in the case of **ANDREW MURIUKI WANJOHI –VS- EQUITY BUILDING SOCIETY & Another [2006] eKLR** is instructive. In that case the court held thus:-

> **"Whenever the applicant offered the suit property as security, he was fully conscious of the fact that if the 1st Plaintiff did not meet his obligations, the suit property could be sold off. <u>Therefore, in the event that it later became necessary for the suit property to be sold off, by the chargee, the charger could not be heard to complain that his loss was incapable of being compensated in damages</u>. He had had the said property evaluated in monetary terms. He had then told the chargee that he**

knew the property to be capable of providing the charges with the peace of mind, of knowing that the money given as a loan would become recoverable, even if the 1st Plaintiff did not pay it.

By offering the property as security the chargor was equating the same to a commodity which the Chargee may dispose of, so as to recover his loan together with interest thereon. Therefore, if the Chargee were to sell off the suit property, the chargor's loss could be calculable, on the basis of the real market value of the said property."[emphasis added]

(24) The Applicants claim that some of the units erected on the land in question belong to third parties has not been proved. No evidence of ownership by any third party of the charged land in question has been availed. In any event any such third party is at liberty to approach the court in the normal manner on their own behalf. Therefore I find that the claim that the Applicants are liable to suffer irreparable harm has not been proved.

BALANCE OF CONVENIENCE

(25) It is trite law that the court will decide such matters in a manner as to favour the lower risk. The applicants have taken and enjoyed the facility granted to them by the Defendant Bank. The facility is in arrears with no payments having been made since **August 2017**. The outstanding amount due continues to accrue interest. I can do no better than to quote the decision of **Hon Justice Warsame** in **KYUNDAI MOTORS KENYA LIMITED –VS- EAST AFRICAN DEVELOPMENT BANK [2007] eKLR** where he held thus:-

"…the money of lenders is not for free. The loan advanced was not meant to be candy sweets to be enjoyed freely by the Applicants. The monies of lenders are a carrot accompanied by a stick and the stick can only be used when there is a default…."

In the circumstances I find that the balance of convenience tilts in favour of the Defendants/ Respondent.

(26) Based on the above I find no merit in this application and I decline to grant the injunctive orders sought by the Plaintiff/Applicant. The Notice of Motion dated **30th January 2019** is hereby dismissed in its entirety with costs to the Defendant/Respondent.

Dated in **Nairobi** this **7th** day of **February 2020.**

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Justice Maureen A. Odero