REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL SUIT NO.211 OF 2019

PETER MWANGI NJUGUNA............................1ST APPLICANT/PLAINTIFF

ELENA WAIRIMU MWANGI..........................2ND APPLICANT/PLAINTIFF

VERSUS

KENYA WOMEN MICROFINANCE

BANK LIMITED...1ST DEFENDANT/RESPONDENT

QUICKLINE AUCTIONEERS.................2ND DEFENDANT/RESPONDENT

RULING

(1) Before this Court is the Notice of Motion dated **22nd August 2019**, by which **PETER MWANGI NJUGUNA** (the 1st Plaintiff/Applicant) seek the following Orders: -

"1. SPENT

2. SPENT

3. SPENT

4. THAT pending the hearing and determination of this suit, this Honourable Court be pleased to grant an Order of Temporary Injunction restraining the Defendants/Respondents by themselves, their agents, employees, servants, assigns or any other person acting on their behest from selling land parcel number NAIROBI/BLOCK 105/ 1265.

5. THAT this Honourable court be pleased to grant permanent Order of Injunction restraining the Defendants/Respondents by themselves, their agents, employees, servants, assigns or any other person acting on their behest from selling land parcel number NAIROBI/BLOCK 105/ 1265.

6. THAT a mandatory injunction directing the 1st Defendant/ Respondent to provide to the Plaintiffs/Applicants statement of account in respect of the account secured by the charge registered against the title to land parcel number NAIROBI/BLOCK 105/ 1265 and motor vehicle registration number KCA 357C and KBU 470B as securities.

7. Costs of the application be borne by the Respondents/Defendants.

(2) The application was premised upon **Rule 19(1)** of the **High Court Rules 2016, Article 159(2)(d)** of the **Constitution of Kenya, Section 1A & 1B of the Civil Procedure Act, Order 40 Rules 1(a) 2,4 and 10, Order 51 Rule 10 the civil Procedure Rules** and all other enabling provisions of the law. The application was supported by the Affidavit of even date sworn by the 1st Plaintiff.

(3) **KENYA WOMEN MICRO FINANCE BANK LIMITED** (the 1st Defendant/Respondent) strenuously opposed the application vide the Replying Affidavit dated **13th September 2019** sworn by **BERNARD KIPROTICH** the legal Counsel of the 1st Defendant Bank.

(4) The application was canvassed by way of written submissions. The Plaintiff/Applicants filed their written submissions on **14th**

November 2019 whilst the 1st Defendant/Respondent filed its submissions on **8th November 2019.**

BACKGROUND

(5) On or about **August 2015**, the Plaintiff/Applicants (who are man and wife) sought and obtained from the 1st Defendant Bank a loan facility amounting to **Kshs.25,000,000** vide letter of Offer dated **15th October 2015**. The loan facility was secured by a legal charge over the property known as **NAIROBI/BLOCK 118/881** registered in the name of the 1st Plaintiff/Applicant. On **20th July 2006** the parties amended the offer letter and substituted the legal charge over **NAIROBI/BLOCK 118/881** with a legal charge over **NAIROBI/BLOCK 105/1265** (hereinafter the "**suit property**") which property was also registered in the name of the 1st Plaintiff/applicant.

(6) On or about **January 2017** a further addendum was made to the letter of offer changing the facility to a multi –option loan advance in the sum of **Kshs.24,252,000**. Yet again in **June 2017** a further addendum was made to the letter of Offer, enhancing the securities to include a Chattels mortgage under the repealed **Chattels Transfer Act, Cap 28 Laws of Kenya**. This Chattels Mortgage covered motor vehicles **KCA 357C** and **KBU 470 B.** The loan facility was further secured by a Deed of Guarantee and indemnity executed by the 1st Plaintiff/Applicant (annexture "**BK7**" to the Replying Affidavit).

(7) The loan facility fell into arrears and as at **28th August 2019** the 1st Defendant claimed from the Plaintiffs a sum of **Kshs.21,522,910.21**. The 1st Defendant Bank then moved to realize its security through the sale of the suit property.

(8) On their part the Plaintiff/Applicants concede to having obtained a loan facility from the 1st Defendant. The Plaintiffs also confirm having offered as security for the loan their property known as **NAIROBI/BLOCK 105/1265** as well as the two motor vehicles **KCA 357C and KBU 470 B**. The Plaintiffs further confirm that a charge was duly registered over the suit property in favour of the 1st Defendant Bank.

(9) The Plaintiffs aver that they were making repayments as required until the **2017** post election violence led to an unfavourable environment for their business causing them difficulty in making the repayments. It is averred that the Plaintiffs approached the Bank with a view to restructuring the facility to provide for lower repayment of **Kshs.50,000** from the **Kshs.641,673.66** required by the Contract but the bank declined to engage. The Plaintiff's claim that on or around **April 2019** they became aware that the 1st Defendant had sold the two motor vehicles Reg. **KCA 357C** and **KBU 470B** for **Kshs.2,000,000/=.**

(10) That despite their efforts to keep up with the repayments as required, the Plaintiffs were shocked to be served with a Notification of Sale by **QUICKLINE AUCTIONEERS** (the 2nd Defendant/Respondent). Subsequent to said Notification an advertisement was placed in the Daily Newspapers indicating that the suit property was to be sold by way of Public Auction on **29th August 2019.** The Plaintiffs then filed the present application seeking injunctive relief.

ANALYSIS AND DETERMINATION

(11) The Plaintiff/Applicants by this application pray for a interim injunction to prevent the sale of the suit property pending the hearing and determination of the main suit. The conditions for grant of interlocutory injunction were set out in the case of **GIELLA –VS- CASMAN BROWN & COMPANY LIMITED [1973]** where the Court of Appeal for East Africa held as follows:-

> **"First an Applicant must show a prima facie case with a probability of success. Secondly, an interlocutory 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."**

(12) In the case of **Nguruman Limited Vs Jan Bonde Nielsen & 2 others [2014] eKLR**, the Court of Appeal stated:-

> **"<u>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</u>. 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 to raise 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 that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed."**[own emphasis]

PRIMA FACIE CASE

(13) The definition of what constitutes a "**prima facie**" case was given in the case of **MRAO LIMITED –VS- FIRST AMERICAN BANK LIMITED & 2 OTHERS [2003] KLR 125** where it was stated as follows:-

> **"So what is a prima facie case? I would say that in civil cases, it is a case in 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."**

(14) In **Nguruman Limited Vs Jan Bonde Nielsen & 2 Others [2014] eKLR**, the Court of Appeal reiterated that:-

"In an interlocutory injunction application, the Applicant has to satisfy the triple requirements to;

> **(a) Establish his case only at a prima facie level,**
>
> **(b) Demonstrate irreparable injury if a temporary injunction is not granted, and**
>
> **(c) Ally any doubts as to (b) by showing that the balance of convenience is in his favour.**

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the Applicant is expected to surmount sequentially. See Kenya Commercial Finance Co. Ltd Vs Afraha Education Society [2001] Vol. 1 EA 86. If the Applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the Respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages 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 claim may appear at that stage. <u>If prima facie case is not established, then irreparable injury and balance of convenience need no consideration</u>."[own emphasis]

(15) The Plaintiff/Applicant do not deny being in arrears of the loan repayments. Their attempt to negotiate a lower repayment plan with the Bank did not bear fruit. The Applicants also do not appear to deny having been served with statutory notices as required by **Section 90** of the **Land Act**. The 1st Defendant have adduced proof of the service of said statutory notice by annexing a copy of the Statutory Notice dated **18th October 2018** as well as the Certificate of posting (annexture **BK 9** to the Replying Affidavit dated **13th September 2019**). The Plaintiff/Applicants do not deny having received this 90 day statutory notice.

(16) Similarly the Plaintiff/Applicants concede to having been served with the 45 day Notification of Sale issued by the 2nd Defendant/Respondent. That Redemption Notice which is dated **7th June 2019** appears as Annexture **BK"II"** to the Replying Affidavit dated **13th September 2019**. The 1st Plaintiff signed to acknowledge receipt of that Redemption Notice on **17th June 2019**.

(17) The Plaintiff/Applicants attempt to challenge the Newspaper Advertisement advertising the sale by auction of the suit property complaining that the extract of the Advert served upon them did not bear a date. This is simply argument for arguments sake on the part of the Plaintiffs. Firstly there is no requirement that a copy of the newspaper advert be served upon the defaulter. Secondly the extract **BK"13"** is just that – an extract. It is not the full page of the newspaper which would bear the date. The annexture indicates that the extract was obtained from the newspaper of **9th August 2019**. I have no reason to doubt that the said advert actually appeared in the newspaper that day. In any event the Plaintiffs have not adduced any evidence to show that the advert was **not** placed in the local daily on **9th August 2019.** This objection is merely a red herring and this court finds no merit in the same.

(18) The Plaintiff/Applicant's claim that the 1st Defendant failed to adhere with the provisions of **Section 97** of the **Land Act**. They claim that no valuation was done on the suit property.

Section 97 of the **Land Act** provides as follows:-

> **"1. A Chargee who exercises a power to sell the charged land, including the exercise of the power to sell in pursuance of an order of a court, owes a duty of care to the Chargor, any guarantor of the whole or any part of the sums advanced to the Chargor, any charge under a subsequent charge or under a lien to obtain the best price reasonably obtainable at the time of sale.**
>
> **2. A Chargee shall, before exercising the right of sale, ensure that a forced sale valuation is undertaken by a valuer."**

(19) The 1st Defendant asserts that it did comply with **Section 97(2)** by commissioning a valuation of the suit property conducted by **Messrs Orion Valuers**. Annexed to the Replying Affidavit dated **13th September 2019** is the Valuation Report dated **11th July 2019**. The Valuation Report returned a Market Value on the suit property of **Kshs.18,000,000** and a Forced Sale Value of **Kshs.13,500,000/=**

(20) The Applicants do not challenge the contents of the Valuation Report but claim that at no time was any visit made to their property for purposes of conducting a Valuation. The report dated **11th July 2019** at page 1 (Page 92 of 1st Defendant's Bundle of documents filed on **17th September 2019** states as follows:-

> "**The property was inspected on 4th July 2019**."

The Valuation Report contains a description of the suit property including a description of the interior of the maisonette thereon as well as a photographs of the property. This description and the photographs could only have come from a person who visited the property. At no time did the Plaintiffs refute the description their property nor do they deny that the photographs in the Report depict the suit property. I reject the allegation by the applicants that this Valuation Report is fictious and/or forged. I find that the 1st Defendant did comply with the provisions of **Section 97**.

(21) The Plaintiff/Applicants take issue with their loan account. They claim that no accounts have been rendered to them and that no explanation was tendered to them of how interest and penalties were tabulated. The 1st Defendant has annexed to their Replying Affidavit

the Statement of Account in respect of the Plaintiffs loan facility (Annexture **BK"14").** The Statement clearly indicates payments made as well as interest charged and the corresponding dates.

(22) It is trite law that a dispute over accounts is not sufficient cause to grant an injunction. In the case of **MOHAMED KHALED KHASHOGGI –VS – EQUITY BANK LIMITED [2013] eKLR**, it was held: -

> **"Accordingly, I agree with the Plaintiff's submissions that it is now settled law that the issue of disputed accounts and interest cannot be a ground for the issuance of injunctive orders."**

(23) Similarly, in the case of **HABIB BANK Ag Vs POP FNK LTD Civil Appeal No.147 of 1989**, it was held:-

> **"That 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 to the amount due under the mortgage."**

Based on the above, I find that the Plaintiff/Applicants have failed to establish a prima facie case in this matter to warrant the grant of the injunctive orders sought.

IRREPARABLE HARM

(24) The Plaintiffs have pleaded that the suit property comprises their matrimonial home where they are raising their school going children and that as such any sale of the property would expose them to irreparable harm that could not be adequately compensated by an award of damages. **HALBURY'S LAWS OF ENGLAND, 3rd Edition Volume 21** at paragraph 739 defines "**irreparable harm**" as follows:-

> **"The term irreparable harm means injury which is substantial and could never be adequately remedied or atoned for by damages."**

(25) In **OOKO VS BARCLAYS BANK OF KENYA LT [2002] KLR Hon Justice Ringera** (as he then was) observed as follows:-

> **"The second condition is that an interlocutory injunction will not normally be granted unless the Applicant can show that he will suffer an irreparable injury which cannot be compensated by an award of damages. The onus is obviously on the applicant to do that. In the instant matter, the Plaintiff did not even attempt to do so. She was content to submit that once a prima facie case had been made, it was not necessary to consider any other matters and that the defendant had not shown it could compensate her adequately in damages. To my mind, the Plaintiff's submission was misconceived. The correct approach to the matter would have been for the Applicant to show that she could not adequately be compensated in damages and that even if damages were an adequate remedy, the Defendant could not meet the required amount**."[own emphasis]

(26) The Plaintiffs were fully aware that the suit property comprised their matrimonial home yet they went ahead to charge the same to the Bank. The agreement was that in event of any default the Bank would be at liberty to sell the said property in order to recover monies due to it. They cannot cry foul now. In **JULIUS MAINYA ANYEGA –VS- ECO BANK LIMITED [2014] eKLR,** the Court held thus: -

> **"The suit property may be a matrimonial home. But what is startling is the Applicant's argument which, properly understood, suggest that matrimonial homes should never be sold under the Mortgagee's Statutory Power of sale. These statements have become quite common in applications for injunction to restrain a Mortgage from exercising the statutory power of sale. I want to disabuse Mortgagors from what seems to be a misplaced posture especially by defaulters. 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."**[own emphasis]

(27) Likewise in **KITUR –VS- STANDARD BANK & 2 OTHERS [2002] IKLR** the Court held:-

> **"It must be noted that when a Chargor lets loose its property to a Chargee as security for a loan or any other commercial facility on the basis that in the event of default it be sold by a Chargee, the damages are foreseeable. The security is thenceforth a commodity for sale or possible sale, with the prior concurrence and consent of the Chargor. How then can he, having defaulted to repay loan arrears prompting a Chargee to exercise its statutory power of sale, claim that he is likely to suffer loss or injury incapable of compensation by an award of damages? Such an argument is definitely misplaced and has no merits."**

(28) The value of the suit property is quantifiable. In the event the Court eventually decides in favour of the Applicants, then in my view an award of damages would be sufficient compensation.

BALANCE OF CONVENIENCE

(29) In **PAUL GITONGA WANJAU –VS- GAHUTO TEA FACTORY CO. LTD & 6 OTHERS [2016] EKLR**, the court is discussing balance of convenience states as follows:-

> **“The court is determining whether an interlocutory injunction should be granted takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on one hand would suffer if the injunction was granted and he should ultimately turn out to be right and which injury the applicant on the other hand might sustain if the injunction was refused and he should ultimately turn ought to be right. The burden of proof that the inconvenience which the applicant will suffer if the injunction is refused is greater than that which the Respondent will suffer if it is granted lies on the Applicant.”**[own emphasis]

(30) This is a loan facility which was advanced to the Applicants in the year **2015.** The facility is in arrears and is currently not being serviced. My view is that the balance of convenience tilts in favour of the 1st Defendant. I am fortified in this finding by the decision in **THATHY –VS- MIDDLE EAST BANK (K) LTD [2002] 1KLR**, where the Court held as follows:-

> **“As regards the balance of convenience, I think the same tilts in favour of refusing the injunction. The Plaintiff is not repaying his mortgage debt. From the statement of account, a lot of what is outstanding is interest. That interest continues to accumulate. At the present tempo the charge debt will be more than the value of the security quite soon. The Bank would loose (sic) because its security will in effect be no security at all if on sale it cannot realize the debt. And the Plaintiff will loose (sic) because if the property is ultimately sold, he will not benefit from his investment. A sale of the security now appears to me to be in the best interest of both parties.”**

(31) Finally based on the foregoing, I come to the conclusion that this application lacks merit. I find that the Banks right to exercise its statutory remedy had crystallized. The 1st Defendant complied fully with the provisions of **Sections 90 and 97** of the **Land Act 2012**. Prayer (5) and (6) of the Summons seeking mandatory orders are in my view premature. Such orders must abide the full hearing of the main suit.

Accordingly, I do hereby dismiss the Chamber summons dated **22nd August 2019** in its entirety.

Costs are awarded to the 1st Defendant/Respondent.

Dated in **Nairobi** this…**7th** ….day of **July 2020**.

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Justice Maureen A. Odero