REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT ELDORET

E & L CASE NO.127 OF 2019

UNICOM LIMITED.....PLAINTIFF/APPLICANT

VERSUS

DIAMOND TRUST BANK.....1ST DEFENDANT/RESPONDENT

BIO CORN LIMITED.....2ND DEFENDANT/RESPONDENT

RULING

This ruling is in respect of an application dated 7th November 2019 brought by the plaintiff/applicant seeking for the following orders:

a. Spent.

b. That this Honourable court be pleased to order a stay of the intended auction of LR No. Eldoret Municipality/Block 10/34 set to be held on 22nd November 2019 pending the inter partes hearing and determination of this application.

c. That this court be pleased to issue a temporary injunction restraining the defendants either by themselves or through their agents, servants and or employees from advertising or offering for sale, transferring laying claim to or in any other manner dealing with LR No. Eldoret Municipality/Block 10/34 pending hearing and determination of this application.

d. That this court be pleased to issue a temporary order of injunction restraining the defendants either by themselves or through their agents, servants and or employees from advertising or offering for sale, transferring laying claim to or in any other manner dealing with LR No. Eldoret Municipality/Block 10/34 pending hearing and determination of this suit.

e. That the costs be provided for.

This matter was brought under certificate of urgency where the court ordered that the application be served within 3 days for inter parte hearing. The same was served and when it came up for hearing the respondent filed a preliminary objection which was heard and a ruling delivered on 3rd December dismissing the PO.

The current application was therefore fixed for hearing.

APPLICANT'S SUBMISSION

Counsel for the plaintiff/applicant submitted that the plaintiff is and has been a tenant of the 2nd defendant and has been on the property for the last 10 years. That the Applicant is a manufacturer of furfural and has improved on the suit property with fixtures on the property of which were attached to show the improvements.

Counsel stated that the plaintiff has over 50 employees. The applicant saw a notice for auction of the property which it stated that had never been served on them. Miss Kimere submitted that the applicants are worried that their property might be affected if the auction goes on.

Counsel therefore submitted that the applicant should be given time to remove the installations and fixtures as the plaintiff will suffer irreparable loss if the sale goes on.

RESPONDENT'S SUBMISSIONS

Mr. Njoka for the 1st defendant/respondent opposed the application and relied on the principles for grant of injunctions as laid down in the case of **Giella Vs Casman Brown**. Counsel submitted that the applicant must prove that it has a prima facie case and that it will suffer irreparable damage incapable of being compensated by way of damages.

Mr. Njoka also submitted that the conduct of the parties is important and that the application is not brought under section 96 of the Land Act which requires a notice to be served within 40 days to the leasee. See supporting affidavit of Grishna Patel.

Counsel submitted that the 1st issue to consider is whether tenancy has been proved this being an application by a tenant. That the lease was renewed on 1st February 2018 for a period of 2 years which tenancy has since lapsed.

Mr Njoka Counsel for the respondent submitted that the averment in the supporting affidavit that the lease commenced in 2009 has not been supported by evidence of tenancy agreement as an attachment. That the applicant has failed to establish a prima facie case therefore rendering the application moot and overtaken by events.

Counsel relied on the replying affidavit which gave a synopsis of the case. It was counsel's submission that the facility was given to two Principal borrowers, Bio corn Ltd and Equip Agencies Ltd. The affidavit gave the history of default and statutory notices as seen in annexure T10 which indicates that the 1st auction was scheduled for 12th September 2018.

Counsel submitted that there was a suit filed by Equip agencies Ltd. HCC No 382 of 2018 whereby they sought injunctive orders for the sale of property and a Nairobi. Court delivered a ruling on 8th February 2019 see TU 18 at Pg 78-103 where the court dismissed the application and discharged the interim orders.

Counsel stated that the court lifted the corporate veil and made a finding that Grishma Patel the 2nd Plaintiff was a company secretary or a Director of both Equip Agencies Ltd and Bio Corn EPZ Ltd. That the 2nd defendant Bio Corn Ltd also filed a suit vide Eldoret HCCC No.19/2019 where it sought injunctive orders stopping the bank from exercising its statutory power of sale to the same suit property. The ruling was delivered on 24th September 2019 see TU 19. Pgs 104-113 where the court sanctioned the auction by the bank and dismissed the application with costs to the respondent.

The 2nd defendant filed an application for review which application was dismissed by the court. See TU 23 pgs 130-132. The 2nd defendant further filed a rule 5(2) b application at the Court of Appeal – see TV 24 pgs 133 to 150.

Counsel submitted that this is to demonstrate the conduct of the parties which the court needs to look at. Counsel further annexed CR 12 of the 23 companies, Equip Agencies ltd Principal Borrowers, Bio Corn EPPZ ltd, a borrower, UNICORN ltd the plaintiff in this case see TU 25 page 151-153. That the directors of the 3 companies are the same people. Gushma Patel is a director and/or shareholder of the 3 companies.See the memorandum. and Articles of Association of the Plaintiff annexed as TU 26 pages 154-167.

Mr. Njoka further submitted that on the issue whether the notices were duly served, he referred the court to the ruling in Eldoret HCCC No.19/2019 where the court in TU 19 at pg 111, found that the notices were duly served upon the 2nd Respondent at the premises. Counsel stated that the notices were duly served and this is an attempt by the applicant to stop a court sanctioned auction which amounts to an abuse of the court process.

Under rule 75 of Court of Appeal Rules. Any party aggrieved by a decision is at liberty to appeal. It does not limit the appeal to parties in the superior courts. See **LSK Nairobi Branch vs Malindi LSK & 6 others 2017 eklr** was upheld in the case of His **Highness the Aghakhan vs AG Civil appeal No.222 of 2016.** See para 20 of the case. That if the plaintiff was aggrieved it ought to have appealed against the decision and not file another suit.

Counsel further submitted that the plaintiff has not established that it will suffer irreparable loss and having annexed a schedule and figures means that if any losses are suffered then damages will be sufficient. That a valuation had already been conducted as per the HCCC Case and therefore an annexure schedule is not a valuation. Further that photos are not proof of ownership.

Finally counsel submitted that the balance of convenience tilts in favour of the bank and that the plaintiff is guilty of material non-disclosure which was withheld from the court. Material non-disclosure that the directors are the borrowers of Equip agencies and Bio corn. Counsel therefore urged the court to dismiss the application with costs to the defendants.

Miss Kimere reiterated her earlier submissions and urged the court to allow the application as prayed.

ANALYSIS AND DETERMINATION

The issues for determination in an application for temporary injunction are as was enunciated in the case of **Giella v Cassman Brown Co. Ltd & Anor (1973) EA 358**. A party must establish a prima facie case with a probability of success, that he or she would suffer irreparable loss which may not be compensated by an award of damages and finally if the court is in doubt, where does the balance of convenience lie?

If a party meets the threshold above then an injunction which is an equitable remedy can be granted. Mr Njoka Counsel for the respondent submitted that it was important for the applicant to prove that there was a tenancy in existence which he stated that the same had lapsed hence the applicant had not proved a prima facie case. From the supporting affidavit and annexures it is evident that no lease or tenancy agreement was attached. The applicant having sued as a tenant did not bother to attach a document that gives it authority to be on the premises which is under dispute. The applicant is not suing as an owner of the suit premises. The applicant has just attached photos of

purported modified development of the leased property which in effect can be from any property. There is nothing distinguishing them to be from the suit property. The casual nature on how the application was brought makes it an uphill task for the applicant to establish a prima facie case with a probability of success.

From the history of this case which has been ably laid down in an elaborate replying affidavit which is well paginated, it is very clear on what transpired in the current case and the related cases. The affidavit indicated that the bank gave a facility to two Principal borrowers, Bio corn Ltd and Equip Agencies Ltd and that there was a history of default and statutory notices as seen in annexure T10 which indicates that the 1st auction was scheduled for 12th September 2018.

It is also evident that there was a suit filed by Equip agencies Ltd. HCC No 382 of 2018 whereby they sought injunctive orders stopping the sale of the suit property and a Nairobi Court delivered a ruling on 8th February 2019 see TU 18 at Pg 78-103. The court dismissed the application and discharged the interim orders.

From the submissions and the court record it clear that the court lifted the corporate veil and made a finding that Grishma Patel the 2nd Plaintiff was a company secretary or a Director of both Equip Agencies Ltd and Bio Corn EPZ Ltd. That the 2nd defendant Bio Corn Ltd also filed a suit vide Eldoret HCCC No.19/2019 where it sought injunctive orders stopping the bank from exercising its statutory power of sale to the same suit property. The ruling was delivered on 24th September 2019 see TU 19. Pgs 104-113. The ruling was to the effect that the court sanctioned the auction by the bank and dismissed the application with costs to the respondent.

Further the 2nd defendant filed an application for review which application was dismissed by the court. See TU 23 pgs 130-132. The 2nd defendant further filed a rule 5(2) b application at the Court of Appeal – see TV 24 pgs 133 to 150.

From the many suits and numerous applications by the applicant which have been dismissed in favour of the respondent, the question is, why is the applicant approaching the court through filing of multiplicity of suits. Is there something that the applicant is not disclosing to the court? If so then the applicant would be guilty of non-disclosure of material facts. The conduct of a party who seeks equitable remedy is paramount for consideration. In this particular case the conduct is important. In the case of **Thathy vs. Middle East Bank (K) Ltd & Ano. HCCC No. 302/02** it was held that:

> **''How about the conduct of the Applicants? ...the history of the parties is characterized by several demands for payment of mortgage debt, and several unfulfilled promises by the Applicants to pay the said debt. The Respondent has extended a lot of indulgence to the Applicants but the Applicants has not made good his promises…And the Applicants is absolutely silent about repayment … the Applicants' conduct disentitles him to the favour of equity. He cannot get an injunction to restrain the Bank from realizing its security when he is heavily indebted, his promises of repayment have come to nought and he does not evince any intention to repay soon or at all….a sale of the security now appears to me in the best interest of both parties.''**

The conduct of the applicant is wanting as it has filed several cases in respect of the same suit land seeking for injunctive orders but the courts have been very vigilant. The applications have been ruled in favour of the respondent bank to proceed with the realization of their security.

The applicant has come to court to restrain the bank from realizing the security through an auction and be given two years to dismantle and remove the fixtures from the suit parcel of land. In the case of **Turbo Highway Eldoret Ltd v Kenya Commercial Bank Ltd [2016] eKLR** where Obaga J held that:

> It is patently clear that the applicant has only come to court not because any of the procedures required have not been complied with but because it wants to have some breathing space. There has never been any dispute as to the amount owed or interest charged. I therefore find that there are absolutely no grounds upon which this court can grant an injunction. The applicant is facing a winding up petition. This is an indication that it is in financial problems. This will seriously affect the respondent from recovering the advanced money. The applicant's argument that the winding up cause has nothing to do with this application is misplaced. An applicant approaching the court for an equitable remedy is obliged to disclose all material facts. I find that the applicant's application lacks merits. The same is hereby dismissed with costs to the respondent.

In this case the applicant had claimed that they were not served with any notice but in the other breath they were aware of the statutory notices served. It is not plausible that they were not served as the court in a ruling mentioned above made a finding that there was service hence the bank could go ahead with the realization of the security. The applicant is not a tenant of the bank and it seems they are hiding behind the 2nd defendant. How come the 2nd defendant is not defending this application? This makes the applicant guilty of material non-disclosure on the relationship with the 2nd defendant and the similar cases that have been filed in respect of the same property.

The fundamental principles of non-disclosure of material facts can be summarized as follows:

a. The Applicant is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge,

b. The duty of disclosure therefore applies not only to material facts known to the Applicant but also to any additional facts which he would have known if he had made sufficient inquiries.

c. The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application, (b) the order for which the application is made and the probable effect of the order on the defendant, and (c) the degree of legitimate urgency and the time available for the making of the inquiries.

d. Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to issues which were to be decided by the judge in the application.

e. The question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented.

f. Finally, it is not every omission that the injunction will be automatically discharged

This makes non-disclosure of material facts a serious issue whereby the court can set aside injunctive orders granted to the applicant. In the case of **SIGNATURE TOURS & TRAVEL LIMITED V NATIONAL BANK OF KENYA LIMITED [20171 EKLR** where the Court of Appeal dealt with the issue concerning material non-disclosure while making an application for injunction. the court in **BAHADURALI EBRAHIM SHAMJI V. AL NOOR JAMAL & 2 OTHERS CIVIL APPEAL NO. 210 OF 1997 HELD**:

"It is perfectly well-settled that a person who makes an ex parte application to the court — that is to say, in the absence of the person who will be affected by that which the court is asked to do — is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not make the fullest possible disclosure then he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage he may have already obtained. It has been for many years the rule of court, and one which it is of the greatest importance to maintain, that when an applicant comes to the Court to obtain relief on an ex parte statement he should make a full and fair disclosure of all the material facts — facts, not law. He must not misstate the law if he can help it — the court is supposed to know the law. But it knows nothing about the facts, and the applicant must state fully and fairly the facts, and the penalty by which the court enforces that obligation is that if it finds out that the facts have not been fully and fairly stated to it, the court will set aside any action which it has taken on the faith of the imperfect statement...ln considering whether or not there has been relevant nondisclosure and what consequence the court should attach to any failure to comply with the duty to make full and frank disclosure, the principles relevant to the issues in these appeals appear to include; (i) The duty of the applicant is to make full and fair disclosure of the material facts. (ii) The material facts are those which it is material for the judge to know in dealing with the application made; materiality is to be decided by the court and not the assessment of the applicant or his legal advisers. (iii) The applicant must make proper inquiries before making the application. The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made sufficient inquiries. (iv) The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application, (b) the order for which the application is made and the probable effect of the order on the defendant, and (c) the degree of legitimate urgency and the time available for the making of the inquiries. (v) If material nondisclosure is established the court will be astute to ensure that a plaintiff who obtains an ex parte injunction without full disclosure is deprived of any advantage by that breach of duty. (vi) Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to issues which were to be decided by the judge in the application. The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented. (vii) Finally, it is not every omission that the injunction will be automatically discharged. A locus pentitentiae (chance of repentance) may sometimes be afforded. The Court has a discretion, notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the ex parte order, nevertheless to make a new order on terms: when the whole of the facts, including that of the original non-disclosure, are before it, the court may well grant such a second injunction if the original non-disclosure was innocent and if an injunction could properly be granted even had the facts been disclosed...ln the instant case the so-called material facts repeatedly alleged to have been either suppressed, concealed or not disclosed by the respondents are only two pending applications which were never heard nor determined by the superior court. It is submitted that the court was consequently misled but the court cannot understand how this could be so...lt is accepted that in cases of ex parte proceedings there must be full and frank disclosure to the court of all material facts known to the applicant but in the instant case everything was in the court record and was available to the learned judge for perusal. There was no deliberate concealment on the part of the respondents. Both the applications were on record and the notice of discontinuance accompanying the latest application clearly showed what applications were being discontinued and they were not in any sense misleading. Granted that the respondents did not inform the learned Judge of the pending applications, the issue is: were the material facts those, which it was material for the learned judge to know in dealing with the application as, made" The answer to this must be in the negative since the learned Judge was satisfied that the pending applications did not preclude him from doing justice to the parties especially in that the applications and the suit had not been heard on merit. He was also concerned that injury to the respondents, which could not be compensated for damages, could be occasioned by a delay. This mode of approach to the matter before him cannot be faulted".

The applicant annexed a schedule of the properties which includes figures for their value. This shows that the value is known and the same can be compensated by way of damages. The applicant will not suffer irreparable damage not capable of being compensated by damages. I am further guided by what was held in the case of **Wairimu Mureithi -vs- City Council of Nairobi Civil Appeal No. 5 of 1979 KLR 332, 396.**

"However strong the Plaintiff's case appears to be at the stage of interlocutory application for injunction, no injunction should normally be granted if damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial positon to pay them".

That is the position in this case, an injunction cannot issue if damages are an adequate remedy. I have considered the application, the submissions by counsel and the relevant judicial authorities and come to the conclusion that the application lacks merit and is dismissed with costs to the 1st defendant.

DATED and **DELIVERED** at **ELDORET** this **19TH** DAY OF **FEBRUARY, 2020**

M. A. ODENY

JUDGE

RULING read in open court in the presence of Mr.Murgor holding brief for Mr.Njoka for 1st Defendant and in the absence of Miss.Kimere and Gichuki Kingara for Plaintiff and 2nd Defendant respectively.

Mr. Yator – Court Assistant