REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCC NO. E102 OF 2019

ZINGO INVESTMENT LIMITED.....PLAINTIFF/APPLICANT

VERSUS

NATIONAL BANK OF KENYA LIMITED.....DEFENDANT/RESPONDENT

RULING

Background

1. Sometime in the year 2013 the defendant granted loan facilities to the plaintiff through the creation of the following securities:

i. Charge for USD 882,354 over L.R. Nos. 209/8628;

ii. Charge for USD 2,238,000.00 over LR No. 9363/98.

iii. Floating Debenture for a maximum principal amount of USD 794,000.

iv. Joint and several guarantees of USD 3,476,000.00 by the directors of the plaintiff.

2. Subsequent to the grant of the aforesaid loan facility, a dispute arose between the parties that led to the filing of case No. HCCC No. 227 of 2016 ***Zingo Investment Ltd. v National Bank Ltd*** (hereinafter **"the earlier case"**).

3. The earlier suit was however compromised through a consent dated 20th December 2017 (hereinafter "the Consent") which set the stage for renewed relations between the parties with the intention of facilitating the resumption of business in the interest of both parties.

4. Following the recording of the consent, a letter of offer dated 27th November 2019 was executed by the parties wherein the defendant undertook to avail working capital to the tune of USD 1,100,000.00 to the plaintiff to enable the plaintiff resume business and in turn facilitate the repayment of the outstanding loan facilities which then stood at USD 5,666,000.00.

5. Prior to the availing of the working capital, the defendant issued an addendum dated 22nd November 2018 in order to address the challenges that had arisen following the execution of the offer letter of 22nd November 2017. The terms introduced through the said addendum were *inter alia* as follows:

i. Procuring a submission of local purchase order to the bank;

ii. Submission of written undertakings from local purchasers in favour of the bank to remit proceeds through the bank;

iii. Commencement of repayment of the facility be effective April 2019;

iv. Fresh board of directors' resolutions;

v. Planned sale process of 1.75 acres being subdivision of LR No. 9363/98 and LR No. 209/8628 to continue and the proceeds applied to the settlement of the outstanding debt.

6. The plaintiff's grievance is that despite approving a working capital of USD 1,100,000.00 that was intended to enable it get back to

business and be able it meet is obligation towards repayment of the loan facilities, the defendant deliberately misapplied, diverted and/or applied part of the funds towards addressing illegal and unmerited charges/debits with the net effect that the plaintiff was denied the benefit of close to 20% of the Approved Working Capital.

7. It is the plaintiff's case that failure to disburse the agreed loan amount in full tremendously affected its business and occasioned cancellation of contracts awarded to the plaintiff by its customers thus resulting in colossal losses and crippling of the plaintiff's business. The plaintiff claims that in furtherance of its unlawful agenda, the defendant purported to issue statutory notices to the plaintiff thus necessitating the filing of the instant suit and applications.

Applications

8. This ruling is in respect to two applications namely; the application dated 24th February 2020 wherein the plaintiff/applicant herein seeks leave to amend the plaint and; the application dated 27th February 2020 wherein the same applicant seeks *inter alia* orders of injunction to restrain the defendant from exercising any statutory power of sale, either by public auction or private treaty and/or otherwise advertising, commencing or proceeding with any realization process in respect to property known as LR No. 9363/98 (IR No. 14628/98) and LR No. 209/8628 or any security of whatever kind issued by the plaintiff on account of any loan facility advanced to it by the defendant and forming the subject matter of this suit.

9. The application for injunction is supported by the affidavit of the applicant's Managing Director, **Mr. Robert Njoka Muthara**, and is premised on the grounds that: -

a) In compliance with the defendant's demands and/or requirements as contained in the addendum, the plaintiff proceeded and availed the purchase orders, and contracts with its customers including undertakings as sought by the defendant.

b) On or about January 2019, it came to the plaintiff's knowledge that the defendant had deliberately and/maliciously debited the plaintiff's accounts with illegal and/or unlawful entries/charges.

c) In addition, the defendant had unilaterally and secretly opened accounts in the name of the plaintiff and debited the same with unexplained and/or unwarranted charges. Numerous complaints by the plaintiff arising this issue have been ignored and/or countered with incoherent and illogical explanations.

d) Despite approving a working capital of USD 1,100,000.00 that was intended to enable the plaintiff get back to business and be able to meet is obligation towards repayment of the loan facilities, the defendant has deliberately misapplied, diverted and/or applied part of the funds towards to addressing illegal and unmerited charges/debits with the net effect that the plaintiff has been denied the benefit of close to 20% of the Approved Working Capital.

e) That the plaintiff's main grievance at the time of filing the suit was that the defendant failed, refused and or neglected to make disbursements of the loan facility to the plaintiff in accordance with the terms of the loan facility agreements, and additionally, the defendant was applying illegal debits and/contractual debits and charges on the plaintiff's accounts.

f) That the loan facility of USD 1,100,000.00 had been approved as working Capital; failure to disburse the agreed loan amount in full, has tremendously affected the plaintiff's business to the extent that it has occasioned cancellation of contracts awarded to the plaintiff by its customers thus resulting in colossal losses and crippling of the plaintiff's business.

g) That as previously stated, the working capital of USD 1,100,000.00 was to be advanced within the spirit of a consent recorded in HCCC No. 227 of 2016; Zingo Investment Ltd vs National Bank of Kenya Ltd, which consent was essentially intended to facilitate resumption of normal business relations and to enable the plaintiff resume business operations and in turn facilitate repayment of the loan facilities.

h) That the plaintiff has in the instant suit sought among other things a declaration that the defendant is in breach of its duty and obligations under the loan agreements and is liable for the losses sustained by the plaintiff arising from the cancellation of the contracts; these losses run in excess of USD 3,677,009.20.

i) That on 26th April 2019, the plaintiff filed a Notice of Motion application seeking orders of Mandatory Injunction directing the defendant to inter alia rectify the illegal debits and charges on the plaintiff's account.

j) That the court vide a ruling dated 11th December 2019 disallowed the application but nevertheless found that the issues as to whether or not the defendant is responsible for the plaintiff's financial woes is an issue that can only be determined after the hearing of the main suit.

k) That the defendant has in furtherance of its unlawful agenda purported to issue statutory notices to the plaintiff.

l) That on 16th January 2020 at 2:26pm, a notice purportedly dated 19th July 2019 was served upon the plaintiff demanding payment of a sum of USD 465,781.93 within thirty (30) days. Prior to that on 13th January 2020, defendant had via email served the plaintiff with a forty (40) days' notice purportedly under Section 96(2) and the Land Act, expressing an intention to sell the charged properties.

m) That no notice has been issued by the defendant in line with the provisions of Section 90 of the Land Act.

n) That even if the defendant had complied fully with its obligations regarding issuance of Statutory notices under the relevant provisions of the law, in view of the issues raised by the plaintiff and the fact the instant suit is still pending; the defendant is estopped from conferring a benefit upon itself arising from a sorry situation brought about by the defendant's own illegal actions.

o) That the defendant's actions are illegal, contra statute and totally unwarranted.

p) That there is pending before court an application by the plaintiff seeking leave to amend the plaint filed on 26th April 2019 with a review of having all issues relating to this matter properly laid before the court for determination.

q) That it will be extremely inequitable for the defendant to proceed with the intended sale of the charged properties before this honourable court has had a chance to consider the plaintiff's grievances as against the defendant.

r) That the issues raised by the plaintiff are not frivolous nor are they farfetched; the plaintiff deserves its day in court and to be afforded a chance to articulate its grievances against the defendant without being straddled with threats and acts of intimidation vis-a-vis sale of the charged properties.

s) That the defendant's actions are purely intended to pre-empt the issues forming the substratum of this suit and to scuttle the plaintiff's quest for justice before this honourable court.

10. The application for amendment of plaint is similarly supported by the affidavit of the applicant's Managing Director and is premised on the grounds that:

a) That since the filing of the suit certain information has become available to the plaintiff.

b) That the said information was not available as at the time of filing the initial plaint.

c) That additionally, the defendant has purported to issue a forty (40) days' notice to the plaintiff signifying an intention to exercise the defendant's statutory power of sale.

d) That the intended actions of the defendant are irregular and/or illegal and are intended to pre-empt the issues forming the substratum of this suit.

e) That the intended amendments are necessary for purposes of laying before the court all pertinent issues relating to this suit.

11. The defendant opposed both the applications through the Grounds of Opposition and the Replying Affidavit of its Recovery Manager-Corporate, **Mr. Christopher Marwa** who states that the applications are devoid of merit, is an abuse of the process of court as they are intended to prolong the hearing and/or final determination of the suit, and to unfairly sabotage the defendant from legally exercising its statutory power of sale

12. Parties canvassed both applications by way of written submissions which I have carefully considered. I will consider each application separately.

Application for amendment of plaint.

13. The plaintiff submitted on the general power granted to courts to amend pleadings under the Civil Procedure Act and Rules in Section 100 and Order 8 Rules 5 respectively. The plaintiff cited various authorities on the essence of allowing amendments and added that it is within the applicant's right to place its grievances before the court for determination.

14. The applicant further submitted that if the respondent was to suffer any prejudice as a result of the amendment, such prejudice will not be in the nature that cannot be compensated by way of costs.

15. On its part, the defendant submitted that the application for amendment is devoid of merit and is intended to prolong the hearing and determination of the suit. It was submitted that the application is an afterthought and an abuse of the process of court.

16. Section 100 of the Civil Procedure Act stipulates as follows: -

"The court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceeding".

17. Order 8 Rules 5(1) of the Civil Procedure Rules on the other hand provides as follows: -

"5. (1) For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just."

18. The issue for determination is whether the applicant has made out a case for the granting of orders for the amendment of the plaint. The law as regards the granting of leave to amend pleadings is well settled. The general rule on this subject is that amendments to pleadings sought before the hearing should be freely allowed if they can be made without injustice to the opposing side, and that there is no injustice if the other party can be compensated by costs. The principles upon which a court acts in an application to amend a pleading before/during trial were succinctly stated in ***Eastern Bakery v. Castelino,*** *(1958) E.A.461 (U.) as follows:*

> ***"It will be sufficient, for purposes of the present case, to say that amendments to pleadings sought before the hearings should be freely allowed, if they can be made without injustice to the other side, and that there is no injustice if the other side can be compensated by costs.***

19. The same was later buttressed by *Bramwell, LJ in* ***Tildesley v Harper*** *(1878), 10 Ch.D.* as follows:

> ***"My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting mala fide, or that, by his blunder he has done some injury to his opponent which could not be compensated by costs or otherwise."***

20. In ***Budding v. Murdoch*** *(1875) 1 Ch.D at p.42,* it was stated that the court will not refuse to allow an amendment simply because it introduces a new issue or case. In ***Ma Shwe Mya v. Maung Po Hnaung*** *(1921), 48 I.A. 214, 48 Cal.832* the court said that there is no power to enable one distinct cause of action to be substituted with another, nor to change by means of amendment, the subject matter of the suit. In ***Raleigh v. Goschen,*** *(1898) 1 Ch.73* it was also postulated that the court would refuse to grant leave to amend where the amendment would change the action into one of substantially different character.

21. Further, in the case of ***Simonian v Johar,*** *(1962) EA.336 (K.),* the court approved amendment to a plaint which raised new causes of action because they were not of a different character from or foreign to or inconsistent with the original cause of action but stemmed from the same transaction. A wider footage on the same issue was given in a more recent case of ***Ochieng and Others v First National Bank of Chicago*** *Civil Appeal Number 147 of 1991* the court of Appeal clearly set out the principles under which Courts may grant leave to amend the pleadings. The same is as follows:

> **a)** ***the power of the court to allow amendments is intended to determine the true substantive merits of the case;***
>
> ***b) the amendments should be timeously applied for;***
>
> ***c) power to amend can be exercised by the court at any stage of the proceedings;***
>
> ***d) that as a general rule however late the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other side;***
>
> ***e) the plaintiff will not be allowed to reframe his case or his claim if by an amendment of the plaint the defendant would be deprived of his right to rely on limitations Act subject however to powers of the court to still allow and amendment notwithstanding the expiry of current period of limitation.***

22. It is noteworthy that the above mentioned parameters are not exhaustive as far as the grant of leave to amend plaints is concerned which means that the court has a very wide discretion in granting leave to amend pleadings.

23. Applying the principles laid down above cited cases to the circumstances of this case, I note that the applicant states that it has, since the filing of the suit come across some new information regarding the computation of its losses that were not available to it at the time it filed the initial plaint. I have perused the proposed amended plaint and I note that it introduces the issue of losses incurred by the applicant and the intended sale of the charged property which is a turn of events that took place on or about 16th January 2020 long after the initial plaint was filed in April 2019.

24. Guided by the general position taken by courts to allow amendments in order to enable parties fully ventilate their issues before the court, I find that it will be in the interest of justice allow the proposed amendments as any inconvenience caused to the respondent, by the amendment, can be cured not only by an award of costs but also by granting the respondent corresponding leave to amend the defence should it deem it necessary.

25. For the above reasons, I will allow the application dated 24th February 2020 in the following terms; -

> ***a) The plaintiff is hereby granted leave to amend the plaint in terms of the Draft Amended Plaint.***
>
> ***b) The Draft Amended Plaint to be deemed as duly filed upon payment of the requisite court fees.***
>
> ***c) The defendant is hereby granted corresponding leave to amend its defence, should it deem it necessary within 14 days from the date of this ruling.***
>
> ***d) The costs of this application shall abide the outcome of the main suit.***

<u>The application for injunction</u>

26. The principles governing the granting of orders of injunction were stated in the case of ***Giella v Cassman Brown*** (1973) EA 358 and were reiterated in the case of ***Nguruman Limited v Jan Bonde Nielsen & 2 others*** CA No.77 of 2012 (2014) eKLR where the Court of Appeal held that;

> ***"in an interlocutory injunction application the applicant has to satisfy the triple requirements to a, establishes his case only at a prima facie level, b, demonstrates 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 states are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially"***

27. The question which arises is whether the instant application meets the threshold set for the granting of orders of injunction. The applicant seeks injunctive orders on the basis that the defendant, failed refused and or neglected to make loan disbursements to it, as agreed, despite being aware of the intended purpose of the loan and that the failure to disburse the funds caused unwarranted consequences.

28. It was the applicant's case that failure to disburse the loans of USD 1,100,000.00 that had been approved as working capital tremendously affected its business to the extent that it occasioned cancellation of contracts awarded to the plaintiff by its customers thus resulting in colossal losses that crippled its business.

29. The plaintiff maintained that the said working capital of USD 1,100,000 was to be advanced to it in the spirit of a consent recorded in the earlier case, which consent, it contended, was intended to facilitate resumption of normal business relations and by extension enable the plaintiff resume business operations that would in turn facilitate repayments of the loan facilities.

30. On its part, the respondent submitted that the plaintiff has approached this court with unclean hands having breached the covenants of the charge instruments. The respondent referred to a ruling delivered by this court in respect to the earlier unsuccessful application dated 24th April 2019 wherein the applicant had sought orders of temporary injunction to restrain the defendant from imposing illegal debits/charges upon the plaintiff accounts and a mandatory injunction directing the defendant to credit the plaintiffs Dollar and Kenya Shillings Accounts.

31. The respondent drew parallels between findings in the earlier application and the grounds advanced therein with the circumstances in the instant application and submitted that this court, having dismissed the earlier application, upon finding that the plaintiff is truly indebted to the defendant, should similarly reject this application. It was submitted that the defendant is entitled to exercise its statutory power of sale in view of the fact that it had duly issued the requisite statutory notices. On its part, the plaintiff argued that it was not issued with the requisite statutory notices.

32. The following facts were undisputed: -

a) That the plaintiff obtained loan facilities from the defendant which facility was secured vide the following instruments.

> ***i. Charge for USD 882,354 over L.R. Nos. 209/8628.***
>
> ***ii. Charge for USD 2,238,000.00 over LR No. 9363/98.***
>
> ***iii. Floating Debenture for a maximum principal amount of USD 794,000.***
>
> ***iv. Joint and several guarantees of USD 3,476,000.00 by the directors of the Plaintiff.***

b) That the plaintiff had challenges servicing the loan facility thus leading to filing of the earlier suit (HCCC No. 227 of 2016).

c) That the earlier suit was compromised by a consent dated 20th December 2017 as follows:

> ***1. The plaintiff admits the outstanding debt of USD 5,666,000 together with accrued interest due and owing to the bank contained in the defendant's letter of restructure dated 22nd November 2017 and duly executed by the plaintiff.***
>
> ***2. That all the claims obtaining between the parties in relation to the issues raised in the instant suit be and are hereby compromised to pave way for implementation of the terms and conditions contained in the aforesaid letter dated 22nd November 2017.***
>
> ***3. The instant suit be and is hereby marked as settled with costs to the defendant.***
>
> ***4. Part of the costs payable by the plaintiff under Clause 3 above have already been factored in the mortgage loan payment as particularized in the letter of offer dated 22nd November 2017, however the plaintiff will make an additional payment of Kshs 4.6 million in accordance with Clause 12 of the letter of offer together with filing fees of the consent.***
>
> ***5. The plaintiff undertakes to immediately upon execution of this consent withdraw Civil Appeal No. 259 of 2017 together with Application No. Nai 155 of 2017 (UR 121 of 2017) simultaneously with this suit with no orders as to costs.***

d) That in the defendant's letter of offer dated 22nd November 2017 it undertook to avail a working capital in the sum of USD 1,100,000 to the plaintiff. The said letter of offer was worded, in part, as follows:

> ***1. Withdrawal of the Appeal filed CA No. 259 of 2017 in the Court of Appeal together with the application to stay of execution as well as making the main claim in the High Court MILIMANI HCCC No. 227 of 2016 – ZINGO INVESTMENT LTD V NBK as permanently settled by way of filing an appropriate consent in the court highlighting customer's acceptance of debt, closure of current suits before the courts and events of default that will lead to call-up and sale of collaterals.***
>
> ***2. Restructure of USD 5,666,000 for 10 years repayable hereunder: -***
>
> - ***6 months' grace period to allow restarting of business relations with previous customers, also produce new stocks, during this time it will be expected any proceeds from sale of property will be paid into the loan account.***
> - ***Monthly instalments for a period of 114 months.***
>
> ***3. Working capital of USD, 100,000.00/= repayable in 24 months from drawdown.***
>
> ***4. Sale of LR No. 209/8626 and 1.75 acres subdivision of LLR 9363/98 and all proceeds being applied to reduce the original debt.***
>
> ***5. Revaluation of the plant and the buildings in residual subdivision LR No. 9363/98 to confirm cover over debt.***
>
> ***6. Adequate charge of the residual sub-division of LR No. 9363/98 to cover the entire debt.***
>
> ***7. Charging of an arrangement fee of USD 15,000/- to be paid on execution of offer letter.***
>
> ***8. Directors guarantee for USD 6766K to be obtained before facilities release.***
>
> ***9. All banking to be routed via account at the bank.***
>
> ***10. Client to withdraw the on-going appeal suit from Court of Appeal.***
>
> ***11. Arrangement fee of USD 15,000/- to be paid on execution of offer letter***
>
> ***12. …….to be settled in full before drawn down of the restructured facility.***
>
> ***13. Quarterly review of the business for the next 18 months.***

Prima facie case

33. In ***Mrao Ltd v First American Bank of Kenya Ltd*** **(2003) eKLR** the **C**ourt of Appeal stated as follows on what amounts to a prima facie case:

> ***"The principles which guide the Court in deciding whether or not to grant an interlocutory injunction are, first, an applicant must show 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...A mere scintilla of evidence can never be enough: nor can any amount of worthless discredited evidence. It is true that the Court is not required at that stage to decide finally whether the evidence is worthy of credit, or whether if believed it is weighty enough to prove the case conclusively: that final determination can only properly be made when the case for the defence has been heard. It may not be easy to define what is meant by "prima facie case", but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence...The terms "prima facie" case, and "genuine and arguable" case do not necessarily mean the same thing, for in using another term, namely a sustainable cause of action, the words "prima facie" are frequently used to refer to a case which shifts the evidential burden of proof, rather than as giving rise to a legal burden of proof in the manner of considering, which was in relation to the pleadings that had been put forward in the case. It would be in the appellant's interest to adopt a genuine and arguable case standard rather than one of a prima facie case, the former being the lesser standard of the two...In civil cases a prima facie case 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 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."***

34. The plaintiff's contention was that the failure by the defendant to avail the agreed working capital resulted in the crippling of its business thus causing its inability to service the loan facility. In a nutshell, and as was observed by this court in the earlier ruling, the plaintiff blamed the defendant's said failure for its financial woes. The plaintiff also contended that it was not served with the requisite statutory notices that preceded the exercise of the statutory power of sale. Through a further affidavit sworn on the plaintiff exhibited annexures to show that the

said statutory notices never reached it and were instead returned to the defendant.

35. On is part, the defendant contended that it fully complied with the provisions of the Land Act, 2012 in as far as service of the statutory notices is concerned. In this regard, the defendant exhibited copies of Statutory Notice, Certificate of Posting, Redemption Notice and Return of Service as annexures **"CM-2 A and B"**, **"CM-3 A and B"** respectively to the replying affidavit.

36. Section 90(1), (2), (3) and 96(2) of the Land Act stipulates as follows on the remedies of a chargee: -

> ***90. (1) If a chargor is in default of any obligation, fails to pay interest or any other periodic payment or any part thereof due under any charge or in the performance or observation of any covenant, express or implied, in any charge, and continues to be default for one month, the chargee may serve on the chargor a notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be.***
>
> ***(2) The notice required by subsection (1) shall adequately inform the recipient of the following matters—***
>
> > ***(a) the nature and extent of the default by the chargor;***
> >
> > ***(b) if the default consists of the non-payment of any money due under the charge, the amount that must be paid to rectify the default and the time, being not less than three months, by the end of which the payment in default must have been completed;***
> >
> > ***(c) if the default consists of the failure to perform or observe any covenant, express or implied, in the charge, the thing the chargor must do or desist from doing so as to rectify the default and the time, being not less than two months, by the end of which the default must have been rectified;***
> >
> > ***(d) the consequence that if the default is not rectified within the time specified in the notice, the chargee will proceed to exercise any of the remedies referred to in this section in accordance with the procedures provided for in this sub-part; and***
> >
> > ***(e) the right of the chargor in respect of certain remedies to apply to the court for relief against those remedies.***
>
> ***(3) If the chargor does not comply within two months after the date of service of the notice under, subsection (1), the chargee may—***
>
> > ***(a) sue the chargor for any money due and owing under the charge;***
> >
> > ***(b) appoint a receiver of the income of the charged land;***
> >
> > ***(c) lease the charged land, or if the charge is of a lease, sublease the land;***
> >
> > ***(d) enter into possession of the charged land; or***
> >
> > ***(e) sell the charged land;***
>
> ***96 (2) Before exercising the power to sell the charged land, the chargee shall serve on the chargor a notice to sell in the prescribed form and shall not proceed to complete any contract for the sale of the charged land until at least forty days have elapsed from the date of the service of that notice to sell."***

37. My understanding of the above provision is that as long as the chargor remains indebted to the chargee, the monies must be paid failing which the latter is entitled to exercise its statutory power of sale. The chargee is however required to fully comply with the provisions of the Land Act especially in respect to issuance of the statutory notice to the chargor showing the nature and extent of the default, and if the default is of non-payment, the amount due to be paid and the consequences of the default.

38. The importance of service of statutory notices was captured by the Court of Appeal in ***Kenya Commercial Bank Ltd. v Pamela Akinyi Ochien'g*** Civil Appeal No. 114 of 1991, as follows:

> ***"Before a Chargee, which the bank was in this case, can exercise its statutory power of sale, certain procedures must be complied with, which, in the case of registered land, are set out in section 74(1) of the Registered Land Act Cap 300. For instance, they must serve on the chargee three months' written notice of the default and require her to comply with the conditions broken before exercising the powers of sale or taking steps to recover the sums due. These safeguards are designed to prevent oppressive behaviour by banks in realising their securities over land, which often forms the only home of the chargor. The loss thereof would in many cases cause real hardship to the borrower and his or her family…The circumstances in which a chargee exercising its statutory power of sale can be restrained from doing so have been set out. 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; but will be restrained, however, if the mortgagor pays the amount claimed into court, that is, the amount which the mortgage claims to be due to him, unless, on the terms of the mortgage, the claim is excessive; but where he was, at the time of the mortgage, the mortgagor's solicitor, the court will fix a sum probably sufficient to cover his claim…The Court should not grant an injunction restraining a***

mortgagee from exercising his statutory power of sale solely on the ground that there is a dispute as to the amount due under mortgage."

39. Similarly, in ***Nyagilo Ochieng & Another v Fanuel Ochieng & 2 Others*** Civil Appeal No. 148 of 1995 [1995-1998] 2 EA 260 the Court of Appeal while dealing with section 74(1) of the repealed ***Registered Land Act*** held that:

> ***"It is trite that before a chargee can exercise his/her/its statutory power of sale there must be compliance with section 74(1) of the Registered Land Act (Cap 300 Laws of Kenya). This section obliges the chargee to serve, by registered post, the relevant statutory notice. Three months after the chargor's receiving such notices the bank's power of sale arises. This is the basis upon which the bank can put up the properties for sale. The appellants stated, in their plaint, that they did not receive any statutory notices. This averment should have put the bank on guard. It is for the chargee to make sure that there is compliance with the requirements of section 74(1) of the Registered Land Act. That burden is not in any manner on the chargor. Once the chargor alleges non-receipt of the statutory notice it is for the chargee to prove that such notice was in fact sent. Although the last known address of the appellants was correct, it must be understood that in face of the denial of receipt of statutory notice or notices it is incumbent upon the chargee to prove the posting. It would have been a very simple exercise for the bank to produce a slip or letters containing statutory notice or notices. The bank did not do so. Instead an officer from the bank simply produced file copies of the notices to prove that the same were sent. Even on a balance of probability it is not sufficient to say that a file copy is proof of posting. Unless the receipt of statutory notice is admitted, posting thereof must be proved and upon production of such proof the burden of proving non-receipt of such notice or notices shifts to the addressee as is contemplated by section 3(5) of the Interpretation and General Provisions Act, Cap 2, Laws of Kenya. It is quite possible that such notices were sent but that fact, in the face of the denial of receipt, must be proved. It is possible that the letters addressed to the two appellants were received by the first respondent who avoided telling the appellants of anything about the same as he was the "villain in the matter". In the absence of proof of such posting the Court is constrained to hold that the sale by auction was void. The learned Judge fell into error and misdirected himself when he held that the notices were sent to their correct address on the supposition alone that the postal address of the appellants was P. O. Box 120, SARE…In coming to the conclusion, the Court has reached, it cannot but entertain the view that the bank ought to have been more careful in proving service of the statutory notices. Failure of such proof has resulted in an innocent purchaser for value being deprived of the title to the suit properties."***

40. Courts have also taken the position that the lack of or improper service with the statutory notices cannot prevent a chargee from exercising its statutory power of sale. This is the position that was taken by the Court of Appeal in ***National Bank of Kenya Limited v Shimmers Plaza Ltd*** [2009] eKLR wherein the learned judges held as follows:

> ***"We venture to say that where the court is inclined to grant an interlocutory order restraining mortgagee from exercising its statutory power of sale solely on the ground that the mortgagee has not issued a valid notice, then in our view, the order of injunction should be limited in duration until such time as the mortgage shall give a fresh statutory notice in compliance with the law. We respectfully think that the learned judge did not exercise his discretion judicially in the circumstances of this case when he granted an order of injunction until the determination of the suit."***

41. In the instant case, I have already noted that the issue of service of the statutory notices was contested by the applicant. I find that the applicant established that the statutory notices sent to it were returned to the sender and were therefore not received by it. I therefore take a cue from the decision in ***National Bank of Kenya Limited v Shimmers Plaza Ltd*** (supra) and similarly find that irregularity or lack of service of notices is not a *carte blanche* for issuance of orders restraining a chargee from exercising its statutory power of sale. I further find that in circumstances where service of statutory notice is contested, such as this case, the order of injunction, if granted, should be limited in duration until such time that the chargee shall give a fresh statutory notice in compliance with the law. I must however point out that the requirement of the service of statutory notice was not meant to enable borrowers escape from their obligations but was meant to enable the borrowers have sufficient time within which to redeem their charged properties.

42. From the outset, this court notes that it is not disputed that the plaintiff is indebted to the defendant. It is the said indebtedness that resulted in a compromise wherein it was agreed that working capital of USD 1,100,000.00 was to be availed to the plaintiff. According to the plaintiff, the failure, by the defendant, to avail the working capital resulted in huge losses that had the effect of crippling the plaintiff's business and culminated in the default in loan repayments. The defendant, on the other hand, denied the claim that it failed to avail the said capital and maintained that the plaintiff is a perennial defaulter who failed to comply with the terms spelt out in the restructure letter. It was the defendant's case that it properly applied the funds during the drawdown.

43. I further note that as opposed to the earlier application where the contest was about alleged illegal charges and crediting of accounts, the present application is in respect of charged property that is currently in danger of being auctioned for failure to service the loan, which the plaintiff states, it could not service in the face of failure by the defendant to avail the working capital. In other words, according to the applicant, the availability of the working capital held the keys to unlocking the loan repayments.

44. This court had, in determining the earlier application, found that loss of business arising from the alleged failure to avail working capital is an issue that the applicant could pursue at the hearing of the main suit and is not a sufficient ground for granting an order of temporary injunction. In the present application, however, the issue of the alleged failure to avail the working capital, as agreed, is no longer an issue that is alleged to have led to loss of business but is claimed to have had the effect of paralyzing its business thus resulting in its inability to service the loan that has led in the threat, by the defendant, to exercise its statutory power of sale. This court is mindful of the fact that at this interlocutory stage, it is not required and is indeed forbidden to purport to decide, with finality, the various relevant "facts" urged by the parties. For this reason, and considering that this court had already pronounced itself on the issue of working capital in the earlier ruling, I reiterate that it is an issue that can be canvassed at the hearing of the main suit.

45. My findings on the issue of prima facie case would have been sufficient to determine the application for injunction but I am still minded to consider the other conditions for granting orders of injunction.

Irreparable Loss

46. In ***Pius Kipchirchir Kogo v Frank Kimeli Tenai*** **(2018) eKLR** in the court stated as follows on the issue of irreparable loss: -

> ***"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 if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury.***

47. ***Halsbury's laws of England*** states as follows on irreparable injury:

> ***"first, that the injury is irreparable and second, that it is continuous. By the term irreparable injury is meant injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact that the plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by injunction, if his rights cannot be adequately protected or vindicated by damages."***

48. In this case, I find that it cannot be gainsaid that the stakes in the present case are higher than in the earlier application as the charged property is in imminent danger of being sold unless the injunctive orders are granted. It did not escape the attention of the court that the subject matter of this case involves a claim of substantial amount of money in the tune of millions of dollars. Considering the colossal amount of money that is claimed in this case, one can say that the loss to be suffered by the applicant will be irreparable. In ***Robert Mugo Wa Karanja v Ecobank (Kenya) Limited & Anor.*** **[2019) eKLR** where the court in deciding on an injunction application stated;

> ***"circumstances for consideration before granting a temporary injunction under order 40 rule 1 of the Civil Procedure Rules requires a proof that any property in dispute in a suit is in a danger of being wasted, damaged or alienated by any party of the suit or wrongfully sold in execution of a decree or that the defendant threatens or intends to remove or dispose the property; the court is in such situation enjoined to a grant a temporary injunction to restrain such acts…."***

49. Going by the dictum in the above cited cases, the fact that the applicant's property is in danger of auctioned coupled with the colossal amount of money involved in the present case, I find that the applicant will suffer irreparable loss if the orders sought herein are not granted.

Balance of Convenience

50. In ***Pius Kipchirchir Kogo*** **case (supra) the court** defined the concept of balance of convenience as follows: -

> ***"The meaning of balance of convenience tilt in favor of the plaintiff' is that if an injunction is not granted and the Suit is ultimately decided in favour 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 plaintiff's' to show that the inconvenience caused to them be greater than that which may be caused to the defendant's inconvenience be equal, it is the plaintiff who suffer.***
>
> ***In other words, the plaintiff has to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater which is likely to arise from granting"***

51. In the instant case, I find that the balance of convenience tilts in favour of granting the interim orders of injunction, albeit, only limited to the period of service of fresh statutory notices.

52. Having considered the parties' affidavits, the written and oral submissions and the case law in their totality and having applied the principles of granting an interlocutory injunction pending the hearing and determination of the suit herein, this court is not satisfied that this is an appropriate case for it to exercise its discretion in favour of the Plaintiff herein.

53. The most glaring fact in this application is the undisputed fact that the applicant defaulted in paying the loan advanced to it by the defendant. It was not disputed that even before the alleged failure by the defendant to avail the agreed working capital, the plaintiff was already indebted to the defendant for large amounts of money. This default necessitated the restructuring of the initial loan. The plaintiff did not demonstrate that it is making any concrete efforts to settle the debt it owes that the defendant, the availability of the additional working capital notwithstanding. In effect therefore, the applicant/plaintiff has come to this court to seek an equitable relief of injunction when he has been in default and has not made good his accounts with the defendant. The applicant has come to this court with unclean hands. The applicant has not shown that it has made any efforts to settle his debt or to negotiate the terms of settlement with the defendant. The court notes that the applicant's complaint is over 20% of the working capital that it alleges was not disbursed to it as agreed. What therefore baffles this court is the fate of the 80% working capital together with the initial loan balance that was disbursed to the applicant.

54. In the circumstances of this case, one can say that there is the likelihood that the outstanding amount could outstrip the value of the property thereby putting the defendant's interests in great jeopardy. In ***Andrew Muriuki Wanjohi v Equity Building Society Limited & 2 others*** [2006] eKLR the court observed as follows: -

> ***"… In my considered view, if the 1st and 2nd Defendants were restrained from selling off the property until the suit was heard and determined, there is a very real risk that the debt may outstrip the value of the property as the borrower has not made repayments for more than three years…"***

55. It is trite law that the court's discretionary power to grant an order for interlocutory injunction must be exercised judicially based on the law and evidence and that an applicant seeking such orders must satisfy the threshold set out in the case of ***Giella v Cassman Brown Company Limited*** (supra).

56. The court did not however lose sight of the fact that the parties herein have in the past negotiated a settlement and reached a compromise over the same debt thus leading to the settlement of the earlier case. In recognition of the parties' previous successful engagement and considering the bank/customer relationship that exists between the parties as shown in the defendant's willingness to advance a large sum of money to the plaintiff, and to restructure the loan when the plaintiff experienced difficulties in servicing it, this court is of the view that it will be in the interest of justice and indeed the interest of the parties to grant them an opportunity to once again make attempts to reconcile their differences.

57. Accordingly, and having regard to the findings and observations that I have made in this ruling I make the following final orders: -

> ***a. The orders of temporary injunction are hereby granted albeit only for a limited period of 6 months to enable the parties herein seek an amicable resolution of their differences failure of which the defendant will be at liberty to exercise its statutory power of sale provided that it fully complies with all the provisions of the law regarding service of statutory notices. For the avoidance of doubt, the defendant shall not exercise its statutory power of sale of the subject property until it re-issues the requisite Statutory Notices.***
>
> ***b. The costs of this application shall abide the outcome of the main suit.***

58. It is so ordered

Dated, signed and delivered via Microsoft Teams at Nairobi this 5th day of November 2020 in view of the declaration of measures restricting court operations due to Covid - 19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17th April 2020.

W. A. OKWANY

JUDGE

<u>In the presence of:</u>

Mr. Kirimi for plaintiff/applicant.

Ms Aisha for Chege for defendant /respondent

Court Assistant: Sylvia