REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT KAJIADO

CIVIL CASE NO. 17 OF 2020

LYDIA BOSIBORI ANYEGA.....PLAINTIFF/APPLICANT

VERSUS

GULF AFRICAN BANK.....1ST DEFENDANT/RESPONDENT

GARAM INVESTMENTS AUCTIONEERS.....2ND DEFENDANT

HUBAAL TRAVEL AGENCY LIMITED.....INTERESTED PARTY

RULING

1. The plaintiff/applicant filed a plaint dated 17th August 2020, challenging the defendants/respondents' decision to advertise her property for sale by public auction. Simultaneous with the plaint, she took out a motion on notice dated the same day brought under Articles 23, 35, 65 50(1), 159(2)(d), 165(3)(a) of the constitution, sections 1A, 1B, 3A, 63(e) of the Civil Procedure Act and Orders 51 rules 1 and 13 and 40 of the Civil Procedure Rules and all enabling provisions of the law, for an interlocutory injunction restraining the respondents from offering for sale or selling Parcel **No. Ngong/Ngong/91959** pending the hearing and determination of the suit. The applicant also sought an order directing the 1st respondent to supply her true and verifiable accounts for the loan that she guaranteed.

2. The motion is supported by the grounds on its face and the applicant's affidavit sworn on the same day. In the grounds on the face of the motion she states that having guaranteed a loan facility extended to the interested party, she is entitled to accurate, verifiable, timely and regular accounts and updates from the 1st respondent. She also states that the respondents have scheduled the property for sale without accounts or requisite notices; that the 1st respondent has shrouded the transactions in mystery thus suppressed information; that it has acted with bad faith and that the 1st defendant has breached its duty of care to her.

3. The applicant again states that the interested party has not been candid to her with regard to the performance of the loan account and that the process initiated by the 2nd respondent on behalf of the 1st respondent is premature. She further states that the value of the property as at 12th August, 2020 was Kshs.63,561,000 against the outstanding amount of Kshs. 14,226,041.33 and, therefore, if an injunction is not granted, she will suffer irreparable loss.

4. In the affidavit, she deposes that the 1st respondent extended a loan facility to the interested party in 2018 and charged her property to secure the loan; that the 1st respondent has purported to exercise its statutory power of sale and scheduled the property for sale prematurely.

5. The applicant goes on to state that as a guarantor, she is entitled to accurate, verifiable, timely and regular accounts and updates from the 1st defendant with regard to the performance of the loan account; that the 1st respondent has breached this fundamental obligation to make disclosures and that there has never been communication from the 1st respondent to her.

6. She again deposes that she came to know about the outstanding amount for the first time through the notification of sale served by the 2nd respondent and that she requested for information on the loan account but the 1st respondent declined to supply information even after visiting the its offices. The applicant further deposes that both the 1st respondent and the interested party are indifferent to her request for information; that the respondents' irregular approach is calculated to undermine the value and cost of the property; that there is complete intent by the respondents to manipulate the true loan amount and that the property sits on a prime area and that her husband is buried on the land.

7. It is the applicant deposition that the intended sale is actuated by illegality, bad faith and is intended to actualize fraud. She states that she is willing to take over the loan once the 1st respondent discloses actual information on the loan, and therefore it is in the interest of justice that the application be granted.

8. The interested party has filed a replying affidavit sworn on 31st August, 2020 by Abdulhahi Ahmed Kanyare, in support of the motion. He deposes that the 1st defendant advanced a loan to the interested party which was secured by the applicant's property; that the interested party is entitled to accurate, verifiable and timely accounts and updates; that the 1st respondent has shrouded the transactions and acted in bad faith oppressive to the interested party and that the interested party had faithfully fulfilled its obligations to the 1st respondent until it underwent financial breakdown made worse by the Covid 19 pandemic.

9. The deponent further deposes that the 1st respondent began the process of realizing the security without serving notices to the interested party and that sale of the property will cause irreparable loss to the applicant. He again deposes that the sale will be fraudulent through a manipulated valuation report; that the requisite notices under the Land Act were not served and that the interested party is willing to continue repaying the loan facility.

10. The 1st respondent has filed a replying affidavit by Lawi Sato, its senior legal officer, sworn on 24th August 2020. He deposes that the 1st respondent advanced a financial facility of Kshs. 20,000,000 to the interested party and the 1st interested party signed a letter of offer dated 21st November, 2018. He states that the applicant executed a legal charge over the property as security for the loan which was registered on 18th December. The applicant also executed a personal guarantee on 22nd November 2018 to secure the Kshs. 20,000,000 loan facility.

11. According to the deponent, the applicant gave two addresses namely; ***P.O Box 3273-043 Nairobi*** which is on the charge instrument and ***P.O Box 1029-00511 Nairobi*** on the personal guarantee and the valuation report dated 12th August 2020. He further states that when the interested party defaulted in repayment, the 1st respondent served the applicant with a three months statutory notice dated 4th December 2019 through the two postal addresses by registered post; that the applicant was thereafter served with a forty days' notice dated 12th March 2020 through the same addresses. He has annexed certificates of posting for letters.

12. The deponent denies that the notices served on the applicant are defective. He contends that a dispute on the accounts or amount due is not a ground for restraining the chargee and that the 1st respondent has no obligation to provide the applicant with statements of account not being the account holder. The deponent states that the interested party acknowledged the default and sought the 1st respondent's indulgence through letters dated 4th May, 2020 and 8th July, 2020 which requests were declined through email of 8th July, 2020.

13. Mr. Sato again deposes that a forced sale valuation for the property was done in a report is dated 1st July, 2020 and that even though the applicant has provided another valuation report for the property, that does not entitle her to an injunction since no error has been shown to exist in their valuation report. He also states that variance in valuation reports is not a ground for granting injunction. He maintains that sale of the property based on their valuation report is not breach of duty since the applicant's loss can be adequately compensated if it turns out that there was any loss of damage suffered.

14. I response to the 1st respondent's replying affidavit, the applicant has filed a supplementary affidavit sworn on 11th November, 2020. She states that the loan advanced was a joint investment between the 1st respondent and the interested party; that the respondents inappropriately commenced realization of the security; that there is inconsistence between the letter of offer and the charge instrument regarding the monthly payment or mode of payment and that the letter of offer dated 21st November, 2019 did not contain monthly payment plan.

15. She also deposes that the amount claimed was not defined on specific monthly repayments and, therefore, the loan facility was incapable of falling into arrears before lapse of twenty four (24) months. In that case, she states, the intention to sale the property is irregular. She further faults the valuation report by the 1st respondent that it is a gross undervaluation and that the report was done clandestinely.

16. The interested party has also filed a supplementary affidavit sworn on 10th September, 2020. It is deposed that the 1st respondent's affidavit contained half-truths; that it is full of non-disclosure of material facts; that the letter of offer was availed to the interested party only being a muslim; that the 1st respondent was not required to impose any interest or penalties; that the loan was advanced at a calculated profit of 2.4 million and that the interested party was required to have paid Kshs. 22.4 million and no any other money was available to the 1st respondent.

17. Parties agreed to dispose of the motion through written submissions. The applicant has relied on her written submissions dated 16th October, 2020 and filed on 21st October 2020. It is submitted that the interested party obtained a loan facility of Kshs. 20 million which was secured by a legal charge over the suit property and that the loan was based on a cocktail of Islamic banking law and common law principles pertaining to charges.

18. According to the applicant, she was served with a notification of sale on 9th July, 2020 by the 2nd respondent and that the respondents advertised the property for sale after they had been served with the suit papers. The applicant argues that since the loan was under Islamic law, it was to attract profit and was Payable within 24 months. She argues that she is entitled to an injunction to protect her from irreparable injury. She relies on ***Surya Holdings Ltd & 4 Others vs ICICI Bank Ltd & Another*** [2015] eKLR.

19. She submits that as a guarantor, she entered into the agreement in good faith that parties would keep their obligations and she will suffer irreparable injury if the orders are not granted.

20. The applicant further argues that the advertisement of the property for sale was irregular; that she did not receive any of the statutory notices; and that the 1st respondent has not been candid on the status of the loan. She relies on a textbook **Brach of Contract**, by **J. W Carter,** for the argument that a promisor's obligation to perform is discharged only if the performance rendered matches the requirements of the contract. She also relies on ***Arcos Ltd v E Aronaasen and Sons*** [1933] AC 470.

21. The applicant maintains that the 1st respondent has not been candid on the loan repayment and that no communication was made to her on the status of the account. She relies on ***Talewa Road Constructors Ltd & Another v Jamii Bora Charitable Trust Registered Trustees & Another*** (HCCC No. 573 of 2011) for the submission that parties to a commercial contract are bound by the terms thereof and a party should not be allowed to benefit from its breaches.

22. The applicant again argues that the security is being realized prematurely since it was not premised on any specific monthly payments and, therefore, the banking facility was incapable of falling into arrears before the lapse of 24 months. In her view, there could be no arrears until 18th December 2020.

23. She again argues that the 1st respondent has unilaterally introduced new terms to the contract and the document produced by the 1st respondent at page 11 of the replying affidavit, has no nexus to the letter of offer dated 21st November, 2018, hence these are new terms that were not known to the applicant and the interested party.

24. The applicant relies on ***Mea Ltd v Echuka Farm Ltd & 2 Others*** [2007] eKLR, for the argument that enforcement of any right under a contract must ordinarily result from infringement of a right known under the law or stipulated in the contract agreement. She also relies on ***Martin Kirima Baithambu v Jeremiah Miriti*** [2017] eKLR for the argument that the guarantor's right accrues from the relationship created by the guarantee and not merely when he discharges the principal debtor's obligations; and that it is not the law that the guarantor has no rights equitable or otherwise until he has paid the guaranteed debt. In this regard, she argues that she is entitled to rights and accuracy in all matters and terms of the loan facility on realization of the security.

25. On the sale of the security, the applicant argues that the interested party has shown that it is interested in continuing to repay the loan and, therefore, the burden should not shift to her. She relies on section 104 of the Land Act on the court's jurisdiction to issue parameters for compliance by parties. She also relies on ***Givan Okallo Ingari & Another v Housing Finance of Kenya Co. Ltd*** [2002] 2 KLR 232, for the argument that any rate of interest to be charged on a loan account must be provided for by the contractual document and must be in accordance with the parties' agreement.

26. The interested party's submissions are dated 23rd October, 2020. It submits that there was no default by the time the 1st respondent invoked its statutory power of sale and therefore statutory notices of sale were prematurely issued. According to the interested party, parties are bound by the terms in the letter of offer dated 21st November, 2018 which stated that the repayment was 24 months from the date of drawdown. He argues that the period (24) months from the date of drawdown had not lapsed by the time the 1st respondent issued the notices, given that the loan facility was given under strict islamic law.

27. According to the interested party, there was no agreement on the monthly repayment of the facility but to service the loan within 24 months. In its view, there was no default. The interested party argues that in the circumstances of this case, there is good reason for the court to exercise its discretion and direct restructuring of the facility.

28. The interested party also relies on the **circular from the Central Bank No. 3 of 2020,** dated 27th March, 2020 asking banks to engage borrowers who request for relief on their personal loans based on individual circumstances. It argues that the business was affected by Covid 19 leading to financial distress and urges the court to step in and apply sections 105 and 106 of the Land Act.

29. The 1st respondent has relied on its written submissions dated 26th August, 2020 and filed on 28th August, 2020. It submits that it advanced Kshs. 20,000,000 loan facility to the interested party and that there is no denial that there is default.

30. Regarding statutory notices under the Land Act, the 1st respondent argues that the applicant was served with the requisite notices through registered post to the two postal addresses she provided. It also argues that even though there is no duty on the part of the 1st respondent to supply statements to the applicant, they were provided to her. It further submits that forced sale valuation was conducted on 1st July, 2020.

31. According to the 1st respondent, the applicant has not established a prima facie case with a probability of success. It relies on ***Sunrise Security Services Ltd & 2 Others v Diamond Trust Bank Kenya Ltd & Another*** [2019] eKLR, **f**or the submission that a prima facie case is more than an arguable case.

32. The 1st respondent goes on to argue that by sending the notices to the applicant's last known address it discharged its obligation under section 90 of the Act. It relies on ***Levnel Enterprises Ltd & Another v Grofin SGB Kenya Ltd & Another*** [2020] eKLR.

33. It also argues that where the applicant, (Chargor) denies receiving the notices, the chargee's obligation is to prove service and relied on ***Nyangilo Ochieng & Another v Fanuel B. Ochieng & 2 Others*** [1996] eKLR that the chargee will discharge such an obligation by showing that the notices were sent which shifts the burden on the chargor to disprove that he did receive the registered letter.

34. On information and accounts, the 1st respondent submits that when the applicant made a formal request for statements, they were supplied. On default, the 1st respondent argues that the interested party acknowledged default through its advocates' letter dated 4th May, 2020. It contends that a dispute over accounts is not a ground for granting injunction. It relies on ***Francis J.K. Ichatha v Housing Finance Co. kenya Ltd*** [2005] eKLR to argue that a dispute on accounts is not a valid ground for restraining the charge from exercising its statutory power for sale. It emphasizes, relying on **Sunrise Security Services case,** that variation in the valuation reports commissioned by opposing parties does not amount to sufficient ground for the grant of interlocutory injunction, and that the applicant must demonstrate satisfactorily why the valuation report that the respondents intend to rely on in disposing the property does not give the best price obtainable. (See **Levnel Enterprese case; Spero Holdings Ltd v co-operative Bank of Kenya Ltd & Another [2016] eKLR**.)

35. The 1st respondent argues, therefore, that the applicant has not shown that it will suffer irreparable injury and relies on ***Samson Mwathi Nyutu v Savings and Loan Kenya Ltd*** [2015] eKLR. It urges that the application be dismissed with costs.

36. I have considered the application responses submissions and the decisions relied on. This being an application for interlocutory injunction, the applicant must satisfy the court that she has a prima facie case with a probability of success; that she will suffer irreparable damage that cannot be compensated by way of damages and that the balance of convenience tilts in her favour. (See ***Giella v Cassman Brown & Company Limited*** [1973] EA 358).

37. On the principles for grant of interlocutory injunction and what a prima facie case is, the Court of Appeal stated in ***Mrao Ltd v First American Bank of Kenya Ltd & 2 others*** [2003] eKLR:

> ***"The principles which guide the Court in deciding whether or not to grant an interlocutory injunction are well settled. In Giella v Cassman Brown 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 he was considering, which was in relation to the pleadings that had been put forward in that case….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."***

38. Further in ***Nguruman Limited v Jan Bonde Nielsen & 2 others*** [2014] eKLR, the Court of Appeal agreed with the definition of a prima facie case in the ***Mrao case*** and stated:

> ***"We adopt that definition save to add the following conditions by way of explaining it. The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. 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. 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."***

39. The applicant charged her property to secure a financial facility of Kshs. 20,000,000/=advanced to the interested party by the 1st respondent. The 1st respondent then initiated the process of realizing the security through a public auction in exercise of its statutory power of sale. The 2nd respondent issued notification of sale to the interested party and advertised the property for sale on 15th September 2020, prompting this application.

40. The applicant has argued, supported by the interested party, that the loan was given under Islamic law and therefore it does not attract interest; that there was no requirement for periodic payment and that it was incapable of falling into arrears. According to the applicant, the loan was to be repaid in twenty four (24) months and for that reason, the 1st respondent's action of issuing the notices and initiating the process of realizing the security is premature. She also argues that save for the notices served by the 2nd respondent, the 1st respondent did not serve her with the requisite statutory notices under the Land Act.

41. The applicant has also argued that the intention to sale the property is ill motivated and fraudulent. She contends that the property had been undervalued and uses her valuation report dated 12th August 2020 to support this argument.

42. The 1st respondent on its part has argued that there is default; that notices were issued and sent to the applicant through the two postal addresses she provided; that the property was valued before the process of realizing the security was initiated and denies that the property was undervalued. According to the 1st respondent, the arguments raised by the applicant are not grounds for restraining it from exercising its statutory power of sale.

43. The fundamental issues here are whether the process of realizing security is premature; whether notices were served and whether the property has been undervalued.

44. There is no denial that the 1st respondent advanced Kshs. 20,000,000/= loan facility to the interested party which was secured by a legal charge over the suit property. According to the applicant and the interested party, the loan was not to attract interest and was payable in twenty-four months. They argue that the letter of offer did not contain any periodic payment or interest. The 1st respondent has not said anything regarding the applicant and interested party's contention, only saying that there is default.

45. I have perused the letter of offer dated 21st November 2018. It states at clause 1, that the facility limit is Kshs. 20,000,000/=; that the facility tenor is twenty four (24) months and that the facility repayment is monthly payment of principal and profit. Clause 5 on profit rate, states that the interested party (customer) would pay profit at the rate of 13% comprising the Central Bank Rate plus the bank's margin of not more than 4% above the Central Bank rate.

46. With regard to repayment, clause 6 states that the facility is to be repaid as stated in clause 1. More importantly, clause 6.2 states that ***"All amounts drawn and remaining outstanding (inclusive of profit and default damages) in respect of the above facility shall be due and payable at any time forthwith on demand."*** The letter of offer is signed on behalf of the interested party. The contents of this paragraph have

not been denied.

47. Although the applicant and the interested party have argued that there was no requirement for monthly payment and interest, that is contrary to clear terms in the letter of offer, that any unpaid amount, inclusive of profit, becomes payable on demand when clause 6.2 is read together with clause 1 that the facility is payable monthly.

48. The 1st respondent states that the interested party went into default before it initiated the process of realizing the security. The interested party has not denied that it is in default. The interested party indeed wrote to the 1st defendant through its advocates on 4th May 2020 after the notices had been issued. It admitted that business was down and that ***"it would be very difficult…to even make a promise to pay."*** This is a clear admission that there was default on the part of the interested party.

49. Regarding service of notices, the applicant's argument is that she only received the notification of sale from the 2nd respondent but did not receive notices issued under sections 90(1) and 96(2) of the Land Act.

50. The law is that it is the duty of the chargor to serve the notices before it can exercise its statutory power of sale. That duty is however discharged where it is shown that the notices were sent by attaching certificates of posting. Thereafter, the burden shifts to the chargor to satisfy the court that he/she did not receive the registers mail.

51. This position was stated by the Court of Appeal in ***Nyangilo Ochieng & Another v Fanuel B. Ochieng & 2 Others*** [1996] eKLR, thus:

> ***"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 chargors 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…It is for the chargee to make sure that there is compliance with the requirements of s.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."***

52. The 1st respondent argues that it issued and served the notices to the applicant through the two postal addresses she provided copied to the interested party. The notices were sent by registered post. I have perused the annextures to the 1st respondent's replying affidavit. There is letter dated 4th December 2019, addressed to the applicant through ***Box Number 3273-043 Nairobi.*** This is notice issued under section 90(1) of the Act. The notice shows the amount in default as well as the total outstanding amount. The notice was sent by registered post and the 1st respondent has attached a certificate of posting.

53. There is also a Forty days notice issued under section 96(2) of the Act to the applicant and dated 12th March 2020. It was sent to the same address and copied to the interested party. The two notices were also sent to the applicant's other address ***Box Number 1029-00511 Nairobi.*** The applicant has not denied that the two addresses belong to her or that she is not the one who gave them when signing the charge and the personal guarantee.

54. In that regard therefore, the 1st respondent has demonstrated that it served the notices on the applicant as required and therefore the applicant has not made a case in respect on non-service of notices at this stage. The interested party also received the notices which it admitted in its advocates' letter of 4th May 2020 addressed to the 1st respondent.

55. The applicant's other ground for seeking interlocutory injunction is that the property has been undervalued. It is her case that whereas the property is valued about Kshs. 63 million, the forced sale valuation by the 1st respondent is low and therefore there is a scheme on the part of the 1st respondent to dispose of the property at an under sale.

56. The 1st respondent conducted a forced sale valuation dated 1st July 2020 by ***Prestige Management Valuers Ltd.*** The market value of the property was put at Kenya shillings Forty seven million (Kshs. 47,000,000/= and forced sale value of Kenya shillings Thirty Five Million Three Hundred Thousand (Kshs. 35,300,000). The applicant conducted a counter valuation for the property by ***Bel Air Properties Ltd***. The report dated 12th August 2020 put the value of the property together with developments at Kshs. Sixty Three million Five Hundred and Sixty one Thousand(Kshs. 63,561,000). It is on that basis that the applicant argues that the 1st respondent undervalued the property.

57. It is true that there are two valuation reports on record for the same property. The value in the two reports is at variance. Whereas the 1st respondent's report has two important components; market value and forced sale value, the applicant's report does not. The law requires a chargee to conduct a forced sale valuation which was done in this. The fact that the applicant's valuation report is at variance with that of the 1st respondent is not sufficient ground to restrain the 1st respondent from exercising its statutory power of sale. The applicant has not shown why she thinks the 1st respondent's forced sale report should not be believed or is wrong so as to amount to a good reason to grant the injunction.

58. As was stated in ***Zum Zum Investment Limited v Habib Bank Limited*** [2014] eKLR, an applicant must satisfactorily demonstrate why the valuation the respondent intends to use does not give the best price obtainable at the material time. That has not happened here.

59. There is a further argument that both the applicant and interested party have not been given true and accurate information relating to the loan account. The 1st respondent has argued that it has always made the statements available to the interested party and supplied the applicant when she applied for them. I do not understand the applicant to say that the accounts are not correct, but that she has not been given accounts or information on the position of the loan account.

60. If the applicant was interested in the performance of the loan account, she would find out from the interested party, or visit the 1st respondent's offices to inquire whether or not the loan was being repaid. The 1st respondent sent notices to her notifying her of the interested party's failure to perform its obligation. Even if there was a dispute over the account, that alone would not be a ground for restraining the 1st respondent from exercising its statutory power of sale. Any failures on the 1st respondent can be compensated by way of damages, if at the end of the trial the applicant succeeds.

61. As the Court of Appeal stated In ***Giro Commercial Bank Limited v Halid Hamad Mutesi*** **[2002] eKLR,** *it has been held time and again that a mortgagee cannot be restrained from exercising his power of sale because the amount due is in dispute, or that the mortgagor has commenced a redemption action* **or because the mortgagor objects to the manner in which the sale is being arranged. Where** *the debt is admitted as due and the loan is not being serviced, the court should not grant an injunction***.**

62. And in ***Jacob Ochieng' Muganda v Housing Finance Company of Kenya Limited*** [2002] eKLR, the Court of Appeal made it clear that if there is any irregularity in the conduct of the auction the applicant would be entitled to damages against the auctioneer (or 1st respondent)where she suffers any special or general damages by the unlawful or improper exercise of any power of sale.

63. Having considered the application, the responses and submissions, as well as the decisions cited by the parties and those by the court, and taking into account the totality of the circumstances of the case, I am not persuaded that the applicant has met the conditions for grant of interlocutory injunction to restrain the 1st respondent from exercising its statutory power of sale.

64. Consequently, the application dated 17th August 2020 is declined and dismissed. Costs of the application will abide by the result of the suit.

Dated, signed and delivered at Kajiado this 11th day of December, 2020.

E.C. MWITA

JUDGE