REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

HCCC NO. 382 OF 2018

(Formerly ELC No. 427 of 2018

ASHITE CHANDRAKANT PATEL……..…….……1ST PLAINTIFF

GRISHMA ASHITE PATEL……...……2ND PLAINTIFF

VERSUS

DIAMOND TRUST BANK KENYA LIMITED……..DEFENDANT

RULING

1. The Plaintiffs who are the joint proprietors of L.R No.209/3477 (the suit properties) have filed a Notice of Motion dated 4th September 2018 seeking the following Prayers:-

1. *Spent*

2. Spent

3. THAT this Honourable Court be pleased to grant a temporary order of injunction restraining the Defendants whether by themselves, their employees, servants, agents or auctioneers from doing any of the following acts that is to say from advertising for sale, selling whether by public auction or private treaty, disposing of or otherwise howsoever completing by conveyance or transfer of any sale concluded by auction or private treaty, taking possession, appointing Receivers or exercising any power conferred by Section 90(3) of the Land Act, leasing, letting, charging or otherwise howsoever interfering with the Plaintiff's ownership or title to all that parcel of land known as L.R No.209/3477 Dar er Salam Road, Industrial Area Nairobi until the determination of the suit.

4. THAT an order be made under the doctrine of *lis pendens* and Section 106 of the Land Registration Act, (previously enshrined under Section 52 of the Indian Transfer Property Act (1959) (Repealed) that pending final determination of this suit in accordance in the ownership, leasing, REGISTRATION or change of registration in the ownership, leasing subleasing, allotment, user, occupation or possession or in any kind of right, title or interest in the charged properties with any land registry, Government department and all other registering authorities be and is hereby prohibited in ALL THAT parcel of land known as L.R NO.209/3477 Der es Salaam Road, Industrial Area Nairobi.

5. THAT in the alternative to prayer (2) and (3) above the time for compliance and/or for rectifying any default to redeem L.R No.209/3477 Der es Salaam Road be extended for a period of 12 months or for such other period as the Court may determine fit pursuant to powers conferred on the Court under section 104 and 105 as read together with Section 90 of the Land Act 2012.

6. THAT an interlocutory mandatory Injunction do issue compelling the Defendant to render a true, proper and accurate account to the Plaintiff(s) and the Court on the actual status of the Borrowers account(s).

2. The two gave joint personal Guarantees for certain facilities granted to the Equip Agencies and Bio-corn Products by Diamond Trust Bank Kenya Ltd (DTB). The facilities were for a maximum limit of Kshs.280,000,000/= and as security, the suit property was charged in favour of DTB for that sum.

3. The principal Debtors may have been in default and on 9th February 2018, DTB issued a Statutory Notice under section 90 of The Land Act 2012 (The Act) upon the Plaintiffs demanding a sum of Kshs.302,700,216 said to be due and outstanding as at 2nd February 2018. This was followed by another Notice on 16th May 2018, this time under the provisions of Section 96(2) of The Act 2012 for the same amount. In

both Notices the Bank has threatened to exercise its Statutory Power of Sale.

4. It is also common ground that Dalali Traders Auctioneers (acting on behalf of the Bank) issued a 45 day Notification for Sale of the property by way of Public Auction on 12th September 2018. The Notice was issued pursuant to Rule 15 of the Auctioneers Rules.

5. In the Plaint presented to this Court on 4th October 2018, the Plaintiffs raise various issues in respect to their contractual relationship with the Bank. For a start, the Bank is accused of extending the period of the Debt and amounts granted to the principal Debtors outside the Guarantees given and without the involvement and consent of the Plaintiffs.

6. Secondly that the Bank has breached the *Induplum* Rule by demanding a sum in excess of the maximum limit permitted by Section 44A (2) of The Banking Act. It is also said that the Bank has violated the provisions of Section 33B of The Banking Act by charging interest rates beyond the capping contemplated by Statute.

7. As an alternative it has been averred by the Plaintiffs that they have ensured that the secured sum has been paid in full and that a total sum of Kshs.706,233,817.30 has in fact been paid. In essence that no money is due and owing from the principal Debtor.

8. In regard to the Statutory Notice issued on 9th February 2018 the same is said to be unlawful for the following reasons:-

a) The secured amount is fully liquidated.

b) The charge herein was not created for the purposes of securing the sum of Kshs.250 million.

c) The charge created by the Plaintiffs secured the specific amounts stated thereon and not any other amount.

d) A valid Statutory Notice can only issue for the secured sum plus interest thereon but not for sums secured otherwise or unsecured.

e) A demand as envisaged under the various sections of the Act must be unequivocal in its intention. The statutory notice is void for uncertainty, ambiguity and consolidation of accounts.

f) The statutory notice, is in respect of accounts run by Equip Agencies Limited and its sister companies whereas the charge only secured a temporary overdraft.

g) The Defendant has over the years subjected the said credit facilities to varying penal interest rates which interest rates are harsh, oppressive and contra-statute. In the circumstances, the same are unenforceable against the Plaintiffs.

h) The Statutory Notice imposes default rate whereas there is no default.

i) The Defendant has unlawfully been insisting on payment by the Plaintiffs sums comprising of penalties which are more than 2 years old and therefore statute barred. The same cannot be lawfully recovered in view of the provisions of the limitation of Actions Act Cap 22 of the Laws of Kenya.

j) The Statutory Notice is irredeemably defective and unenforceable in law in so far as it purports to confer on the Defendant an implied right to tack.

9. Further reasons, (some repeated) are given as to why the Plaintiffs see a failure by the Bank to abide by the provisions of the Act as follows:-

a) The Defendant has purported to consolidate the accounts of Equip Agencies Limited (borrower) and its sister companies and the Kshs.302,706,216 plus interest at 26.5% from 2nd February 2018 demanded is the sum total of the purported accrued balances in respect of those accounts.

b) The alleged borrowing is unsecured and statutory power of Sale over the suit property cannot arise.

c) The Plaintiffs interest is a lease from the President for a term of 99 years nine months from 1/5/1976. It is mandatory under the provisions of Section 96(3)(b) of the Land Act that "The holder of the land out of which lease has been granted if the charged land is a lease" be given (40) forty days notice before sale. No such Notice has been issued to the President (Commissioner of Lands).

d) The Plaintiffs have tenants who conduct business in the premises. The said tenants have not been served with a notification of sale as provided for by Section 96(e) of the Land Act. No sale can proceed before such Notices are effected.

e) The sale is premature due to failure of the Defendant to obtain a Consent of the President to sell as mandatory provided for by Rule (2) of the Government Lands (consents) Rules which provide;

(2) in all case where Government lease……...such consent must be obtained.

(b) before the land subject matter of mortgage is sold pursuant to a power of sale or by order of Court.

f) There has been no valuaton and/or proper valuation of the suit properties within the last one year to determine the fair market.

g) The failure to notify the Plaintiffs of the default and failure to value the properties and provide valuation report to the Plaintiffs compromises the duty of care imposed on the Chargee by Section 97 of the Land Act.

h) The Plaintiff is discharged from the charges on account of the Defendant's alteration and unilateral amendment of borrowing terms.

10. Ultimately the Plaintiffs seek the following prayers:-

(a) A permanent injunction restraining the Defendant, whether by itself, or its appointed agents, from doing any of the following acts, that is to say, from advertising for sale, selling by private treaty or public auction, leasing, subleasing, charging, disposing of, taking possession or subdividing, appointing Receivers or Administrators over or otherwise howsoever completing any conveyance or transfer of any sale conducted by auction of private treaty, or otherwise howsoever interfering with the Plaintiffs ownership of L.R No.209/3477 Der es Salaam Road, Industrial Area Nairobi.

(b) A declaration that the Plaintiffs are duly released and discharged from the Charges dated 5th September 2014, further Charge dated 17th November 2014 and second further Charge dated 1st April 2015 and from any liability there under and entitled to delivery up of its title document and Reconveyance of LR NO.209/3477 Der es Salaam Road, Industrial Area Nairobi and an order do issue to this effect.

(c) A declaration that the Statutory notices dated 9th February 2018 and 10th May 2018 and Auctioneers Notice dated 4th July 2018 are invalid, null and void ab initio.

(d) A declaration that the Defendant's Statutory Power of Sale has not accrued as against the charged property LR. No. 209/3477 Der es Salaam Road, Industrial Area Nairobi and the Plaintiffs are entitled to an immediate discharge thereof.

(e) An order for accounts and any other or further relief this Honourable Court may deem fit to grant.

(f) Costs of this suit.

(g) Interest on (c), (d) and (f) above.

11. This Court can only exercise its discretion in favour of the Plaintiffs if they satisfy the overworked principles set out in Giella vs. Cassman Brown and Co. Ltd [1973] EA 398 that:-

a) An Applicant must show a prima facie case with a probability of success.

b) An Interlocutory Injunction will not normally be granted unless the Applicant might otherwise suffer irreparable loss which would not adequately be compensated by an award of damages.

c) If the Court is in doubt, it will decide an application on the balance of convenience.

12. In evaluating the viability of the Plaintiffs' case, this Court must be careful not to draw hard and fast conclusions on untested evidence. That is the true remit of the Trial Court and not a Court at an interlocutory session. With that in mind, I do not propose to carry out a detail or retail evaluation of the matters before me. What is the Plaintiffs' case?

13. The Plaintiffs complain that the interest levied by the Bank and the amount demanded violates the provisions of the Banking Act. However, it has to be remembered that the Plaintiffs are the Guarantors of the debt and there is evidence that the principal Debtor does not question the rate of interest charged or the amount demanded. In reaction to the various demands made by the Bank, representatives of the Bank and the principal Debtor met and a letter of 31st August 2018 followed. The letter is reproduced:-

31st August 2018

Our Ref; EAL/379/2018/JM

Managing Director

Diamond Trust Bank Ltd

P.O. Box 61711-00200

NAIROBI

Dear Sir,

RE: ACCOUNT SETTLEMENT

We would like to take this opportunity to thank you for your much-valued time to discuss above matter at your office dated 30th August 2018.

We would like to propose the settlement of account as under:

a) Down payment of Kshs.110,000,000/= through RTGS dated 28th September 2018

b) Restructure the remaining overdraft balance under Equip Agencies Ltd and Biocorn Products Ltd combined into seven years term loan with equal monthly installment towards interest and repayment with effect from October 2018.

The sanction of our request will enable us to reduce our exposure gradually and safeguard our reputation.

We are confident and committed to deliver this proposal and appreciate your understanding and support during this challenging phase to realized desired goal that benefits both parties on win-win basis.

Yours faithfully,

Equip Agencies Limited

Signed

Director

There is no complaint about what is demanded or the interest charged. The debt appears admitted.

14. Perhaps I need to say this, the contents of this letter are received notwithstanding that it was written on a without prejudice basis because the privilege in that communication belongs to the author, that is, the principal Debtor and not the Plaintiffs who are the Guarantors. The principal Debtor who is not party to this suit would obviously not be able to object to its production.

15. It is appreciated that there will be occasion when a Guarantor can take up a complaint which ordinarily belongs to the principal Debtor. For example a Guarantor can resist a demand of a non-existing debt even though the principal Debtor is silent about it because that demand could imperil the assets of the Guarantor who stands to lose as much or even more than the principal Debtor. But if the Guarantor must take up the mantle alone, then it must demonstrate effort to involve the principal Debtor and where the principal Debtor is dis-interested or in collusion with the Creditor, then there would be a good case for the principal Debtor to be enjoined as a Defendant. Yet in the circumstances of this case, Grishma Patel (the 2nd Plaintiff) appears to be the Company Secretary/Director of both Equip Agencies Limited and Bio-corn EPZ Products Limited (see Memorandum of Acceptance pages 22 and 23 of Plaintiff's documents). The two companies are the principal debtors. The 2nd Plaintiff makes no explanation as to why the principal Debtor or Debtors are not joined to the suit either as Plaintiffs or Defendants. The absence of the principal Debtors who admitted the debt is therefore not without significance.

16. It is also said that the principal Borrowers have repaid and overpaid the facility. The Plaintiffs have the information of payments allegedly made by the principal Debtor of Kshs. 706,233,812.30. But the Bank makes the point that the payment of Kshs. 206 million is not payment made towards a loan but the total amount of money deposited into the current account of one of the principal Debtor over the period of time. The Plaintiffs accept that the facility granted to the principal Debtor was an overdraft and not a loan. The argument therefore that the principal Debtors have repaid a total sum of Kshs. 785 million does not impress the Court. It is perhaps misleading! Again, it has to be remembered that the principal debtors have admitted the debt.

17. Were facilities enhanced and periods extended without the consent of the Plaintiffs? No evidence is put forward to advance this complaint.

18. There is then a grievance that the 40 days Statutory Notice required by the Bank under Section 96(2) of the Act breaches subsections 3(b) and 3(e) which read;

"3. A copy of the notice to sell served in accordance with subsection (2) shall be served on;-

a. …….

b. The holder of the land out of which the lease has been granted, if the charged land is a lease.

c. …….

d. Any Lessee and Sublessee of the charged land or of any buildings on the charged land.

19. A copy of the certificate of title to the suit land shows that it is a Grant of 99 years from 1.5.1976 from the President. In the grant, the Commissioner of Lands acts on behalf of the President. The giver of the grant is undoubtedly the President. The provisions of section 96(3)(b) require that where the charged land is in the nature of a leasehold, the holder of the lease out of which the lease has been granted must be served with a 40 day notice. This provision does not have any exemptions and it must be presumed to cover situations where the holder is the President or Commissioner of Lands.

20. The objective of the rule would seem to be that Lessor or Land owner who would have initially given consent to charge needs to be notified of a possible sale of the charged property. This is because invariably the possible sale leads to a new Lessee.

21. That said the person who has the right to receive the notice under section 96(3)(b) is the holder of the land, in this case, the Commissioner of lands on behalf of the President. Neither the Commissioner of Lands nor the President have raised a complaint. This Court very much doubts that the chargors equity of redemption has been clogged by non-compliance with these provisions because the person entitled to the Notice under subsection 3(b) does not complain. Unlike the Notices that are required to be served upon by chargor under section 90 and 96(2) of the Act, Notices under section 96(3) do not relate to the chargor's equity of redemption. However, a chargee who ignores the provisions of subsection 3(b) stands the risk of the realization process being faulted by the holder of the land. But this is yet to arise here.

22. Similar arguments can be made in respect to subsection 3(e). Tenants or subtenants of premises on the charged property ought to be given Notice of an intended sale. A tenant or subtenant may be unwilling to deal with any other landlord other than the chargor. The Notice affords a tenant/subtenant opportunity to reorganize his or her affairs. But it has to be emphasized that the right of notice belongs to the tenant or subtenant and so for a statutory notice to be faulted for noncompliance with the provisions of section 96(3)(e), the complainant must necessarily be the tenant or subtenant. In the case before this Court none of the Plaintiffs' tenants have sought to challenge the Notice.

23. There is then contention that the intended sale is premature for want of consent under the provisions of Rule (2) of The Government Lands (consents) Rules. The Government Land (consents) Rules were made under the now repealed Government Lands Act (cap 280) and have been carried over and imported as subsidiary legislation in the Land Registration Act. Rule 2 thereof provides as follows:-

> "2. (1) In all cases where a Government lease contains an express covenant not to assign, sublet or otherwise part with the possession of the land or any part thereof without the consent of the President in writing, or where such lease is subject to the provisions of the Crown Lands Act, 1902 (No. 21 of 1902), and to the rules for the time being in force under that Act, the lessee shall not be required to obtain the consent of the President to the execution of a mortgage of the land or any part thereof the subject of the lease, but such consent must be obtained—
>
> (a) before a mortgagee is given or obtains possession of the land the subject of the mortgage, whether by foreclosure or otherwise; and
>
> (b) before the land the subject of the mortgage is sold pursuant to a power of sale, or by order of the Court.
>
> (2) In this rule, "mortgagee" includes any person, corporation or company from time to time deriving title under the original mortgage".

24. As is relevant here, the Rule requires that where a Government Lease contains an express covenant not to assign, sublet or otherwise part with the possession of the land or any part thereof without the consent of the President in writing, the lessee shall not be required to obtain the consent of the President to the execution of a mortgage of the Land but such consent must be obtained before a mortgage is given or obtain possession of the land or the land is sold pursuant to a power of sale or by order of the Court. The Government would be interested on how the grantee or lessee deals with the land where it has issued grants or lease. Hence the conditions imposed on the Grant.

25. In the matter at hand, the Plaintiffs are required by special condition 10 in the Grant to obtain consent of the Commissioner before charging or parting with possession of the suit land or any part thereof. For that reason, the suit property would seem to be under the ambit of Rule 2 of The Government Lands (consents) Rules.

26. Whereas the Rule is silent as to when the consent must be sought it must obviously be before the sale. The intended sale of 12th September 2018 did not happen and no new auction date has been set. There is no knowing whether the Bank will seek the consent should a new auction be scheduled. Clearly, then, even if I was to find a breach of the Rule by the Bank at this point, it cannot be reason to injunct a future sale.

27. As to the complaint that there has been no valuation and/or proper valuation of the suit property within the last one year, the Bank has shown to this Court a valuation report by Chrisca Real Estates. The Report is dated 31st August 2018. It is in respect to the suit property and returns the following values;-

a) Forced sale ……. Kshs.60,000,000/=

b) Current open market value …… Ksh.80,000,000/-

c) Mortgage value …….. Kshs.65,000,000/=

d) Insurance value …… Kshs.25,000,000/=

Those values have not been faulted by any evidence to the contrary. This is really no foundation for this purported grievance.

28. It seems rather obvious that the Plaintiffs cannot make out a prima facie case and the orders of temporary injunction are not deserved, but there are yet other pleas made by them. This Court turns to reflect on and consider them.

29. The Court is asked to order that the doctrine of *lis pendens* do apply to the suit property pending the final determination of the suit. The doctrine of lis pendens had been codified in section 52 of The Transfer of Property Act, 1882 as follows:-

> ***"During the active prosecution in any court having authority in British India by the Governor General in Council, of a contentious suit or proceeding in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the court and on such terms as it may impose."***

30. This Court says very little in this regard because it has been said many times over that the doctrine cannot be invoked to stop a chargee from exercising its statutory and contractual right of sale which process has commenced before the inception of a suit. It is also doubted that, after the repeal of The Transfer of Property Act, the doctrine still remains part of our land law.

31. I also say no more of the attempt to call into aid the doctrine of *lis pendens* because to grant it is to technically grant the order of injunction which the Plaintiffs do not deserve.

32. Sections 104 and 105 of the Land Act 2012 gives the Court power to grant certain reliefs to a chargor. Subsection 2 of section 104 reads:-

> "(2) A court may refuse to grant an order under subsection (1) or may grant any relief against the operation of a remedy that the circumstances of the case require and without limiting the generality of those powers, may—
>
> (a) cancel, vary, suspend or postpone the order for any period which the court thinks reasonable;
>
> (b) extend the period of time for compliance by the chargor with a notice served under section 90;
>
> (c) substitute a different remedy or the one applied for or proposed by the chargee or a different time for taking or desisting from taking any action specified by the lessor in a notice served under section 90;
>
> (d) authorise or approve the remedy applied for or proposed by the chargee, notwithstanding that some procedural errors took place during the making of any notices served in connection with that remedy if the court is satisfied that—
>
> (i) the chargor or other person applying for relief was made fully aware of the action required to be taken under or in connection with the remedy; and
>
> (ii) no injustice will be done by authorising or approving the remedy, and may authorise or approve that remedy on any conditions as to expenses, damages, compensation or any other relevant matter as the court thinks fit.

While section 105 provides:-

> "(1) The Court may reopen a charge of whatever amount secured on a matrimonial home, in the interests of doing justice between the parties".

33. The provisions of section 105 are not applicable because the charged property is not a matrimonial property. And in respect to section 104 (2) reliefs, a suitor for any such relief must, for starters show good faith. Good faith would be lacking where, like here, the chargor is alleging that no debt is due under the charge (and that there is in fact an overpayment) when the principal debtor's admission of a substantial debt has not been faulted.

34. The upshot is that the Notice of Motion dated 4th September 2018 lacks merit and is dismissed with costs. Any interim orders granted today are hereby discharged.

Dated, Signed and Delivered in Court at Nairobi this 8th day of February, 2019.

F. TUIYOTT

JUDGE

Present;

Shah for Defendant/Respondent

Okulla for Kingori for applicant

Nixon- Court Assistant