REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO.136 OF 2018

JOHN KARUGU MAARA.....PLAINTIFF/APPLICANT

VERSUS

HOUSING FINANCE COMPANY

OF KENYA LIMITED.....1ST DEFENDANT

THE UNIT PAINT BALL LIMITED.....2ND DEFENDANT

RULING

1. This Court is asked to make a quick decision as to whether or not to allow the Notices of Motion of 4th April 2016 and 28th September 2018. This is because the applications were argued on 13th February 2019 and the outcome determines whether an auction due for tomorrow (19th February 2019) will be allowed to proceed.

2. The applications are for grant of a temporary injunction to restrain HFCK from evicting the Applicant, taking possession, encroaching, trespassing, alienating, disposing or in any other way whatsoever interfering with the parcel of land known as Title Number Muguga/Nderi/T.19 (the suit property).

3. In a Plaint dated 23rd March, 2018 and presented to Court on 8th April 2018, the Plaintiff avers that he and his wife Miriam Njoki Kangu took a loan facility of Kshs.23,070,740/= and a Charge for that sum was created over the suit property. A further facility was granted to the couple through a letter of offer executed by the two on 6th February 2015. A further charge to support the new facility was registered on 16th March 2015.

4. It is a common fact that the Bank has issued two Statutory Notices upon the Plaintiff with a view of selling the charged property. This aggrieved the Plaintiff. The Plaintiff avers that the Defendant delayed in making the final disbursement of the first loan and this led to a delay in completion of the project. That as a consequence, the Plaintiff has suffered accrued interest. In addition, the Plaintiff complains that HFCK induced him into contracting of the 2nd Defendant for purposes of constructing the project.

5. The Plaintiff avers that the 2nd Defendant had not (contrary to the information given to him by the 1st Defendant), successfully carried out similar projects. In the end they lacked capacity and delayed the project.

6. The Plaintiff also complains that the 1st Defendant has not furnished to him a full account of the mortgage debt at various drawdowns.

7. Ultimately, the Plaintiff seeks the following prayers:-

a) Permanent Injunction restraining the 1st Defendant by itself, its agents and/or servants or any other person acting for the 1st Defendant or with the 1st Defendant's authority, from evicting the Plaintiff or taking possession, encroaching or trespassing into, or alienating, disposing of or in any other way whatsoever interfering with the parcel of land known as TITLE NUMBER MUGUGA/NDERI/T.19 pending the hearing and determination of this suit.

b) Damages for fraudulent misrepresentation.

c) General damages against the Defendants.

d) An account from the 1st and 2nd Defendant as prayed in paragraph 21.

e) Interest thereon.

f) Costs of this suit.

g) Any other relief the Court deems fit to grant.

8. In support of his application for injunction he raises two other issues. First, that HFCK intends to proceed with the sale before carrying out a current valuation of the property. Secondly that email copies of statutory Notices were served on him and no service as required by law was effected.

9. The issue of service of the statutory Notice ought not to arise because the same is admitted in paragraph 20 of the Plaint as follows:-

> "20. The project was finally completed in May 2017 however the same had accrued high interest which the Plaintiff has been paying since until the 1st Defendant served the Plaintiff with a Statutory Notice dated 20th November 2017 and further a Notice to sell the property dated 8th March 2018".

10. In regard to valuation, a Chargee is under obligation to ensure that a forced sale valuation is undertaken by a valuer before selling the charged property (section 97(2) of The Land Act). This is because the Chargee is under duty to sell charged land at the best price reasonably obtainable at the time of sale. A current valuation has been held by our Courts to be a valuation undertaken not later than 12 months prior to the date of sale. This is drawn from Rule 15(d) of the Auctioneers Rules.

11. In resisting the plea for injunction, HCFK has produced a copy of a valuation undertaken by Nishani Management over that charged property which returned the following values:-

Open market value ……. Kshs.24,500,000/=

Forced sale value …… Kshs.18,375,000/=

Insurance value ……. Kshs.34,600,000/=

The Report is dated 2nd July 2018 and is therefore current as at the date of this decision. Nothing much will turn on the Plaintiff's complaint in that respect.

12. This Court has been shown email correspondence between the Plaintiff and officials of the Bank which suggest that at one point in time, the Plaintiff was discontented about certain delays in the project. This Court accepts the production of the emails notwithstanding the protest by Counsel for the Bank that their production breaches the provision of section 106B of the evidence Act which provides:-

> "(1) Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on paper, stored, recorded or copied on optical or electro-magnetic media produced by a computer (herein referred to as "computer output") shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein where direct evidence would be admissible.
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> (2) The conditions mentioned in subsection (1), in respect of a computer output, are the following—
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> (a) the computer output containing the information was produced by the computer during the period over which the computer was used to store or process information for any activities regularly carried out over that period by a person having lawful control over the use of the computer;
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> (b) during the said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities;
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> (c) throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its content; and
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> (d) the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.
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> (3) Where over any period, the function of storing or processing information for the purposes of any activities regularly carried on over that period as mentioned in paragraph (a) of subsection (2) was regularly performed by computers, whether—
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> (a) by combination of computers operating in succession over that period; or

(b) by different computers operating in succession over that period; or

(c) in any manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers, then all computers used for that purpose during that period shall be treated for the purposes of this section to constitute a single computer and references in this sections to a computer shall be construed accordingly.

(4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following—

(a) identifying the electronic record containing the statement and describing the manner in which it was produced;

(b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;

(c) dealing with any matters to which conditions mentioned in subsection (2) relate; and

(d) purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate), shall be evidence of any matter stated in the certificate and for the purpose of this subsection it shall be sufficient for a matter to be stated to be the best of the knowledge of the person stating it.

(5) For the purpose of this section, information is supplied to a computer if it is supplied thereto in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of an appropriate equipment whether in the course of activities carried on by any official, information is supplied with a view to its being stored or processed for the purpose of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities".

The Court does so because through a supplementary affidavit sworn on 6th November 2018, the Plaintiff produced a computer certificate envisaged by the provisions filed in Court on 3rd July 2018.

13. In an email dated 13th October 2014, for instance, the Plaintiff complains of a 7 months delay. He requests for immediate disbursement of finances into the 2nd Defendant's account. He makes a similar complaint on 16th May 2015. This time he complains of lost rental income of Khs.2.9million.

14. On the part of the Bank it produces a drawdown schedule of the facility as follows:-

May 2013 …….. Kshs.6,987,650/65

September …….. Kshs.5,863,402/15

December …… Kshs.6,962,154/14

October 2014…….. Kshs.3,257,532/80

The Bank blames any delay on the 2nd Respondent.

15. The Court observes that at this interlocutory stage it cannot make any hard and fast findings on evidence that has not been tested by cross-examination. What may be clear is that there were delays in completion of the project. Those delays may well be attributed to the 2nd Defendant. But it has to be remembered that the 2nd Defendant was a contractor of the Plaintiff. The manner in which the Plaintiff engaged the 2nd Defendant will have to await trial of the matter. Whether or not HCFK induced the 1st Defendant into contracting the 2nd Defendant is a matter that can only be determined on tested evidence.

16. This Court is therefore not certain that the Plaintiff has made out a prima facie case that the default in repayment of the loan came about in disbursing the loans. I say so bearing in mind that even after the alleged delays the Plaintiff took a further facility in March 2015. It would also be somewhat curious that it took the Plaintiff about 3 years after the alleged delays and only upon the threat by HFCK to sale the charged property to formally raise the complaint through these proceedings.

17. **GIELLA VS. CASSMAN BROWN** [1973] EA 358 is the locus classics in matters of temporary injunction. The principles in that case are:-

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 be adequately be compensated by an award of damages.

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

It is also settled law that the application of these grounds is sequential.

18. As I have a doubt as to whether the Plaintiff has established a prima facie case with a probability of success, the Court must ask the question whether the harm that the Plaintiff is likely to suffer in the event that the injunction is not granted cannot be adequately compensated by an award of damages. The danger faced by the Plaintiff is the sale of a charged property. The sale of a charged property is a matter expressly contemplated by the parties when default happens. That the Chargee reserves the right to sale in the event of default is expressly provided in the charge document. A sale of the charged property cannot therefore cause irreparable harm to the Plaintiff. The Plaintiff does not say that HCFK is not in a position to pay its damages in the event that the trial Court comes to the decision that the sale was unlawful.

19. In declining to grant the injunction this Court bears in mind that accounts provided by the Bank shows that the Plaintiff and his spouse owe the Bank some Kshs.42,444,256.30/= as at 28th April, 2018. The couple are in default and the default persists. The Court has also considered that it has been unable to see any clear evidence, at this stage of the proceedings, that HFCK is to blame for this state of affairs.

20. The upshot is that the applications of 4th April, 2018 and 28th September 28th September 2018 are hereby dismissed with costs.

Dated, Signed and Delivered in Court at Nairobi this 18th day of February, 2019.

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F. TUIYOTT

JUDGE

Present -

Kawamara for Plaintiff

Kamwami for 1st Respondent

Nixon – Court Assistant