REPUBLIC OF KENYA

IN THE HIGH COUT OF KENYA

AT KAJIADO

CIVIL SUIT NO. 47 OF 2018

(Formerly Kajiado ELC Civil Suit No.673 of 2017)

JIM KENNEDY KIRIRO NJERU.....PLAINTIFF

VERSUS

EQUITY BANK (K) LIMITED.....DEFENDANT

RULING

By way of a Notice of Motion dated 25th April 2017, brought in terms of article 10, 40(3), 159(2)(d) of the Constitution, Sections 1A, 1B and 3A of the Civil Procedure Act, Order 40 rule 3 & 7 of the Civil Procedure Rules 2010, Section 93(3) of the Land Registration Act No. 3 of 2012 and all enabling provisions of law, seeking the following orders: -

a) THAT this Application be certified as urgent and heard ex parte in the first instance.

b) THAT pending the hearing and determination of this Application, a temporary injunction do issue restraining the Defendant, either by itself, employees, servants and/or agents, appointed or authorized by it , particularly Josrick Merchants Auctioneers, from selling or advertising for sale by way of private treaty or by public action the property comprised in Title Number Kajiado/Kaputiei –North/14551, Milimani Estate, Kitengela, Kajiado county of interfering in any way whatsoever with the Plaintiff's/Applicant's proprietary interests thereof.

c) THAT pending the hearing and determination of this suit an injunction do issue restraining the Defendant, either by itself, employees, servants and/or agents, appointed or authorized by it , particularly Josrick Merchants Auctioneers, from selling or advertising for sale by way of private treaty or by public action the property comprised in Title Number Kajiado/Kaputiei –North/14551, Milimani Estate, Kitengela, Kajiado county of interfering in any way whatsoever with the Plaintiff's/Applicant's proprietary interests thereof.

d) THAT costs of this Application to be borne by the Respondent.

The Notice of Motion is premised upon eleven grounds appearing on the face of it which include the ground that the Applicant is a former employee of the Respondent whose employment was unlawfully, illegally and unfairly terminated by the Respondent. Subsequent, to the termination, the applicant together with his nine other colleagues instituted a suit in the Employment and Labour Relations Court at Nairobi and the same was designated ELRC No. 1430 of 2015; vide a ruling delivered by the Hon. Lady Justice Hellen Wasilwa on 6th April, 2016, the court at para 23 of the said ruling ordered that the loan facilities taken out by the Applicant and his colleagues would suffer immensely if the loans were converted to commercial rates.

Further grounds, are that despite the pendency of suit the Respondent has ignored and/or disregarded the Employment and Labour Relations Court Ruling directing it to accord to the Applicant all the benefits of an employee, and in particular, the Respondent has converted the interest rate of his loan to a commercial ones and is now subjected to an interest rate of 18% as opposed to the staff rate of 5% making it difficult for the Applicant to continue servicing the loan as he is still unemployed.

That the Respondent has illegally and without lawful reason, instructed Josrick Auctioneers to advertise for sale and subsequently sell the Applicant's property comprised in title number Kajiado/Kaputiei north 14551, Milimani estate, Kitengela, Kajiado County (the suit Property) by way of public Auction on 28th April 2017; should the said auction be rendered nugatory and the Applicants and, the Applicant stands to suffer irreparable damage by being rendered homeless as they rely exclusively on the said property for a home and a source of livelihood both for himself and his family, which family comprises of his school going young children.

Further that the orders sought herein are incapable of causing prejudice to the Respondent in any manner whatsoever for reasons that the Applicant remain committed to repaying the loan amount fully, the Applicant is in fact not in fact in fact not in arrears as alleged by the Respondent and in the highly unlikely event that the suit it unsuccessful, the subject property whose value is appreciating shall still be available as security and the Respondent may realize the same.

The Applicant believes that this case has very high chances of success particularly because the Applicant is not in arrears and the Respondent is currently holding the Applicant's savings, which amount can easily set off the alleged arrears, if any. It was also stated that this Court under articles 3(2) and 10(1) of the Constitution of Kenya, 2010 is compelled to grant the sought. Further that the rule of law and the principles and values of the constitution will be submitted to disrepute unless the orders sought are granted forthwith. That it is in the interest of justice and fairness that the application is allowed.

Analysis and Determination

I have carefully considered the application, the affidavits tendered by both parties in support and in rebuttal of issues herein as well as the judicial precedence and the law of the subject of amendments, I take the following view of the matter. The issue for determination is whether or not the Plaintiffs' have met the threshold for granting interlocutory injunction.

At this juncture, this court endeavors to briefly examine the legal principles governing the application of this nature. In applications for an interlocutory injunction the burden resides with the Applicant to prove the satisfaction of the court that the same should be granted. It is also noteworthy that an injunction is a discretionary remedy and is granted on the basis of evidence and sound legal principles.

The principles for grant of temporary injunctions are well set out in the celebrated case of ***Giella –versus- Cassman Brown and Company Limited (1973) E.A 385, at page 360 where Spry J. held that: -***

> ***"The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a 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."***

In the case of ***Mrao Limited –versus- First American Bank of Kenya and 2 Others (2003) KLR 125,*** the Court of Appeal in determining what amounts to a prima facie case stated;

> ***"A prima facie case in a Civil Case include but is not confined to a "genuine or arguable" case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as 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."***

I stand to be guided by the above authorities.

On whether or not the Plaintiff has a prima facie case with a probability of success, it is not in dispute that the applicant herein was an employee of the Defendant Bank until the 2nd of July 2015 when the Defendant/Respondent when the Defendant Bank terminated his contract. It is also not in dispute that the Applicant obtained financial accommodation from the Defendant Bank vide a letter of offer dated 13th June, 2011, amounting to Kshs. 3,500,000/= at an interest rate of 5% per annum. The loan facility was secured by a legal charge over the suit property registered in the Applicant's name.

The applicant's contention is that his failure to service the loan facility was directly owing to his unlawful, illegal and unfair dismissal by the Defendant Bank as he was dutifully and faithfully repaying the monthly installments of Kshs.23, 099. Further that the Defendant bank breached the order of court in Cause 1430 of 2015 which ordered the Bank to allow the Plaintiff to continue enjoying the staff interest rate of 5% pending hearing and determination of the suit by converting the interest rate to commercial rate and therefore making it difficult for the Plaintiff to repay the loan.

On the other hand, the counsel for the Defendant Bank in addressing the question whether the Bank breached the Order of the Court, pointed out that the plaintiff has not filed a contempt of court proceedings against the Defendant Bank on the alleged breach of the Court Order. In the Defendant's view, the order of the court given on the 21st August, 2015 did not restrain the Bank from converting the interest rate on the Plaintiff's loan account to commercial rate. Further that the court neither bared the Bank from charging additional interest upon default by the Plaintiff including the Plaintiff on their repayment obligations nor restrained it from offsetting the Plaintiff's outstanding loan from monies held in other account with the bank.

According to the Defendant, it was an express term of the Offer under clause 4 thereof, that the Bank was entitled to charge interest at the prevailing commercial rate without prior notice to the Plaintiff in the event the Plaintiff left the employment of the bank. The Bank therefore submitted that the Plaintiff's ground for prima facie case on alleged breach of Court Order therefore fails.

My view of the foregoing is that the Plaintiff's contention is heavily anchored on the issue of interest payable. It was within the bank's powers to convert the said interest rate of 5% to commercial rate pursuant to clause 4 of the Charge dated 13th June 2011. It is stated therein *inter alia* that: -

> ***"……. should you leave the employment of Equity Bank ltd, the interest will be charged at the prevailing commercial rate without prior notice to the Borrower."***

It is noteworthy to state herein that although the Plaintiff obtained the loan facility during the course of employment to the Defendant bank, a loan agreement is a distinct legal obligation which is independent of the employment. The role played by employment in this scenario was to confer an advantage by way of certain privileges to the Plaintiff for instance the enjoyment of lower interest rate of 5% accorded to all employees of the Defendant Bank instead of them being subjected to commercial rates. The said privileges as expressly stated under the above-cited clause ends upon the employee's departure from the employment. Thus the departure of the Plaintiff from the Bank has a bearing only to the interest rate payable to the defendant bank and not the repayment of the principal amount. The law as regards disputes arising from interest rate payable is well settled and I shall make a determination on the same below.

However, I note that the above powers were reserved by the orders issued in the decision of *Lady Justice Hellen Wasilwa in the ELRC Cause No. 1430 of 2015* stated at paragraph 23 and 24 of her ruling dated 6th April, 2016, as follows:

> ***"However, on a balance of convenience, it would be pertinent for this Court to preserve the loan they are currently servicing because they stand to suffer immensely if they are converted to commercial rates at the moment. If in any event the Court finds otherwise, then the Respondents will still be able to recover their dues as they are holding onto the Applicants terminal dues."***

In the premises, I find that the question of interest rate was unambiguously dealt with, and the was ordered to refrain from converting it to a commercial one unless or until the ELC suit has been heard and determined contrary to the Defendant Bank's contention that no such orders were issued in the abovementioned ruling. Therefore, if at all the Bank converted the said interest to commercial interest rate, the same was done with blatant disregard of the order of the court and should be treated with contempt it deserves. I'm inclined to agree with the Hon. Kwach, JA (as he then was in the case of **Mrao Supra**), when he had this to say:

> ***"I have always understood that it is the duty of any person entering into a commercial transaction particularly one in which a large amount of money is involved to obtain the best possible legal advice so that he can better understand his obligations under the documents to which he appends his signature or seal. If courts are going to allow debtors to avoid paying their just debts by taking some of the defences I have seen in recent times for instance challenging contractual interest rate, banks will be crippled if not driven out of business altogether and no serious investors will bring their capital into a country whose courts are a haven for defaulters. I agree entirely with the Commissioner of Assize Shah that the appellant was not entitled to an injunction upon any one of the grounds urged on its behalf."***

In view of the above decision, I wish set it clear that in accordance with the already existing jurisprudence, a dispute touching on the amount payable or interest chargeable without more is not a ground for restraining a chargee from exercising its statutory power of sale. In the case of ***Priscillah Krobought Grant vs. Kenya Commercial Finance Co. Ltd. and 2 Others, Court of Appeal at Nairobi, Civil Application No. Nai 227 of 1995 (108/95 V.R)*** (unreported), the court stated as follows: -

> ***"Finally, it will bear repetition, we think if we were to state that a court does not normally grant an injunction to restrain a mortgagee from exercising its statutory power of sale solely on the grounds that there is a dispute as to the amount due under the mortgage – see Barmal Kanji Shah & Another Vs. Shah Depar Devji (1965) E. A. 91, 32 Halsbury's Laws of England (4th Edition) paragraph 725and Uhuru Highways Development Ltd. Vs. Central Bank Kenya and 2 Others, Civil Application No. Nai 140 of 1995 (unreported) per Kwach J. A."***

The circumstances in which a mortgagee or charge may be restrained from exercising his statutory power of sale are set out in ***Halsbury's Laws of England Vol. 32 (4th Edition) paragraph 725*** which says: -

> "*725.* ***When mortgagees may be restrained from exercising power of sales—***
>
> > ***"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 arranged. He will be restrained however if the mortgagor pays the amount claimed into court, that is, the amount which the mortgagee claims to be due to him, unless, on the terms of the mortgage, the claim is excessive."***

This passage was quoted with approval by Kwach J.A. in **Mrao Ltd –vs- First American Bank of Kenya Ltd** [2003] K.L.R. 125, at page 127 (supra).

There is no doubt that the Defendant owes the Plaintiff Bank a substantial amount of money. This court is in total agreement with the decisions cited above which upholds the view that a chargee cannot be restrained from exercising its power of sale merely because there exists a dispute as to the amount owing or interest charged. However, the chargee maybe be retrained where the amount claimed is paid in court or is excessive and unconscionable, and or the interest charged is uncontractual or illegal. I also wish to categorically state that the existence of a dispute touching on the interest rate payable is not an excuse for non-repayment of the principal amount of the loan facility. Thus despite existence of a dispute on interest rate payable, the Borrower should be able to continue repaying at least the principal amount of the loan facility pending the determination of the dispute on interest payable. In cases like this, evidence that the borrower continues repayment of the loan facility or at least the principal amount or proof of his willingness to do so is paramount.

Furthermore, despite the fact that the issue of interest has been in dispute in this case, it is not in dispute that the Applicant herein defaulted repayment of the said financial accommodation. The fact that the court in ELRC Cause No. 1430 of 2015 ordered the Bank not to convert the

interest rate to a commercial one until the ELRC suit was heard and determined did not grant the Plaintiff from continuing to repay the mortgage. I have been three years since the court issued the said order and it seems the Plaintiff has not made any effort to service loan in question since no piece of evidence has been produced before me to that effect. It is my view that the Plaintiff, before challenging the issue of interest charged and or amount owing, he ought to have produced evidence before court to show that the principal amount of the loan advanced to him was repaid or he has been making an effort or signs of his willingness to regularize his loan account as required by the contract they entered into.

In view of the foregoing, I take the position that Disputes as regards interest charged must be seen as a subsidiary issue which can only be given enough attention where the Chargor has honoured his obligations to repay the loan or where a charger in default shows willingness to repay the outstanding amount of money owed to lender. The same is not shown in the case.

According to the plaintiff, he made an investment while still in employment with the Defendant Bank through the Employee Share Ownership Plan (ESOP) where I acquired a total of 18, 000 shares in the Defendant company, which shares would have, and in fact matured for purposes of trading at the market price in 2013. He asserted that the shares' current market price is Kshs.32.75 per share, which figure translates to approximately Kshs. 589, 500.00/= being the monetary worth of my shares. The Plaintiff alleged that the Defendant has unlawfully, illegally and or otherwise without any basis, withheld the said shares, which had matured in 2016 when the ELRC ordered the Defendant to accord him all the benefits he was entitled to as an employee and the same is currently an issue for determination in the ELRC case at Nairobi. He also claims that he had a mileage claim against the Defendant which the Defendant has blatantly refused to pay. The same is currently is also an issue for determination in before the ELRC at Nairobi.

The defendant Bank on the other hand asserted that the Plaintiff was well aware that his saving in SACCO had been utilized to offset part of the loan and the plaintiff's disposition at para 16 of his Supporting Affidavit is to the effect that he has Kshs. 28, 053 in the SACCO is untrue. On the mileage claim, the Defendant Bank confirmed that the same is an issue pending determination in Cause No.1430 of 2015. Regarding the issue of Equity Employee Share Ownership plan, the Bank submitted that the allegation is baseless as the Plaintiff's aware that the Bank had disposed of his shares and proceeds realized therefrom were applied to offset the outstanding loan. The Defendant Bank further dismissed the Plaintiff's contention that it holds his monies in the sum of Kshs. 1, 586, 046 saying that such amount is non-existent as the Bank had already utilized the sums in SACCO and ESOP to offset the loan leaving outstanding balance as demanded.

In the foregoing, it is important to note that the parties herein entered into a loan contract which was dully and willfully executed by both parties. The said contract conferred rights and obligations to the parties herein which include the obligation borne by the Plaintiff to repay the loan facility according to the terms of the contract. The Defendant was also clothed with power of sale upon default of repayment of the loan facility by the plaintiff pursuant to section 90 and 96 of the Land Act, 2012. Nowhere, in the contract that the parties herein signed is expressly stated that incase of default, the monies being which the plaintiff is claiming would be used to offset the loan facility. That is not to say it's wrong for the Bank to do so as an alternative to recover its monies from the borrower, but the Plaintiff should not be allowed to the same as an excuse for not repaying the loan facility for the past three years as agreed upon in the loan agreement or at least making an effort or showing willingness to do so. The said claims advanced by the Plaintiff herein have no bearing to the default and repayment of the loan amount as far as the loan agreement is concerned. Neither is the exact amount of the monies he is claiming are known which an issue is pending determination in the ELRC. The same can be used to hinder the Defendant bank from recovering its loan amount as per the agreement they entered into. This limp therefore fails.

On second issue as to whether the Plaintiff might otherwise suffer irreparable injury which would be adequately compensated by way of damages. From the facts and materials presented, I find that as much as it is important to preserve the Plaintiff's right to property pursuant to article 40 of the constitution of Kenya, it is also of utmost importance that the interest and rights of the Chargee or Defendant Bank to the mortgage in question must be protected. I'm alive to the fact that the Plaintiff is likely to lose the suit property, which is his family home and his only source of livelihood. I wish to associate myself with the case of ***Andrew M. Wanjohi –v- Equity Building Society & 7 Another (2006) eKLR,*** where the court held *inter alia* that:

> ***"…….by offering the suit property as security the chargor was equating it to a commodity which the chargee may dispose of, so as to recover his loan together with the interest thereon."***

I wish to reiterate that since the suit property was given as security for the loan, it became a commodity for sale and it is therefore subject to sale in case of default in loan repayment in the event that the Chargee decides to exercise its statutory power of sale pursuant to the provisions of section 90 and 96 of the Land Act, 2012. The same proposition was taken by ***Ringera J in Isaac O. Litali v Ambrose W. Subai & Others HCCC No.2092 of 2000(unreported); John Nduati Kariuki T/A Johester Merchants –vs- National Bank of Kenya Limited (2006) 1 EA 96; Thomas Nyakamba Okong'o vs Co-operative Bank of Kenya Limited (2012) eKLR and Maithya –vs- Housing Finance Co. of Kenya & Another (2003) 1 EA 133.***

I therefore take the view that in absence of any effort from the Plaintiff to rectify the default, this court is not able to find that the Plaintiff will suffer irreparable injury if the injunctive orders are not granted.

On a balance of convenience, from the facts and materials presented, I find that the balance tilts in favour of the Defendant bank. Bearing in mind that the Bank is in s business of selling money to earn some profit, the Defendant hearing gave away its money to the Plaintiff in 2011 which is roughly six years ago and the Plaintiff defaulted repayment of the same in 2015 which is roughly three years ago and since then the Plaintiff has not been making any effort to repay even the principal amount to the defendant Bank. Having established that the interests of the Bank are in imminent need of protection at this point, this Court is unable to agree with the Plaintiff's contention that he is more likely to suffer more inconvenience that the Bank if the injunction is disallowed.

In view of the foregoing, it is abundantly clear that the Plaintiff has failed to establish a prima facie case to meet the threshold for the grant of the order sought herein. Consequently, the Plaintiff's Notice of Motion dated the 25th April, 2017 is hereby dismissed for want of merits. I also take the position that if the Defendant Bank wishes to exercise its statutory power of sale, it must issue fresh statutory notices and ensure an updated valuation report is prepared as required by the law and also to enable the Plaintiff have ample time to try and rectify the default.

Costs will be in the cause.

Dated signed and delivered in open Court at Kajiado this 1St March 2019.

R. NYAKUNDI

JUDGE

Representation

Mr. Njenga holding brief for Kiche for the Defendant