



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MILIMANI COMMERCIAL & TAX DIVISION**

**CIVIL SUIT NO. 79 OF 2019**

**A.O.BASID LIMITED.....PLAINTIFF/APPLICANT**

**VERSUS**

**ASL CREDIT LIMITED.....DEFENDANT/RESPONDENT**

**DIRECTIONS**

1. I have considered the documents filed by the parties; in particular the Replying Affidavit dated 24<sup>th</sup> April 2019, filed by the Plaintiff/Applicant and deposed by Abdi Basid Omar Shekh, a director of the Applicant Company.

2. The affidavit addresses the four questions raised by the court, which are as follows:-

*(a) What was the amount of money advanced to the Plaintiff in total;*

*(b) How much has been paid so far and when was the last installment paid;*

*(c) What is the outstanding balance (if any); and*

*(d) Are there any the arrears (if any).*

3. In response, thereto, the Plaintiff stated that the Defendant registered a charge over suit property being Mainland & North Section V1/1213 and 1214, Title No. 10475 Fort Reitz, in the sum of Kshs. 100,000,000. However, the only sum of Kshs. 31,200,000.00 was advanced. That a further sum of Kshs. 48,751,183.00.

Kshs. 30,000,000.00 and Euros 251,000 were granted but was secured by different properties from the suit property.

5. Finally, the Applicant argues that, the sum advanced and secured by the subject security has been fully settled. The Applicant attached to the Replying Affidavit a copy of Higher purchase application form, list of securities held under higher purchase agreement and a statement of accounts showing payments made.

6. On the contrary, the Respondent through a Replying Affidavit dated 27<sup>th</sup> March 2019, sworn by Daniel Wandera an Advocate in the legal department of the Respondent avers that, the Applicants were advanced the following facilities;

*(a) Kshs. 48,751,183.00 on 25<sup>th</sup> March 2015*

*(b) Kshs. 30,000,000 on 17<sup>th</sup> May 2016*

*(c) Euros 251,000 on 24<sup>th</sup> February 2017*

*Total sum advanced 101,843,183.00*

7. According to the Respondent, the Plaintiffs have paid back a total sum of Kshs. 97,416,485.00 as at 28<sup>th</sup> March 2019. That the last

installment of Kshs. 930,100.00 was paid on 20<sup>th</sup> January 2018. It is further submitted that the Applicants are in total arrears of Kshs. 174,333,204.00 as at 28<sup>th</sup> March 2018. The Respondents argue that by filing numerous applications the Applicants are abusing the court process and that the court should not grant any interim orders to stop them from selling the property. The Respondents have annexed the Replied Affidavit to the following documents.

(a) Copies of the applications made by the Plaintiffs for the various facilities marked "DW1"

(b) Copies of transactions advise evidencing disbursements of the funds to the Applicants marked "DW2"

(c) A copy of the legal charge dated 8<sup>th</sup> August 2016;

(d) Correspondences of various dates 16<sup>th</sup> January 2018, allegedly from the Plaintiff seeking for accommodation to regularize the loan account marked "DW4";

(e) A copy of summary statement of accounts of the Plaintiffs loan account marked "DW5"

(f) A statement of account of the Plaintiffs loan account marked "DW5".

8. It is therefore apparent from the documents filed by the parties, whereas the Applicant is of the view that the legal charge secured only one facility, the Respondents are of the view that it secured all the three facilities. One would therefore need to examine these documents further and/or have an address from the parties as to the correct position.

9. Be that as it were, the Applicants have not given the court any evidence to show that they have fully repaid the particular loan they allege was secured by the suit property. They have not disputed the averments by the Respondents that the said facility is not fully repaid and that the last installment was on 20<sup>th</sup> January 2018. I have also seen correspondence from the Applicants dated 16<sup>th</sup> January 2018 addressed to the firm of Tumusiime & Company Advocates, in Kampala Uganda in which they state as follows:-

*" As you are informed I have outstanding arrears with financiers who facilitated the servicing of the contract in Total Uganda Limited, it is in my best interest to settle my outstanding arrears with them the creditors and thus giving instructions and authorizing you to disburse USD 370,000 to ASL Credit Limited."*

The Applicants in the said correspondence gave details of the Respondents Bank account in which the funds were to be paid.

10. From the documents given by the Applicants, I find insufficient evidence to support the averments that the legal charge secured only one facility and/or that there are other securities issued to cover the other facilities. The statement of account produced by the Plaintiff and marked "ABOS2" addresses only one facility, but not the other facilities. In view of the scarce information given by the Plaintiff/Applicant, the court is unable to grant any interim orders. However, I also note that, the Respondents gave the court a figure of the outstanding balance and the same was given as the amount in arrears. The court was not told when the loan was advanced and the last date of payment and neither was the value of the security indicated. Further, the court was not told the securities offered. In the absence of this information, the court is not able to make any interim orders pending the hearing of the case.

11. Those are the orders of the court.

**Dated, delivered and signed in an open court this 7<sup>th</sup> day of May 2019.**

**G.L. NZIOKA**

**JUDGE**

In the presence of:

Mr. Ongundi for the Applicant

Mr. Lusi for the Respondent

Dennis .....Court Assistant