REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL CASE NO.364 OF 2018

JOHN NJUGUNA NGARUIYA.....1ST PLAINTIFF

ESTHER WAIRIMU NJUGUNA.....2ND PLAINTIFF

VERSUS

INTER TROPICAL TIMBER TRADING LIMITED...1ST DEFENDANT

GEOFFREY NGANGA KARIUKI.....2ND DEFENDANT

PREMIER CREDIT LIMITED.....3RD DEFENDANT

RULING

(1) Before the Court is the Notice of Motion dated **20th August 2018** in which the 1st and 2nd Applicants seek the following Orders:-

> **"(a) SPENT**
>
> **(b) THAT a temporary injunction restraining the 3rd Respondent whether by itself, its agents and its servants from selling, dealing, interfering, alienating or disposing of all that parcel of land known as Land Parcel No. Kiambu/Municipality Block 5 (Kuamumbi) 112 pending the hearing and determination of the suit.**
>
> **(c) Any other relief the court deems fit in the interest of justice.**
>
> **(d) Costs of the application."**

The application which was premised upon **Section 1, 1A, 3** and **3A** of the **Civil Procedure Act, Order 40** of the **Civil Procedure Rules 2010,** and all other enabling provisions of the law, was supported by the Affidavit sworn by **JOHN NJUGUNA NGARUIYA** (the 1st Applicant) on **20th August 2018**.

(2) The 3rd Respondent **PREMIER CREDIT LIMITED** opposed the application through their Replying Affidavit sworn on **24th October 2018** by **JAMES MUGAMBI** the Managing Director of the 3rd Respondent.

(3) The Court directed that the application be disposed of by way of written submissions. Pursuant to these directions the Applicants filed their written submissions on **22nd November 2018**, whilst the 3rd Respondent filed its written submissions on **25th January 2019**.

BACKGROUND

(4) The undisputed facts of this case are as follows. On or about **30th October 2015**, the 1st Respondent **INTER TROPICAL TIMBER TRADING LTD** through its director **GEOFFREY NGANGA KARIUKI** (The 2nd Respondent herein) approached the 3rd Respondent seeking a Bank Guarantee for **Kshs.27,100,000/=.** The said Bank Guarantee was to be issued in favour of **CABROS EAST AFRICA LTD** in order to fulfil a performance Bond to Kenya Power & Lighting Company (hereinafter KPLC) for supply of treated poles. The 3rd Respondent was however unable to guarantee the entire amount and offered vide its Letter of Offer dated **2nd November 2015** to guarantee a sum of **Kshs.13,550,000/=** only.

(5) The 2nd Respondent then approached Chase Bank Ltd (before it was placed under receivership) to guarantee the balance required for the Performance Bond. Accordingly the 3rd Respondent did pay over to Chase Bank Ltd a sum of **Kshs.13,550,000/=.** Consequent to this Chase Bank Ltd did issue a Bank Guarantee (Serial No.001PBGR 1537000) for **Kshs.27,100,000/=** to the 1st Respondent on **5th November 2015** for the benefit of **Cabros East Africa Ltd** (Annexture 3 in the 3rd Respondent's Replying Affidavit dated **5th November 2015**). The said Bank Guarantee which was to be valid for six months took effect on **30th October 2015** and was to expire on **27th April 2016.**

(6) The Applicants do not dispute the fact that as security for this Bank Guarantee the 2nd Respondent in his capacity as Director of the 1st Respondent and the Applicants all signed personal guarantees by which the two suit properties being:-

(i) LR Kiambu/Municipality Block 5 (Kiamumbi) 112 and

(ii) LR.NO.Kiambu/Municipality Block 5 (Kiamumbi)/703

which properties were both registered in the joint names of the two Applicants, would be charged in favour of the 3rd Respondent (annexture 4 to the Replying Affidavit dated **24th October 2018**) None of the facts stated above are in dispute.

(7) As it transpired this Guarantee was never enforced because Chase bank went into receivership. The 3rd Respondent then demanded from the Applicants the sum of **Kshs.4,060,170** representing the costs incurred by the 3rd Respondent in arranging for the Bank Guarantee. The Applicants aver that instead of releasing to them the Title Deeds for the suit properties the 3rd Respondent, handed said Title Deeds to Auctioneers with instructions to sell by auction the suit properties in order to recover this sum of **Kshs.4,060,170**.

(8) The Applicants submit that it is mischievous for the 3rd Respondent to by-pass Chase Bank (now under receivership) and claim their costs from the Applicants knowing fully well that the Bank Guarantee was not and has never been enforced to date. The Applicants contend that this amounts to unjust enrichment.

(9) The Applicants submit that the 2 suit properties being worth above **Kshs.10 Million** would easily fetch **Kshs.7.0 Million** in an auction yet the amount due is only some **Kshs.4.0 Million**. That the amount being claimed as costs is in any event exorbitant and can only amount to extortion and that the 3rd Respondent is acting in bad faith seeking to settle personal scores between the 1st and 2nd Defendants who are neighbours.

(10) The Applicants further contend that given that the Guarantee Agreement was frustrated due to the placing of Chase Bank under receivership, their obligations under the Guarantee Agreement were also extinguished and stood terminated and accordingly the two Title Deeds ought to have been returned to them. The Applicants submit further the 3rd Respondent cannot claim these costs when it was not they who issued the Bank Guarantee.

(11) Finally the Applicants deny having entered with any agreement to pay such costs and deny having acceded to paying this sum of **Kshs.4,060,170/=.** They urge that they were not privy to the calculation of this amount and if any sum is due it ought to be paid by the 1st and 2nd Respondents. Finally the Applicants insist that they were never served with any redemption notice for the suit properties thus any sale of the same would be unprocedural. The Applicants urge the Court to allow their application as prayed.

(12) On their part the 3rd Respondent submits that the Applicants acknowledged the disputed costs which were clearly provided for in the Charge Agreement. That the Applicants through their Advocate expressed a clear intention to offset the debt due within a specified period, on condition that the two Titles were released back to them. The 3rd Respondent submits that notwithstanding the fact that Bank Guarantee was not enforced, they still incurred the cost of **arranging** for that Bank Guarantee which cost was expressly acknowledged by the Applicants. The 3rd Respondent states that the Applicants were duly issued with a redemption notice in accordance with the law and were also issued with Statutory Notices of Default; thus the Applicants cannot feign ignorance of the 3rd Respondents intention to redeem. The 3rd Respondent submits that the Applicants are deliberately misrepresenting the facts in an attempt to use the courts as an avenue to evade their obligation to pay the amount due. The 3rd Respondent further contends that the Applicants will not be prejudiced if they pay the amount claimed as they remain at liberty to claim this amount back from the 1st and 2nd Respondents. It is finally submitted that no prima facie case has been shown to warrant the issuance of the injunctive orders sought and the same should be denied.

ANALYSIS AND DETERMINATION

(13) As stated earlier the majority of the facts of this case are not in dispute. The bone of contention is the amount of **Kshs.4,060,170/=** demanded by the 3rd Respondent from the Applicant as costs incurred in arranging for the Bank Guarantee for **Kshs.27,100,100**.

The conditions upon which an interlocutory injunction may be granted were well set out in the case of **GIELLA –VS- CASMAN BROWN** as follows:-

(a) The 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 injury, which would not be adequately compensated by an award of damages.

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

(14) The Applicants must establish a prima facie case with a probability of success. The definition of what constitutes a "**prima facie case"** was given in the case of **MRAO LTD –VS- FIRST AMERICAN BANK OF KENYA LTD & 2 others** in which it was held:-

> **"A prima facie case in a civil application includes but is not confined to a 'genuine and arguable case". It is a case 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."**

(15) Having considered the application before me together with all relevant pleadings including the written submissions filed by both parties, I find that two issues arise for determination.

> **1. Were the Applicants issued with the relevant Statutory Notices?**
>
> **2. Has a prima facie case been established to warrant a grant of the orders sought.**

I will now proceed to deal with each issue individually.

(i) <u>Were requisite notices issued</u>?

(16) The Applicants have averred that they were not issued with redemption notices for the suit properties as required by the law. A look at the file reveals this to be a blatant untruth. In their own Notice of Motion dated **20th August 2017**, the 1st Applicant's annexture **JNN"4"** is a Redemption Notice dated **22nd November 2017** addressed to the 1st Respondent which notice gave the Respondent 45 days to redeem the suit properties by payment of this sum of **Kshs.4,060,170/=.** Having himself annexed this Notice of Redemption to his pleadings the 1st Applicant cannot claim ignorance of that Notice. In addition the 3rd Respondent have annexed to their Replying Affidavit dated **24th October 2018** a copy of the Statutory Notice of Default (Annexture **"JN"5")** dated **1st September 2017**, addressed to the Applicants (amongst others), which Notice was issued under **Section 90(3)** of the **Land Act, Cap 280**, **Laws of Kenya.** I find therefore that there exists incontrovertible proof that the requisite notices were issued to the Applicants and they cannot now deny receipt of the same.

(iii) <u>Has a prima facie case been shown</u>?

(17) The Applicants have not denied the Charge Agreement nor have they denied being parties to the same. Clause 3.1 of that Charge Agreement provides inter alia that:-

> **"3.1 All costs, charges and expenses incurred by the chargee in obtaining or attempting to obtain payment of any moneys hereby secured or properly incurred by the Chargee in relation to or under this Charge …..shall by virtue of the provisions of sub-clause. 3.2 of this present clause be deemed to be included in the expression "expenses".**

Clause 4 of the same Charge Agreement reads as follows:-

> **Secured amount**
>
> **4. The amount secured by this Charge shall be the aggregate of Prescribed Maximum Debt or so much thereof as may from time to time be outstanding all interest from time to time due or payable to the Chargee or covenanted to be paid to the Chargee and all costs taxes liabilities obligations charges and expenses incurred by the Chargee from time to time in relation to this Charge (hereinafter together called "the Charge Debt").**

(18) By signing this Charge Agreement the Applicants bound themselves to the terms and conditions of said agreement. The terms clearly provided for payment of "**expenses**" incurred by the Chargee in facilitating the Charge. The Applicants cannot now seek to repudiate that agreement which they voluntarily signed.

(19) The Applicants have challenged the sum of **Kshs.4,060,170/=** levied as costs by the 3rd Respondent terming the same unreasonable, exorbitant, and extortionist. However it is manifest from the letter dated **13th January 2017**, written by the 1st Defendant to the 3rd Defendants that the Applicants were fully aware of these costs and undertook to clear the same. The said letter (Annexture **"2"** to the 3rd Respondents Replying Affidavit dated **24th October 2018**) reads in part as follows:-

> **"Dear Sir, Madam**
>
> **<u>RE: BANK FEES KSHS.4,060,170</u>**
>
> **This is to advise that we are aware of the bank fees due to your institution in our account. We would like to undertake to clear the outstanding amounts by 3rd February 2017…."**

(20) This letter amounts to a clear and unequivocal admission by the Applicants of the debt due to the 3rd Respondent in the sum of **Kshs.4,060,170/=** as fees and even went further to undertake to clear that amount by **3rd February 2017**. Having so admitted their indebtedness to the 3rd Respondent the Applicants cannot now turn around to deny the debt.

(21) Having considered all relevant factors, I find that the applicants have failed to show a prima facie case with a probability of success. Accordingly, I decline to grant the interim orders sought. The application dated **20th August 2018** is hereby dismissed in its entirety with costs to the Respondents.

Dated and Delivered in Nairobi this…6th …day of May 2019.

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Justice Maureen A. Odero