REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL SUIT NO. 20 OF 2020

CAROL CONSTRUCTION ENGINEERS LIMITED

JEREMIAH MWEBI MAYIEKA.................. PLAINTIFFS/APPLICANTS

VERSUS

NATIONAL BANK OF KENYA......................DEFENDANT/RESPONDENT

RULING

1. The Plaintiffs/Applicants ("Applicants") took out a Plaint lodged in Court on 26/03/2020 seeking the following prayers:

a. A permanent injunction order do issue to restrain the Defendant, its agents and or servants from the intended fraudulent advertisement and or the intended fraudulent sale, alienation and or disposal of the suit property herein namely Nakuru/Municipality Block 2/58/Nakuru.

b. An order do issue directing the Defendant within 14 days thereof to discharge the charge registered in respect of title no. Nakuru/Municipality Block 2/58/Nakuru.

c. Refund of overpayment of Kshs. 180,651.30.

d. General damages for fraud and/or deceit;

e. Aggravated and or exemplary damages;

f. Costs;

g. *Interests on (c) and (d) at prevailing commercial rates with effect from 17/10/2017 until payment in full.*

2. Contemporaneously with the Plaint, the Applicants filed a Notice of Motion Application dated 26/03/2020 seeking for the following reliefs:

a. Spent.

b. Spent.

c. That pending the hearing and determination of the suit herein, an interlocutory injunction order to issue to restrain the Defendant either by itself, its agents and/or servants from fraudulently purporting to advertise for sale or purporting to interfere, alienate or otherwise howsoever deal with security herein namely title no. Nakuru/Municipality Block 2/58.

d. That the auctioneers' costs and other charges occasioned by the fraudulent statutory notice dated 29/10/2019 and the 12/02/2020 redemption notice herein dated be settled by the Defendant.

e. *That, in any event, the costs hereof be awarded to the Plaintiffs/Applicants*.

3. The Application was supported by a Supporting Affidavit deponed by the 2nd Applicant.

4. The Defendant has filed a Statement of Defence. In addition, through its lawyers, it has filed a Replying Affidavit sworn by Judah Kimutai, a Loans Recoveries Officer in the Bank's Nakuru Branch.

5. Due to the COVID-19 Pandemic and in line with new directives and regulations issued, all the documents in this case were lodged in Court electronically. Additionally, after directions issued by this Court, the Written Submissions were lodged electronically as well. Thereafter, the parties' respective lawyers appeared by Video-conference, confirmed the filings and indicated that they did not wish to orally highlight their submissions.

6. The basic facts of the case are not contested. The Applicants took an overdraft facility from the Respondent sometime in 2008. The Applicants offered the Nakuru/Municipality Block 2/58 (the "Suit Property") as collateral for the facility. The Applicants initially defaulted in servicing the loan facility. By a letter dated 21/03/2013, the Defendant stated that the amount due was Kshs. 3,518,308.70. This letter by the Respondent was in response to one by the 1st Applicant conceding that it had defaulted on the terms of the Overdraft facility and proposing to service the loan after a grace period of 60 days to enable it to complete construction of a housing project it had in Kenlands area, Nakuru. In that letter dated 18/03/2013, the 1st Applicant proposed that it will service the loan by paying all the rents collected from the Project. It expected that the rents collected will be in the region of Kshs. 600,000/- per month.

7. In its response dated 21/03/2013, the Respondent agreed to accommodate the Applicants in the following terms:

> *….[W]e have reconsidered your proposal to resume repayment of your overdraft after 60 days from the date of your letter and have exceptionally accepted it in order to give you time to complete construction of your buildings in Kenlands area which you claim are almost complete.*
>
> *You are hereby required, therefore, to make your first depost of Kshs. 600,000/- on or before 20th May, 2013 and by every 20th day of every subsequent month until your loan is fully cleared.*
>
> *Kindly note that any default in payment of the above amount shall leave the Bank with no other option but to commence the process of sale of the security property held through public auction at your costs and consequences in order to clear the debt in our books.*

8. The parties are in agreement that the Applicants, thereafter, proceeded to service the loan. As at October, 2017, the Applicants had fully paid the amount that had been indicated as outstanding in the Respondent's letter dated 21/03/2013. Indeed, by October, 2017, a provisional statement showed the account was in the credit zone.

9. The parties also agree that on 31/10/2017, the Respondent posed an item it described as "Main Interest" in the sum of Kshs. 3,112,045.87 into the account. It is this sum which is the basis of the dispute herein.

10. The Respondent explains that this disputed sum is the "legitimately charged accrued interest covering the period from 2012." Mr. Kimutai explains in his affidavit that "the bank's financial system computed the accrued interest which was not reflected on the daily bank statement as long as the account was in default as the 1st Plaintiff account was." The Respondent further explain that the charge document clearly provided that the 1st Applicant was required to pay all the accrued interests (and penalties in the event of default).

11. On the other hand, the Applicants argue that when the Respondent accepted the Applicants' offer on how to liquidate the overdraft facility, there was no discussion or agreement on the payment or even accrual of interests. The Applicants argue that by its letter dated 21/03/2013, the Respondent represented that it will not charge any accrued interests and that once the Applicants liquidated the amounts due as at that date, they will be discharged of the date. Once the Applicants accepted the offer, vide their letter dated 30/03/2013, the Applicants say that the Respondent is estopped from insisting on payment of the accrued interests. This is so, the Applicants argue, because the Applicants relied on the representation of the Respondent and liquidated the agreed debt. The Applicants argue that they acted on the Respondent's representation that the payment of Kshs. 3.5 Million was in full and final settlement of the debt owed.

12. The Applicants relied on section 120 of the Evidence Act. It provides as follows:

> *When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing.*

13. The Applicants cited the famous decision by Lord Denman CJ in the English case, ***Pickard v Sears 112 E.R. 179*** thus:

> *The rule of law is clear that where one, by his words or conduct, willfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is precluded from averring against the latter a different state of things as existing at the time..*

14. The Applicants also relied on the Court of Appeal's decision in ***Serah Njeri Mwobi v John Kimani Njoroge (2013) eKLR***, where the Court held that:

> *The doctrine of estoppel operates as a principle of law which precludes a person from asserting something contrary to what is implied by a previous action or statement of that person.*

15. They also cited the Court of Appeal's decision in ***First Assurance Company Limited v Seascapes Limited (2008) eKLR*** where the Court gave the elements which must be established for estopped to operate as representation which is acted upon by the opposite side to its

detriment.

16. In the written submissions by its Counsel, the Respondent insists that there is nothing in the letters dated 18/03/2013 and 21/03/2013 that can be directly or remotely be described as an agreement not to charge interests. It argues that section 88(1)(a) of the Land Act, 2012 creates a presumption that every charge shall attract interest which must be paid by the Chargor. That presumption, the Respondent argues, cannot be rebutted by the "wishful thinking" of the Applicants that they do not owe the interests accrued.

17. In addition to the position that the Respondent never made any representation to the Applicants that it will not charge any accrued interests, the Respondent's counsel argues that an estoppel can never give rise to a cause of action; it may only be used as a defence.

18. All in all, the Respondent argues that no estoppel has been established because no representation was made; that there was a presumption that the Applicants would pay the accrued interests; and that, therefore, the Applicants have not met the conditions for granting an injunction as set out in ***Giella v Cassman Brown & Co. [1973] E.A. 358***.

19. The Respondent's Counsel referred the Court to four authorities: ***Robert Njoka Muthara & Another v Barclays Bank of Kenya Limited & Another [2017] eKLR; Gesa Building and Civil Engineering Limited & Another v Equity Bank [2019] eKLR; Orion East Africa Limited v Housing Finance Kenya Limited;*** and ***National Industrial Credit Bank v Acquinas F. Wasike & Another [2015] eKLR***. I diligently read all the authorities submitted but I did not find them to be entirely on point. The ***Robert Njoka Muthara case*** dealt with the question whether a guarantor can validly question interests charged on a loan taken by his benefactor when the loan agreement between the bank and the benefactor provided for the interest rates. The ***Gesa Building Case*** dealt with the question whether a dispute on the amount owed is sufficient reason to stop a bank from exercising its statutory power of sale.

20. The ***Orion East Africa Limited Case*** dealt with the question whether on the facts of the case the Bank was entitled to charge penalty interests, default charges or interests on arrears. The answer the Court gave was that the contract of the parties controlled. In this case, however, the narrow question is whether the doctrine of estoppel operates to modify the contract between the parties.

21. Lastly, the ***Acquinas Francis Wasike Case*** also dealt with the question whether interest is payable on a debt or loan in the absence of an express agreement or some course of dealing or custom to that effect. The answer the Court gave is in the negative: for interest to be payable, it must be part of the contract between the parties. Again, that is not the issue in contention in this case. Rather, the issue in this case is whether, the doctrine of estoppel properly established can be relied on to preclude a bank from charging interest that was otherwise payable; and if so whether the conditions for the operation of the doctrine have been met in the present case.

22. From this outline of the facts of the case and the contentions of the parties, the case presents two issues for resolution:

> a. *First*, whether the doctrine of equitable or promissory estoppel can operate to validly preclude a chargee in a bank-customer relationship from insisting on charging interests which would otherwise be owed under the charge.
>
> b. *Second*, if the answer to (a) above is in the affirmative, whether it can be said provisionally that Applicants have established a *prima facie* case demonstrating that all the elements for the operation of the doctrine of estoppel are the present in this case.

23. As the cases cited by the Applicants show, the doctrines of estoppel by representation as well as promissory estoppel are well established in our jurisprudence.

24. It is true that in the English Common Law, equitable or promissory estoppel does not, generally, found a cause of action. This limitation goes back to the founding (or rediscovery) of the doctrine in the contract jurisprudence by Lord Denning. For example, in ***Combe v. Combe [1951] 2 K.B. 215, 219***, Lord Denning remarked that equitable estoppel:

> *does not create new causes of action where none existed before. It only prevents a party from insisting on his strict legal rights when it would be un- just to allow him to enforce them.*

25. Lord Denning seems to have gone a little further than this statement of the law in the celebrated case of ***Central London Property Trust Ltd. v. High Trees House Ltd. [1947] K-B. 130 (1946***) (the "High Trees Case"). In the High Trees case, the plaintiff was a lessor of a block of flats. The lessor represented to the lessee, that the lessee could pay reduced rent due to the economic conditions during the second War. The lessee proceeded to pay the reduced rent for four years. By the fourth year, all the flats in the block were fully let and the lessor demanded for payment of rent in full-including the arrears for the period when the lessee had paid reduced rent. The lessor instituted proceedings seeking a declaration that the rent payable was that which was stated in the lease agreement on the ground that the subsequent arrangement for reduced rent was not supported by consideration. Lord Denning held that the lessor could not recover the arrears that had accrued reasoning as follows:

> *The law has not been standing still since* ***Jorden v. Money****. There has been a series of decisions over the last fifty years which, although they are said to be cases of estoppel are not really such. They are cases in which a promise was made which was intended to create legal relations and which, to the knowledge of the person making the promise, was going to be acted on by the person to whom it was made, and which was in fact so acted on. In such cases the courts have said the promise must be honored .... The courts have not gone so far as to give a cause of action in damages for the breach of such a promise, but they have refused to allow the party making it to act inconsistently with it*

26. This is, most conservatively stated, the law as it exists in Kenya today. It might be arguable that indeed the law has inched closer to the American position where a promissory estoppel can found a cause of action – but at worst – the doctrine of equitable estoppel prevents a party from acting inconsistently with a promise the party has made if that promise or representation had the effect of inducing another party to reasonably rely on it to that other party's detriment.

27. In the present case, the Applicants' case sound in fraud and breach of contract: they insist that they have discharged their side of the bargain the contract they had with the Respondent; and that, given that position, it would be a fundamental breach of contract and fraudulent for the Respondent to refuse to discharge the Charge over the Suit Property and to purport to exercise statutory power of sale over it. They aim to call in aid equitable estoppel to estop the Respondent from denying that it represented, through its agents, that it will not charge accrued interests on the remaining balances; and by its conduct backed up such representation and that, consequently, the Respondent is precluded to claim otherwise. If so prevented from claiming otherwise, the Respondent will, then, be unable to rely on the literal terms of the Charge to insist on payment of accrued interest. If so prevented, it follows that the Applicants would prevail in their cause of action to demonstrate that the Respondent would be in fundamental breach of contract to refuse to discharge the Charge over the Suit Property and to insist on exercising statutory power of sale over it.

28. In this regard, then, the Applicants are not really using equitable estoppel to found a cause of action – but deploying it to support another cause of action by preventing the Respondent from resiling from its purported representation. It seems to me, then, that the answer to the first issue presented by the facts of this case is that in an appropriate case the doctrine of equitable or promissory estoppel can operate to validly preclude a chargee in a bank-customer relationship from insisting on charging interests which would otherwise be owed under the strict terms of the charge.

29. This brings us to the second issue: whether it can be said provisionally that Applicants have established a *prima facie* case demonstrating that all the elements for the operation of the doctrine of estoppel are the present in this case.

30. It is important to recall the procedural posture of this case. This is an application for injunctive relief. In our jurisprudence, consideration whether a party is entitled to an interlocutory injunction is now enshrined in a tripartite legal criterion set out in the celebrated case of ***Giella vs Cassman Brown*** in the words of Spry V.P.:

> *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 be adequately compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience*.

31. Hence, the Court's first task is to determine if the Applicant has established a *prima facie* case with a probability of success once the full case is fully ventilated. It is important to recall that at this point the Court can do no more than form a necessarily provisional view of the case. Translated to our specific tasks, the question would be whether the Applicants have placed sufficient material on the table to warrant a provisional finding by the Court that upon full ventilation of the facts in the case they are likely to persuade the Court that all the elements of equitable estoppel are present to support their cause of action against the Respondent.

32. From a scan of our decisional law, one must show the following five elements in order to establish estoppel by representation or promissory estoppel:

a. *Representation*: There must be a representation by the representor in words or by acts or conduct;

b. *Reasonableness*: The person relying must satisfy the Court that it was reasonable for them to rely on the representation;

c. *Reliance*: the victim must demonstrate that he was induced by the representation and in such reliance acted on it;

d. *Detriment*: the victim must show that in acting in reliance of the representation he suffered some detriment or changed his position; and

e. *Unconscionability*: the victim must demonstrate that it would be unconscionable to permit the representor to resile from the representation.

33. Where each of these elements is demonstrated, a party will be permitted to raise an estoppel to prevent the opposite side from going back on their word and establishing by evidence any averment which is substantially at variance with his former representation.

34. The most critical question to ask in this regard is whether the Respondent's letter dated 21/03/2013 coupled with the conduct of the Respondent thereafter amounts to a representation capable of being reasonably relied on by the Applicants.

35. As outlined at the beginning of this opinion, the Respondent's counsel insists that the Respondent's letter contains no representation at all that it will not insist on the payment of accrued interests. The Respondent argues that the text of the letter, terms of the Charge and the law (section 88 of the Land Act) all combine to belie the existence of the alleged representation by the Respondent.

36. I have carefully looked at the correspondence between the parties and the other documents filed in the case. I must be careful not to prejudge final determination of the issues after comprehensive consideration of all the evidence in the case. However, from what has been presented by the parties at this stage, it is permissible to form the provisional view that upon the full ventilation of the facts, there is a probability that the Applicants would be able to demonstrate that the Respondent made a representation that it will not charge any further accrued interests after the Applicants liquidated the amounts owed on the Overdraft facility as at 21/03/2013. I say so for two reasons:

a. *First*, the letter dated 21/03/2013 appears to give the 1st Applicant the re-assurance that its obligation is to pay the overdrawn balance until it is "fully cleared." There is no mention of accrued interests in that letter. The letter also talks of "exceptional basis."

b. *Second*, the conduct of the Respondent in issuing statements which did not contain any accrued interests over the period of four years during which the Applicants were paying down the loan as per the agreement in the letter dated 21/03/2013 would seem to

support the view that the Respondent was acting pursuant to the representation that it would not insist on payment of accrued interests. Indeed, as recently as 18/10/2018, the Respondent issued an official statement to the Applicants showing that they had cleared paying the loan; and that their account had a credit of Kshs. 10,000/-. It was only thereafter that the Respondent, at once, introduced the "main interest" of Kshs. 3,112,045.87 claiming it was the accrued interests. It is noteworthy that for four years no interests had been reflected in the account which would be more in keeping with the representation the Applicants claim the Respondent made that it would not charge accrued interests.

37. Based on these two factors, this Court makes a finding that the Applicants have established a *prima facie* case that they might prevail on merit on full ventilation of the evidence to demonstrate, with the aid of the doctrine of promissory estoppel that they are entitled to the discharge of the charge and a favourable verdict of fraud in the case. This is because there is a *prima facie* showing of material representation based on the analysis above. The representation, if proved, would be, in context, reasonable. It was also relied upon by the Applicants who adjusted their position in its reliance. Finally, it would, no doubt, be unconscionable to permit the Respondent to resile from that position if, in fact, the representation was made. In other words, all the elements for the operation of the doctrine of equitable estoppel are *prima facie* present, and that doctrine would aid the Applicants, upon full ventilation of the evidence, to establish its causes of action against the Respondent. Differently put, the Applicants have demonstrated that they have a *prima facie* case with a probability of success on merits.

38. Having found a showing of *prima facie* case, given that what is at stake is public auction of a parcel of land, there is no question that the Applicants have easily shown that they will suffer irreparable injury if the contemplated sale proceeds. Finally, in the particular circumstances of this case, the balance of convenience would tilt in favour of the Applicants given that what is at stake is land which is definitionally unique. On the other hand, the Respondent might be compensated with money should the Applicants ultimately fail in this suit.

39. In the end, therefore, the Application largely succeeds. The Court makes the following orders:

a. That pending the hearing and determination of the suit herein, an interlocutory injunction does issue to restrain the Defendant either by itself, its agents and/or servants from advertising for sale, selling or interfering, alienating or otherwise howsoever dealing with the security namely Title No. *Nakuru/Municipality/Block 2/58*.

b. That in order to balance the rights of the parties herein, the suit herein shall be heard on a priority basis.

c. **That costs of this Application shall be in the cause**.

40. Orders accordingly.

Dated in Nairobi this 11th day of June, 2019

………………..………

JOEL NGUGI

<u>JUDGE</u>