REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL CASE NO. 6 OF 2019

STUDERTEK POWER SYSTEMS (E.A) LTD.....1ST PLAINTIFF/APPLICANT

RICHARD GAKIME MBURU.....2ND PLAINTIFF/APPLICANT

VERSUS

HOUSING FINANCE COMPANY OF KENYA LTD.....DEFENDANT/RESPONDENT

RULING

[1] I am considering a notice of motion dated 3rd April 2019 which is brought pursuant to **Section 90, 96 (2) and (3) (c) of the Land Act 2012, 1A, 3, 63 (e) of the Civil Procedure Act, Order 40, 51 Rule of the Civil Procedure Rules 2010 and other enabling laws**. The applicant seeks among other orders a temporary injunction to restrain the respondent by itself, agents and or employees or whosoever acting on its behalf from trespassing into, advertising for sale, selling, transferring of disposing of land title No. NYAKI/MULATHANKARI/1787 (hereinafter the *"Suit Land")* pending the hearing and determination of this suit.

[2] The application is supported by the grounds set out in the application and supporting and further affidavit of Richard Gakime Mburu sworn on 3rd and 29th April 2019 respectively. It is contended that in 2013 the 1st plaintiff obtained a loan of Kshs. 16,000,000/- from the defendant and the 2nd plaintiff who is the registered owner of the Suit Land guaranteed the loan. In 2014 he was given another loan of Kshs. 4,000,000/-. The defendant opened account number 6000013072 and 6000014078 to service the 1st and 2nd facility respectively. Then, an overdraft account number 7040000954 in form of a loan of Kshs. 1,300,000/- was opened upon request of the 1st plaintiff.

[3] In October 2017 the 1st plaintiff was served with a statutory notice demanding the clearing of arrears. The 1st plaintiff sought the defendant's indulgence to restructure the loan so as to fit the 1st plaintiff's comfort of repayment. The 1st plaintiff accepted the option of capitalization of the arrears and conversion of the overdraft into a term loan in one year on condition that he maintains payment of Kshs. 532, 618/- for three consecutive months beginning in March 2018. He paid amounts for March, April and May.

[4] It was stated that upon satisfying the conditions agreed upon by the parties, the defendant did not restructure the loan despite reminders from the 1st plaintiff. The 1st plaintiff and defendant executed a letter of offer dated 23rd July 2018 on 16th August 2018 which consolidated the two mortgage loans for an extended term of 10 years and conversion of the overdraft loan account to one year. The 1st plaintiff was required to pay Kshs. 380,000/- from June 2018. Due to the defendant's late response, the 3 months created a variance of Kshs. 841, 473/- since the 1st plaintiff was not sure of the monthly installment to be paid after compliance with the loan capitalization. The defendant vide their letter dated 28th September 2018 stated that upon payment of the said sum arising from the months of June, July and August 2018 the loan would be fully restructured.

[5] They claimed that the variance originated from the defendant's failure to communicate the restructuring of the loan in advance or in time. That the defendant owed the 1st plaintiff the duty of care to promptly capitalize and or restructure the loan upon payment of the monthly minimum of Kshs. 532, 618/- for the three months. On 9th January 2019 the defendant sought to initiate the process of realization of the security. On 31st January 2019 the plaintiff was served with notification of sale from Taifa Auctioneers dated 25th January 2019 informing them that the Suit Land would be sold on 5th April 2019 through a public auction. The defendant did not serve the applicant with a 40 days' notice to sell as required pursuant to **Section 96(2) of the Land Act.** In the absence of notices of sell, the process initiated by the defendant and its agent was irregular, unlawful and void *ab initio*.

[6] The defendant opposed the application through the replying affidavit of Samuel Muthomi Kibiti, Operations Manager at the respondent's Meru Branch, sworn on 23rd April 2019. He asserted that when the 1st plaintiff breached the terms and conditions of the said loan agreements by failing to make repayments of the agreed monthly installments they gave him a number of occasions to do so. They even approached the 1st applicant's directors with proposals on how to regularize its loan accounts but in all instances failed to honor the pledges. Following the

persistent defaults that lasted for a period of more than 30 days they had no option but to commence the process of recovery and or exercise of statutory power of sale.

[7] The respondent stated that pursuant to **Section 90 of the Land Act 2012** they issued to the 1st applicant's directors namely Dickson Kithaka Mugo, the 1st plaintiff, the chargor's spouse Mary Wanjiku with a 3 months statutory notice dated 15th June 2017. It was sent via registered mail of which the applicants acknowledged receipt. Upon realization that the notice was defective for having not been sent to the 2nd applicant's spouse they issued a fresh statutory notice. That the respondent issued a 3 months statutory notice dated 16th October 2017 to conform to the statutory requirements of which the applicants acknowledged receipt. The notice itemized the extent of the default and or arrears as Kshs. 2, 645, 009.60/- as at 31st October 2017 with the total outstanding amount as Kshs 18,590, 314.30/- and the applicants were on notice to have the arrears regularized within 3 months and in default the respondent would be at liberty to invoke provisions of Section 90 (3) of the Land Act 2012.

[8] According to the respondents, at no instance did they waive the 3 months statutory notice dated 16th October 2017. The applicant defaulted and arrears kept on escalating. Due to the defaults the respondent issued 40 days' notice of intention to sell dated 19th January 2018 and which was duly served on the chargor and his spouse, 1st applicant and Dickson Kithaka Mugo. In between the process of exercise of statutory power of sale and following further consultations the respondent in response to the applicant's letter dated 10th January 2018 offered to conditionally restructure the 1st applicant's facilities. The 1st applicant accepted the option of capitalization of the arrears on the accounts and conversion of the overdraft to a term loan repayable within one year. However, the 40 days notice of intention of sell dated 19th January 2018 was still running.

[9] Vide the letter dated 23rd July 2018 the respondent conditionally offered to restructure the 1st applicant's facility and the offer was duly accepted by the latter of 16th October 2018. Notwithstanding the mercy extended by the respondent and numerous pledges the terms were not honored and therefore restructuring could not be effected due to non-compliance and thus nothing crystallized and the status quo remained. The monthly repayments expected from the 1st applicant pursuant to the letter dated 23rd July 2018 were Kshs. 380,000/- of which the 1st applicant did not repay as expected. Failure by the applicants to honor the terms implied the status quo prevailed and noting as the time of the 40 days notice of intention to sell dated 19th January 2018 the entire outstanding amount had fallen due which was Kshs. 19,373,612.80/-as of then and it remains unsettled to date.

[10] The respondent instructed Taifa Auctioneers to carry out a public auction over the charged property but it did not yield since no bidder met the minimum threshold of the forced sale value of the charged property. That contrary to the assertions by the applicants the repayment of the facility has been erratic and not within the agreed contractual parameters and all initiatives to restructure and capitalization were necessitated by the default but unfortunately the said initiatives did not materialize for the reason of failure by the applicant to honor their obligations. Due process of the law was complied with and all the requisite notices provided thus the applicants have no genuine complaints to raise against the respondent and their application herein as well as the entire suit should fail.

[11] This matter was canvassed by way of written submissions. The applicant reiterated what they had stated. They added that they have demonstrated that they have an arguable and meritorious case of which no prejudice will be occasioned on the respondent if the application is allowed.

[12] The respondent submitted that parties are bound by their contracts and not even the court of law can rewrite unless it can be demonstrated there was undue pressure at the material time. Besides if a contract does not crystallize like restructuring did herein and in the circumstances of the prior existing contract between the parties what is the default position is that the parties are relieved of their obligations. Furthermore the applicant has not met the conditions for grant of injunctive reliefs.

ANALYSIS AND DETERMINATION

[13] The issue of determination is whether to grant the temporary injunction sought.

[14] The principles on injunctive relief as were first established in **Giella vs Cassman Brown [1973] EA 358** have developed to greater refinement and in light of the Constitution of Kenya, 2010, the court should take into consideration all the circumstances of the case in order to serve substantive justice. This wider view of justice as ushered in by the Constitution and the overriding objective principle should inform the court when asking the traditional considerations stated in the opinion of Spry VP at page 360 by Spry VP that:

> **"…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. (E.A. Industries v. Trufoods, [1972] E.A. 420.)"**

Prima facie case

[15] In the case of **Mrao Ltd v First American Bank of Kenya Ltd& 2 others [2003] eKLR** the Court of Appeal 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."**

[16] From the record and arguments of the parties, there was an agreement to restructure the loan which was accepted by the 1st plaintiff.

See letter dated 23rd July 2018 where the respondent offered to restructure the 1st applicant's facility on specified terms and condition. The offer was duly accepted by the latter of 16th October 2018. It seems the 1st plaintiff paid the initial three installments. But, it did not pay the other installments as had been agreed. They seem to blame the defendant for this eventuality; more specifically that the defendant delayed in communicating to them the terms of the restructured loan. Samuel Muthomi Kibiti, Operations Manager at the respondent's Meru Branch, stated in his affidavit sworn on 23rd April 2019 that the 1st plaintiff breached the terms and conditions of the loan agreements by failing to make repayments of the agreed monthly installments; and so, they gave him a number of occasions to ameliorate the default in vain. He averred that they even approached the 1st applicant's directors with proposals on how to regularize its loan accounts but in all instances failed to honor the pledges. Following the persistent defaults that lasted for a period of more than 30 days they had no option but to commence the process of recovery and or exercise of statutory power of sale.

[17] From the record, it is clear that parties had agreed on the terms and the monthly repayments expected from the 1st applicant pursuant to the letter dated 23rd July 2018 was Kshs. 380,000/- of which the 1st applicant was aware but did not pay as expected. Failure by the applicants to honour the terms agreed was a breach which made the entire loan due and payable. The debtor was aware of the new terms and I do not see the reason why the monthly instalments were not paid on due dates. I have seen debtors in other cases inducing misunderstanding in a mortgage in order to justify default and in the hope that it will pass for a basis for an injunction. The respondent was careful to issue all relevant notices upon the debtor, the guarantor and the spouse before selling the charged property. The issue here is purely one of accounts and amount of instalments payable which does not constitute a basis for granting and injunction against a chargee who is exercising the statutory power of sale unless the claim is excessive or tinctured with illegal interest. See **Sports Cars Ltd vs. Trust Bank Ltd, Case No 754 of 1999, where** the court held that:-

> **"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 redemption action, or because the mortgagor objects to the manner in which the sale is being 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, unless on terms of the mortgage, the claim is excessive".**

[18] In the circumstances of this case, the test of prima facie case or irreparable damage occurring does not aid the applicants.

Balance of convenience

[19] But where does the balance of convenience lie? The charged property has not been sold. The auction did not yield for no bidder met the minimum requirements of the sale. I note also that the respondent is still protected as the charge placed on the Suit Land is intact. The applicant has stated that he is still making payments to facilitate his facility. Parties placed themselves in a new situation and agreement. As I stated, there was default in making further instalments as per the restructured loan terms. Nonetheless, purely in the interest of justice, and due to the peculiar situation herein, some interim relief is merited. I will therefore grant stay of sale of the charged property for only 90 days to enable the respondent to work out the monthly instalments payable after factoring in the penalties accruing from the default of the restructured loan. The respondent shall do so in 30 days and the 1st plaintiff shall make prompt payments thereof at the end of the month immediately following the rendering of the new instalments and thereafter at the end of each succeeding month until payment in full. Any default by the applicants in repayment of loan in accordance with this order will mean that the stay will lapse automatically. I am enjoined under the law and the Constitution to fashion relief which is appropriate in the circumstances of each case. It should be noted that I have made a finding that parties agreed to restructure the loan and therefore these orders are not re-writing the contract whatsoever. The application is allowed to the extent I have stated. Costs to the respondent. It is so ordered.

Dated, signed and delivered in open court on 6th June 2019

F. GIKONYO

JUDGE

IN PRESENCE OF

Kimaita for defendant/Respondent

Richard Gakime Mbara – present

M'Twerandu for plaintiff – absent

F. GIKONYO

JUDGE