REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

COMMERCIL AND TAX DIVISION

CIVIL SUIT NO E105 OF 2019

MASHIN CONSTRUCTION LIMITED.....PLAINTIFF/ APPLICANT

VERSUS

GULF AFRICAN BANK LIMITED.....DEFENDANT/RESPONDENT

RULING

Background

1. Through a letter of offer for construction finance dated 10th July 2015, which was later varied on 17th November, 2015, the respondent offered to advance a loan facility in the sum of Kshs. 250,000,000 to the applicant. One of the conditions of the offer was that the applicant would repay the loan over a period of 24 months with a grace period of 18 months. The loan facility was secured in favour of the respondent by a charge over the applicant's parcel of land reference No 330/1354 Lavington Nairobi (hereinafter **"the suit property"**) in order to complete construction of 34 units on property known as LR. 209/3028.

2. The applicant states that the said transaction was a Diminishing Musharaka governed by Sharia law in which the respondent was not entitled to charge interest and challenges the statutory notice issued to it by the respondent on 23rd October 2018 through which the respondent demands the payment of the sum of Ksh. 313,278,728.20 and claims that the respondents' action is a breach of the Musharaka arrangement.

Applicant's case

3. This ruling relates to the application dated 26th April 2019 in which the plaintiff/applicant seeks the following orders;

a. Spent

b. That this honourable court be pleased to issue a temporary injunction restraining the defendant /respondent whether by itself, employees, servants, agents, assigns or any other person acting on its behalf and/under its mandate and/ or instructions from selling or offering for sale, exercising any statutory power of sale whether by public or private treaty transferring, charging, leasing, pledge taking possession of, or otherwise in any manner alienating, disposing of the property or interfering with the property known as L.R. no 330/1354, Lavington Nairobi on account of any facility advanced to it by the defendant/ respondent that forms the subject matter of the suit, pending the interparty hearing and determination of this application

c. That this honourable court be pleased to issue a temporary injunction restraining the defendant /respondent whether by itself, employees, servants, agents, assigns or any other person acting on its behalf and/under its mandate and/ or instructions from selling or offering for sale, exercising any statutory power of sale whether by public or private treaty transferring, charging, leasing, pledge taking possession of, or otherwise in any manner alienating, disposing of the property or interfering with the property known as L.R. no 330/1354, Lavington Nairobi on account of any facility advanced to it by the defendant/ respondent that forms the subject matter of the suit, pending the hearing and determination of the suit

d. The defendant respondent reviews the amount payable as the same contains penalties not consistent with the facility offered.

e. That in the alternative the court be pleased to extend the time for compliance and/ rectifying any default to redeem the property known as LR NO 330/1354, Lavington Nairobi to such a period as the court may so determine

f. That further in the alternative to the above, the defendant/ respondents statutory power of sale be postponed to such a period as the court may so determine to enable the plaintiff/ applicant to rectify the default.

g. That this honourable court be pleased to make any orders deemed necessary to the ends of justice

h. That the costs of this application be borne by the defendant/ respondent in any event.

4. The application is brought under sections 1A, 1B, 3A and 63(c) and (e) of the Civil Procedure Act, Order 40 rules 1,2,3 of the Civil Procedure Rules, 2010 and Section 103 of Land Act 2012 and is supported by the grounds set out on the face of the Notice of Motion and the affidavit 0f **Abdinasir Mohamud Sheikh** who avers that the applicant has already paid a substantial amount of money to the respondent towards the repayment of the facility advanced to it and that it sought accommodation from the respondent on the payment of the Diminishing Musharaka facility through a letter dated 1st March 2019.

5. Counsel for the applicant submitted that the transaction was governed by the Islamic banking law and maintained that the Diminishing Musharaka agreement entails a profit and loss arrangement where the borrower and the lender enter into partnership in which they share the profits and the losses. With regard to the amount owing, it was submitted that the same was excessive and contrary to the agreement made by the parties.

Respondent's case

6. The defendant/ respondent opposed the application through a replying affidavit sworn by its Legal Officer **Mr. Lewi Sato** who avers that the applicant failed to abide by its payment obligations to the respondent and that the applicant has not paid any amount towards servicing the loan since the inception of their agreement. He further states that the statutory notices issued were not in breach of the Musharaka agreement.

7. Counsel for the respondent submitted that the applicant had not made out a case to warrant the granting of the orders sought in the application in view of the fact that the application mainly challenges the amount owing. It was submitted that the law is now settled that the challenge of the amount due is not a ground for issuance of orders of injunction. For this argument, counsel relied on the case of **Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] eKLR**.

8. It was further submitted that any loss occasioned by the applicant as a result of the respondent's exercise of its statutory power of sale could be adequately compensated by an award of damages.

Analysis and Determination

9. I have considered the applicant's application, the response made by the respondent and the rival submissions made by the parties' advocates herein together with the authorities that they cited. The main issue that falls for determination is whether the application meets the threshold for grant of interlocutory injunction. **Order 40 Rule 1(a)** of the **Civil Procedure Rules** provides that:

Where in any suit it is proved by affidavit or otherwise that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongly sold in execution of a decree ... the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.

10. The principles governing the grant of orders of temporary injunction were well set out in the case of ***Giella vs 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."

Prima facie case

11. A prima facie case is well defined in the case of ***Mrao Limited vs First American Bank of Kenya and 2 Others*** *(supra)* **where** the Court of Appeal in determining what amounts to a prima facie case stated;

"A prima facie case in a Civil Case includes 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 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. 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."

12. The applicant submitted that it has satisfied the threshold for a prima facie case as the facility advanced to it was based on principles of Islamic banking and that it had legitimate expectation that the same would be upheld. I note that clause 16.3 of the agreement signed by the parties states that:

…notwithstanding the provisions of clause 17, each of the parties recognize that the principle of payment of interest is repugnant to shari'ah and accordingly to the extent that Kenya law would but for the provision of this clause impose whether by contract or by statute, any obligation to pay interest, the parties hereby irrevocably and unconditionally expressly waive and reject any entitlement to recover interest from each other.

13. The applicant submits that the defendant's actions amount to a breach of contract under common law and contravenes the philosophical themes of Islamic law. The respondent however contended that it had not breached the Shariah law as what was charged by the respondent was the agreed profit and not interest as alleged by the applicant. It was the respondent's case that the parties had expressly agreed that should the applicant default in payment, an amount would be paid at the rate of 20% per annum at the prevailing rate of the facility.

14. The respondent relied on the decision in the case of ***Joseph Waudi v National Bank of Kenya* Civil Appeal No. 77 of 2004** in which the court stated the following:

"It is trite law that a court will not restrain a mortgagee from exercising its statutory power of sale because the amount due is in dispute or because the mortgagor objects to the manner in which the sale is being arranged. It will be restrained however if mortgagor pays the amount claimed into court."

15. The conditions under which a court can issue orders of interim injunction as stated in the above cited case of **Giella – Vs- Cassman Brown & Company Ltd** (supra) can be summarized as follows:

a) The applicant must establish a prima facie case with a probability of success at the trial.

b) That interlocutory injunction will not normally be granted unless the applicant would suffer irreparable injury which would not adequately be compensated in damages.

c) That if the court is in doubt, it will decide on a balance of convenience.

16. In the case of **Kenya Commercial Finance Company Ltd –Vs- Afraha Education Society [2001] IEA 86** it was held that all the three conditions/stages for granting orders of injunction must be applied as separate distinct and logical hurdles which the applicant must surmount sequentially. In this regard, establishing a prima facie alone is not a sufficient basis to grant an interlocutory injunction as the court must also be satisfied that the loss to be suffered before the applicant if the order is not granted will irreparable. Irreparable loss has been defined as loss that cannot be compensated for in damages. In other words, where damages is adequate remedy that the respondent can pay, interlocutory injunction will not be granted even if a prima facie case has been established.

17. Lastly, where the court is in doubt as to the adequacy or efficacy of the damages available to either party, the application is determined on a balance of convenience.

18. In the instant case, the fact that the applicant was granted a loan facility by the respondent is not disputed and neither does the applicant deny that it is in default of the loan repayments. What is disputed is the allegation of breach of contract through the charging "illegal" interests contrary to the agreement between the parties. It is however worthy to note that the respondent maintained that what it charged the applicant was profit and not interest.

19. My finding is that courts have held the position that a dispute over the amounts due and owing under a loan facility cannot be a ground for granting an order of injunction. This was the verdict of the court in the oft cited case of **Mrao Ltd vs First American Bank of Kenya & 2 others** (supra) where the court held that:

"The mortgagee will not be restrained from exercising his statutory power of sale because the amount due is in dispute, or because the mortgagor has begun the 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 in court, that is, the amount which the mortgagee claims to be due to him…"

20. I find that in view of the fact that the applicant did not deny that it was already in default, the issue of whether the applicant has a prima facie case against the respondent does not arise. Needless to say, an order of injunction is an equitable order that can only be granted in favour of a party who comes to court with clean hands. In this case, I find that the applicant cannot be said to have approached the court with clean hands when it concedes that it is in default of the loan repayments. The situation would have been totally different if the dispute was only the issue of the interest/profit due when the principle sum has already been settled. The applicant did not demonstrate that it has paid the principle sum or a substantial part thereof towards such settlement as was alleged. Flowing from the above finding, I am unable to find that the applicant established a prima facie case against the respondent and I do not need to consider the rest of the conditions for the granting of orders of injunction.

21. My above findings on the issue of prima facie case notwithstanding, I am also minded the alternative prayers sought by the applicant for the extension of the time of compliance so as to enable the applicant rectify its default in order to redeem the suit property. The applicant also sought orders that the respondent's statutory power of sale be postponed to such a period as the court may so determine so as to enable it rectify the default. In response to the prayer for extension of time, the respondent argued that the parties were bound by the terms of their agreement and that it was not within the purview of this court to alter or rewrite the said terms.

22. I have considered the alternative prayer for more time to make good its default. I note that at the hearing of the application the applicant indicated that it required a period of 3 months to rectify the default. The applicant did not however come out with a clear proposal on how it intends to make good the respondent's claim for the loan repayments which, according to the respondent, stood at Kshs. 313,278,728.20.

23. Be that as it may, and considering the nature of the agreement that the parties entered into, which was strictly speaking not a conventional loan agreement as we know it, but a Diminishing Musharaka arrangement that is akin to a partnership agreement where the respondent as the financier agreed to finance the construction of houses which it was to sell back to the applicant and that any profits or losses were to be shared by the parties, I am inclined to grant the applicant's request for a period of 3 months only, with effect from the date of filing this application, being 26th April 2019, to enable it rectify the default, and pay the full amount claimed by the respondent failure of which the respondent shall be at liberty to proceed with the intended sale of the charged property in order to recover the full sum due to it. For the avoidance of doubt, the applicant is hereby granted a period up to 26th July, 2019 to make good the respondents claim.

24. I make no orders as to costs

Dated, signed and delivered in open court at Nairobi this 4th day of July 2019.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Saende and Gesare for plaintiff applicant

Mr. Wafula for respondent

Court Assistant – Margaret