REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAHURURU

CIVIL CASE NO.5 OF 2018

(FORMERLY OF ELC.NYAH.355 OF 2017)

NORTHWEST (K) LTD..... PLAINTIFF/APPLICANT

- V E R S U S –

KENYA DEPOSIT INSURANCE CORPORATION (OFFICIAL RECEIVER

FOR CHASE BANK LTD).....1ST DEFENDANT/RESPONDENT

KEYSIAN AUCTIONEERS.....2ND DEFENDANT/RESPONDENT

R U L I N G

Northwest (K) Ltd, the plaintiff/applicant, filed this suit against Kenya Deposit Insurance Corporation (Official Receiver for Chase Bank Ltd), 1st defendant/respondent and Keysian Auctioneers, 2nd defendant/respondent.

By the application dated 29/3/2017, the applicant seeks the following orders:

a. ….spent;

b. ….spent;

c. Pending the hearing and determination of the suit, the 2nd respondent, its servants, agents and employees acting on the instructions of the 1st defendant/respondent be restrained by an order of injunction from selling by way of Public Auction property known as LR.No.Nyandarua/Ndemi/7183;

d. Costs of the application be provided for;

A background to this dispute is that the 1st defendant, who is a flower farmer opened an Account No.004217296001 with the 1st defendant and the applicant had an agreement with the 1st defendant bank for overdraft facilities to enable the applicant pay his workers between July, 2011 to February, 2012; that the applicant became unable to service the overdraft due to high interest rates and at that juncture, engaged the 1st respondent to restructure the loan facility to curb the abnormal interest rates as well as provide an extra loan facility to purchase a vehicle. The applicant offered the suit land ***LR.Nyandarua/Ndemi/7183***, as security. The request was as per the letter dated 11/3/2014 (GRM.2). The property was further secured by a personal guarantee and indemnity by each of the directors of the applicant, **George Ruitiyu Mukabi** and his wife **Jane Njambi Ruitiyu**. The loan was repayable over a period of 60 months at an interest rate of 18% per annum.

The sum that was advanced was Kshs.3,648,227/= as per the letter of offer dated 30/6/2014(GRM.2). The charge was registered on 1/10/2014 and the said sum was disbursed in the applicant's account on 24/10/2014. The bank declined to grant the more facilities but instead sent him a notice to exercise its power of sale on 8/2/2016. The parties started negotiations on how to repay the loan and curb the exorbitant interest but the 1st respondent instructed the 2nd respondent to dispose of the suit property. The applicant received notice of sale on 22/2/2017 (GRM 8 & 9). The land was to be sold at a forced value of Kshs.6,000,000/= which the applicant contends is much low considering that the property is valued at Kshs.15,000,000/= as per Valuation Report (CRM.10). The loan arrears are Kshs.5,096,154/= as at 22/2/2017 which the applicant believes is exaggerated.

The application was supported by the affidavit of the applicant dated 29/3/2017. The applicant's counsel Mr. Keya filed submissions on

28/11/2017. Counsel submitted that the 1st respondent hoodwinked the applicant into taking an overdraft over which they charged exorbitant interest which was set at will; that once the loan was secured, the 1st respondent showed their true colours by purporting to sell the suit property; that the respondent did not come to equity with clean hands because the 1st respondent should have explained to the applicant what steps it would have taken after the restructuring of the loan.

It is also the applicant's submission that the interest rate of 18% is unreasonable and the 1st respondent has refused to lower it to Central Bank rates of 14%; that the bank has refused to negotiate the interest and yet the 1st respondent lured the applicant into obtaining the said loan in order to realize the security.

The applicant's submission is that they are willing to repay the loan once the court rules on the interest; that the Central Bank reduced the interest rate to 14% and the 1st respondent should render a statement and explain how the interest rate was arrived at; that the property is worth Kshs.15,000,000/= (15 Million) and if sold the suit land is at the forced price of Kshs.6,000,000/=, the applicant will suffer gross injustice.

In opposing the application, James Gakuya, Channel Experience Officer of Chase Bank Ltd swore an affidavit dated 11/5/2018 stating that the application is brought in bad faith and is an abuse of the court process, misleading and intended to prejudice the 1st respondent and stop it from exercising its statutory power of sale. He deponed that when the guarantee and indemnity and the charge were executed by George and Jane Ruitiyu were fully aware of the duties and obligations as guarantors and chargors; that the applicant frequently defaulted in servicing the loan and as of 31/5/2017, was indebted to the 1st respondent to the tune of Kshs.5,300,760.90; that the payments were erratic and the bank severally made demands to the applicant; that the respondent on 8/2/2016 notified the applicant and guarantors of the outstanding loan and its intention to exercise its statutory power of sale under Section 90 and 96(1) of the Land Act and Section 56(2) of the Land Registration Act, that is, 90 days' notice. After the expiry of the period, the 1st respondent issued the applicant with a further notice of 40 days to sell but there was no response from the applicant nor guarantors. Thereafter, the 2nd respondent was instructed to issue a 45 days redemption notice and notification of sale of the suit property on 23/2/2017; that **Acumen Valuers** conducted a valuation of the property on 1/2/2017 and it was valued at Kshs.6,000,000/= (JG7). It is the 1st respondent's contention that due process was followed, the charge is valid and this application is meant to scuttle the 1st respondent's right to exercise its statutory power of sale; that the 1st respondent is likely to suffer irreparable loss if the debt is allowed to continue to grow. He urged the court to dismiss the application.

The firm of Mulondo, Oundo Muriuki Advocate filed submissions in which counsel submitted that this being an application for interlocutory injunction, it turns on the tests established in ***Giella v Cassman Brown & Co. Ltd (1973) EA 358*** which are;

1. **Whether a prima facie case has been established by the plaintiff to warrant granting the order of injunction;**

2. **Whether the plaintiff will suffer irreparable loss if the order of injunction is not granted;**

3. **Whether the balance of convenience tilts in favour of granting the prayer.**

On the first test, counsel relied on the decision of ***Mrao Ltd v First American Bank of Kenya Ltd & others (2003) eKLR (CA.39/2002)*** defined a prima facie case. He submitted that the applicant has expressly acknowledged that he was advanced a loan facility of Kshs.3,648,227/= by the 1st respondent, in order to restructure the outstanding overdraft and cannot turn round and claim that they were tricked into restructuring the terms of the overdraft. The applicant by its letter of 11/3/2014, wrote to the 1st respondent requesting to restructure the overdraft facility and a further loan to buy a motor vehicle; that it is also admitted that the land ***Nyandaura/Ndemi/7183*** was offered as security and the applicant then admits having defaulted.

Counsel relied on the decision in ***Simon Njoroge Mburu v Consolidated Bank HCC.797 and 741/2012*** where the court dismissed an application for injunction and deemed the practice of borrowers defaulting in loan repayment and rush to court on being served with statutory notices. It was urged that the applicant by rushing to court and not paying, has come to equity with dirty hands ***(See Olive Farm Ltd v Forty Bank Ltd HCC.215/2015.)***

Counsel also addressed the issue that the land is undervalued and considered the valuation report valuing the land at Kshs.15,000,000/=. Counsel said that the report cannot be a basis for stopping the sale because the applicant has not availed any evidence to prove what there is undervaluation of the land.

On the second test as to whether the applicant will suffer irreparable loss, counsel submitted that the applicant should demonstrate that if the order is not granted, the harm that will be suffered cannot be compensated by way of damages. He urged that the property was valued before the notification of sale and loss will be compensated in damages.

Counsel relied on the decision of ***Maithya v Housing Finance of Kenya (K) Ltd (2003) EA 133*** which was cited in ***Abel Moranga Ogwacho and another v Standard Chartered Bank Ltd (2014) (ELC 552/2012 Kisii)*** where the court held that securities are valued before lending and loss of properties by sale is clearly contemplated by the parties even before the security is formalized. According to counsel, the applicant will benefit from the sale because their debts will be settled.

As to where the balance of convenience tilts the Miss Wainaina submitted that the applicant was in arrears of Kshs.5,300,760.90 as at 31/9/2017 which continues to accrue; that no effort has been made to settle the sum and any further delay of the sale will end up with the sum and recovery costs surpassing the value of the land; that the balance of convenience tilts in favour of the 1st respondent. Counsel urged the court to dismiss the application and the 1st respondent do proceed with recovery.

I have now considered the application, the affidavits and the rival submissions of both counsel. The undisputed facts are that George Mutahi

Ruithiyu and Jane Njambi Ruithiyu are the directors of the applicant, Northwest (K) Ltd and are the registered owners of the charged property, ***Nyandarua/Ndemi/7183***. It is also a fact that the applicant vide a letter dated 11/3/2014 applied for a loan facility for restructuring outstanding liability of about Kshs.2.9 million from the 1st respondent and by a letter of offer dated 30/6/2014, the 1st respondent issued a letter of offer. The loan was secured by the suit land and a personal guarantee and indemnity of the applicant's directors. The loan was disbursed to the applicant's account on 24/10/2014. As per the charge document, the interest chargeable was 18% (Clause 3).

It is also not in dispute that the applicant does not deny being indebted to the 1st respondent ***(see paragraph 12 and 13 of their affidavit)***. What has aggrieved the applicant is the applicable interest which is termed as punitive and the forced value of sale of Kshs. 6,000,000/=.

This being an application for an interlocutory injunction, the case does turn on the principles set out in the case of ***Giella v Cassman Brown & Co. Ltd. (Supra)***.

1. The first consideration is whether the applicant has made out a prima facie case to warrant the grant of an injunction; An injunction will only be granted if the applicant demonstrates that he has a prima facie case with a probability of success.

A prima facie case was defined in ***MRAO Ltd case (Supra)*** as:

> **"…..prima facie case is more than an arguable case. It is not sufficient to raise issues. 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."**

I already pointed out earlier that he applicant acknowledges having been advanced a loan facility of Kshs.3,648,227/= by the 1st defendant to restructure outstanding overdraft facility.

I have also noted earlier that the applicant admits having defaulted in repaying the loan and therefore owes money to the 1st respondent. The loan was disbursed on 24/10/2014. The respondent issued a notice in exercise of the statutory power of sale in 2016. The applicant has not alleged that the notices that were issued where irregular the notice were therefore proper. The applicant has not told the court how much he has been able to raise towards the loan settlement since the notices were issued.

Instead, the applicant blames the 1st respondent for imposing a punitive interest rate of 18% instead of 14% as allowed by Central Bank. I must observe firstly that the directors of the applicant signed the charge which clearly stipulates that the interest chargeable was 18%. If the applicant did not agree with the interest rate, they should not have signed the charge document. The parties agreed on the interest rate applicable and the applicant cannot expect the court to rewrite the contract for them.

Mr. Keya, counsel for the applicant argued that Section 44(1) of the Cap.488, provides that the interest should not surpass the principle sum that was disbursed. He blames the respondents for coming to equity with unclean hands. On the other hand, the 1st respondent contends that it is the applicant who has come to equity with unclean hands.

In the case of ***Maithya v Housing Finance*** *cited in* ***Olive Farm Ltd (Supra)***, the court in dismissing an application for injunction for reasons that no prima facie case had been made stated thus:

> **"Those who come to equity must do equity. Failure to service the loan or to pay the lender or to pay into court what had been admitted took the applicant outside the realm of exercise of the court's discretion."**

In the case of ***Simon Njoroge Mburu (supra) the court said that***:

> **"I have already noted that the plaintiff acknowledged the receipt of the statutory notice being served upon him on 30/5/2012. Further at paragraph 10 of the affidavit in support of the plaintiff's application, he admits that he received the notification of sale issued by the s aid Auctioneers on 10/9/2012. The plaintiff did nothing about those notices and waited until the last minute before the sale was due to take place to file the application before court on 5/11/2012. Because of late filing, the plaintiff was also late in obtaining the injunction orders issued by Lady Justice Mwilu on 6/11/2012. In my opinion, the plaintiff has not come to court with clean hands."**

In this case, even though the interest has surpassed the principal sum, the appellant has not shown what he has done about the sum owed by him.

The second leg of the applicant's complaint is that the valuation of the suit property at a forced value of Kshs.6,000,0000/= is too low. According to him, the property is worth Kshs.15,000,000/=. It was submitted by the 1st respondent that the property was valued at Kshs.10,000,000/= when the 45 days' notice was issued on 23/2/2017. The applicant annexed a valuation report from Orion valuers.

Section 97(1) and (2) of the Land Act No.6 of 2012 provides for forced valuation and it is applicable where the charged land is to be sold in the exercise of the power of sale pursuant to an order of the court. It is also applicable to a chargor who is a guarantor of the loan. It reads as follows:

> **1. "A chargee who exercises a power to sell the charged land, including the exercise of the power to sell in pursuance of an order of a court owes a duty of care to the charger, any guarantor of the whole or any of the sums advanced to the chargor, any charges under a subsequent charge or under a lien to obtain the best price reasonably obtained at the time of sale;**

2. A chargee shall before exercising the right of sale, ensure that a forced sale valuation is undertaken by a valuer."

The purpose of valuation was discussed in the case of ***Palmy Company Ltd v Consolidated Bank of Kenya***:

> **"The purpose of valuation under Section 97(2) of the Land Act in twofold. The first one is to obtain the best price reasonably obtainable at the time of sale, thus protecting the right of the chargor to property…….. The second one is to prevent unscrupulous chargee from selling the charged property at a price which is peppercorn or not comparable to interests in the land of the same character and quality."**

Apart from alleging that the land is now valued at Kshs.15,000,000/=, no other evidence was adduced to support the fact that the forced price of Kshs. 6,000,000/= is too low. In ***Palmy Company Ltd Supra***, the court further said **"the onus of establishing on prima facie basis, that the applicant's right has been infringed by the respondent by failing to discharge of the case under Section 97(1) of the Land Act lies on the applicant…… The court needs cogent evidence and material in order to say that prima facie, there has been an undervaluation of the suit property which is an infringement of Section 97(2) of the Land Act by the respondent as to entitle the court to call for an explanation or rebutted from the respondent."**

The applicant did not attempt to discharge the said onus.

Having considered the above, I find that the applicant has not demonstrated a prima facie case with high chances of success.

2. Whether the applicant is likely to suffer irreparable harm, or can the applicant be compensated in monetary terms; The suit land was valued before it was charged and a value was put to it in monetary terms. It follows that even if the statutory power of sale is exercised, it is likely to be beneficial to the applicant because it will alleviate his indebtedness and if there be a balance from the sale it will be given to the applicant.

In ***Maithya Housing Finance Ltd (Supra)***, the court stated: **"The securities are valued before loaning and loss of properties by sale is clearly contemplated by the parties even before the security is formalized. Damages would therefore be an adequate remedy. The balance of convenience tilts in favour of the lender since it is in a position to repay should the borrower's security continue to be eaten away by the mounting redemption money and may prove insufficient."**

It is my view that irreparable loss will not be suffered by the Applicant in the event of sale.

3. Whether the balance of convenience tilts in favour of the Applicant;

In the case of ***Peter Kamau Kiriba vs City Council of Nairobi & 3 others; ELC case 422/2013***, when dismissing an application for injunction, the court said:

> **"Further to that, it has been established that the suit property is currently charged to the 3rd Defendant as security for a loan of 3 million advanced to the 2nd Defendant. With such an encumbrance on the title, it is such that the interests of the 3rd Defendant would be prejudiced would a temporary injunction be issued to the Plaintiff/Applicant as prayed."**

In **Shah vs Devji (1965) EA 91** the court held;

> **"That the court should not grant an injunction restricting a mortgagee from exercising his statutory power of sale solely on the ground that there is a dispute on the amount due to a mortgage." "See also Mrao Ltd Supra."**

What the applicant disputes is the amount payable and interest applicable. That is not a ground for stopping the sale. The applicant should have shown good faith by paying what they believe they owe. Having failed to do so, I find that the balance of convenience tilts in favour of the 1st respondent who will be more inconvenienced if the security is not realized.

After considering the facts herein and the decisions cited, I come to the conclusion that the Applicant has not established a prima facie case against the Respondents. The Applicant has not shown that he will suffer irreparable loss if the orders are not granted and the balance of convenience tilts in favour of the 1st Respondent. I find therefore that the application lacks merit and it is hereby dismissed with costs.

Dated, Signed and **Delivered** at ***NYAHURURU*** this ***5th*** day of ***July,*** 2019.

……..

R.P.V. Wendoh

JUDGE

PRESENT:

Mr. Maina Kairu Holding brief for

M/S.Bosibori for the respondents,

Keya for applicant – absent

Roita – Court Assistant