REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL CASE NO. 14 OF 2018

NTIMA HOUSING CO-OPERATIVE SOCIETY LTD.....PLAINTIFF

-VS-

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

R U L I N G

1. Before me is a Notice of Motion dated 7th June, 2018, in which the plaintiff seeks an order of injunction to restrain the defendant, from selling or otherwise alienating **L.R No. Ntima/Igoki/1790** by public auction or otherwise, pursuant to the statutory notice dated 10/1/18 and the auctioneer's instruction letter dated 31st May 2018 until the suit is heard and determined.

2. The grounds upon which the motion was grounded were set out in the body of the Motion and in the affidavit of Faith Gatakaa Miriti, the General Manager of the plaintiff. It was contended that in or about 2014, the plaintiff got a facility from the defendant to put up a commercial building on **L.R No. Ntima/Igoki/1790 (*"the suit property")*** secured by a charge over the suit property for Kshs.24,000,000/= and a further charge for Kshs.36,140,000/=.

3. Upon completion of the building, on or about 25th August, 2017, the defendant forwarded to the plaintiff a letter of offer dated the same date restructuring the facilities to a 15 year mortgage. The offer had a moratorium of 6 months to enable the plaintiff get tenants for the building which was to lapse on 25th February, 2018 at the earliest. The plaintiff contended that it continued to make payments during the moratorium period.

4. The plaintiffs contended that despite aforesaid, on 10th January, 2018, the defendant issued the plaintiff with a statutory notice demanding the payment of Kshs.1,915,701/80 together with interest within 3 months. That the defendant wrongfully varied the monthly repayments from a total of Kshs.707,468/= to over Kshs.800,000/=. Thereafter, on 25th April, 2018, the defendant issued a redemption notice upon the plaintiff.

5. The plaintiff contended that the notice of 25/4/2018, did not comply with the legal requirements of ***sections 96 (3) and 89 (1) of the Land Act, 2012*** and that the intended sale of the suit property was unlawful and actuated by malice/bad faith.

6. The application was opposed through the replying affidavit of Floridah Mbogori, sworn on 26th June, 2018. She deposed that, although the 6 months moratorium was not disputed, the same was subject to the plaintiff continually servicing the interest accrued on the said loan and was payable until the subject project loan was converted into a term loan of 15 years. That defendant had failed to pay the interest due.

7. It was further deposed that any amounts paid or deposited in the plaintiff's loan account did not service the interest accrued but was received on a without prejudice basis and was not a waiver of the defendant's rights as contained in the loan agreement between the plaintiff and the defendant.

8. When the matter came up for hearing on 26th June, 2018, the court directed that the application be canvassed by way of written submissions. It was submitted for the plaintiff that the application rested on the finding as to whether the plaintiff had an arguable case on the 6 months moratorium period provided in the letter of offer dated 25th August, 2017. That according to the said letter, the 6 months moratorium would have lapsed on 28th February, 2018. That the statutory notice dated 10th January, 2018, coming before the lapse of the moratorium was contrary to a legally binding contract between the parties and was therefore ill advised, null and void for all purposes and intents.

9. It was further submitted that the plaintiff had a reasonable genuine complaint deserving to be heard and determined. That the haste shown by the defendant in its desire to sell the suit property, was a clear manifestation of some deeply vested interest by top management of the

defendant which made them act irrationally and maliciously. That the suit property was located at the heart of Makutano shopping centre in Meru town making it a rare gem. That in the event it is sold, the damage to be suffered can not be adequately compensated by award of damages because, the plaintiff can not get a similar property by size and location to buy.

10. On the other hand, it was submitted for the defendant that the conversion of the facility to a 15 year mortgage was to take place after 6 months moratorium period. That the letter of offer dated 25th August 2017, was for the restructuring of the existing loan facility that the plaintiff received from the defendant.

11. It was further submitted that, the plaintiff had failed to establish a prima facie case with a probability of success as he had failed to demonstrate that conversion of the facility occurred immediately after execution of the letter of offer. Consequently, the defendant urged the court to dismiss the application with costs.

12. I have carefully considered the affidavits on record, the rival submissions and the authorities relied upon by the defendant. This is an application for a temporary injunction.

13. The principles on which the courts will grant an injunction are well known. The Court of Appeal restated those principles in ***NGURUMAN LIMITED V. JAN BONDE NIELSEN & 2 OTHERS, CA NO. 77 OF 2012***, together with the mode of their application as follows:-

> **"In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;**
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> **(a) establish his case only at a prima facie level,**
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> **(b) demonstrate irreparable injury if a temporary injunction is not granted, and**
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> **(c) ally any doubts as to (b) by showing that the balance of convenience is in his favour.**
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> **These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case, that alone is not sufficient basis to grant an interlocutory injunction. The court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between." (Emphasis added).**

14. In ***JAN BOLDEN NIELSEN VS. HERMAN PHILLIIPUSSTEYN Also Known As HERMANNUSPHILLIPUS STEYN & 2 OTHERS (2012) eKLR*** the court adopted the reasoning in ***SULEIMAN VS AMBOSELI RESORT LTD (2004) eKLR 589*** and stated:-

> **'I believe that in dealing with an application for an interlocutory injunction, the court is not necessarily bound to the three principles set out in the Giella Vs Cassman Brown case. The court may look at the circumstances of the case generally and the overriding objective of the law. In Suleiman vs Amboseli Resort Ltd (2004) e KLR 589 Ojwang Ag. J (as he then was) at page 607 delivered himself thus:-**
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> **'…….counsel for the defendant urged that the shape of the law governing the grant of injunctive relief was long ago in Giella Vs Cassman Brown, in 1973 cast in stone and no new element may be added to that position. I am not, with respect, in agreement with counsel in that point, for the law has always kept growing to greater levels of refinement, as it expands to cover new situations not exactly foreseen before. Justice Hoffman in the English case of Films Rover International made this point regarding the grant of injunctive relief (1986) 3 All ER 772 at page 780-781:- " A fundamental principle is that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been "wrong"…."**
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> **Traditionally, on the basis of the well accepted principles set out by the Court of Appeal in Giella Vs Cassman Brown the court has had to consider the following questions before granting injunctive relief.**
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> **i. Is there a prima facie case….**
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> **ii. Does the applicant stand to suffer irreparable harm…**
>
> **iii. On which side does the balance of convenience lie?**
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> **Even as those must remain the basic tests, it is worth adopting a further, albeit rather special and more intrinsic test which is now in the nature of general principle. The Court in responding to prayers for interlocutory injunctive relief, should always opt for the lower rather than the higher risk of injustice……". (Emphasis added).**

15. In the instant case, it was contended for the plaintiff that the 6 months moratorium period provided for in the letter of offer dated 25th August 2017, would have lapsed on 28th February 2018. That since the same was accepted by signature and sealing by the plaintiff on 28th August, 2017, no recovery action would have taken place before lapse of the 6 months moratorium period. That therefore, the statutory notice dated 10th January, 2018 coming before the lapse of the moratorium was null and void for all purposes and intents.

16. It was therefore contended by the plaintiff that it had a prima facie case deserving preservation of the status quo by way of an injunction pending the hearing and determination of the suit.

17. On the other hand, the defendant contended that, conversion of the facility was to take place after the 6 months moratorium period. The defendant further contended that one of the conditions was that the plaintiff was to continually service the interest until conversion of the facility, which it had failed to.

18. The dispute would seem to purely rest on the 6 month moratorium. Was any money payable during that period or after? The plaintiff was categorical that notwithstanding the moratorium, it continued to make some payments to the accounts. Copies of the bank statements were produced to prove this fact.

19. On the other hand, the defendant appeared to contradict itself on this issue. Whereas in the submissions it was contended that the plaintiff was not servicing the loan, at paragraphs 6 and 8 of the replying affidavit, it was deposed as follows:-

> "6. **THAT paragraph 7 of the plaintiff/application supporting affidavit is false and misleading as no loan repayments were made by the plaintiff/applicant during the moratorium period and neither did the defendant/respondent demand for the same as being alleged by the plaintiff/applicant or at all. There were some payments made however not adequate to cater monthly interest.**
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> **8.THAT any amounts so paid or deposited on the plaintiff/applicant loan account during the said moratorium period if any and which as stated did not really service the interest accrued, was so received on purely without prejudice basis and not as a waiver of the defendant/respondent rights as contained in the loan agreement between the plaintiff/applicant and the defendant/respondent". (Emphasis mine).**

20. The statements of account produced by the plaintiff disclose a different picture all-together. There were payments that the plaintiff made between August, 2017 and January, 2018. The defendant did not state the amount of interest due and by how much the payments that were made and received failed to cover the interest.

21. The letter of 10th January, 2018 did not disclose that the amounts being demanded was arrears of interest or principal sum. The question that really arise is, where is the bona fides of the lender in this case? A lender who waits patiently for the borrower to construct and finalize a multi-million building at the heart of Meru town, then where a little interest is alleged to be due, springs with all guns blazing that what otherwise was agreed to be payable in 15 years is now made payable immediately raises serious issues as to its bona fides. Is it its intention to recover the amount of the outlay or get to the completed "gem" easily by disposing it? That is not what our law presupposes.

22. Applying the test of law and taking into consideration the circumstances of this case, I find that the plaintiff has made a sufficient case for the granting of a temporary injunction. The question is sufficient to be investigated pending the hearing and determination of this case. If that property is disposed off and the plaintiff is ultimately successful, it will suffer irreparable loss as any damages awarded cannot secure a property of the size, nature and location of the suit property.

23. I further find that the balance of convenience tilts in favour of maintaining the status quo. There will be minimum injustice by granting the injunction and requiring the plaintiff to continue servicing the facility than to allow the defendant dispose of the suit property at this stage.

24. Accordingly, I allow the application dated 7th June 2018, subject to the plaintiff continuing to make the monthly repayments from the date of this ruling until the suit is heard and determined. The costs of the application shall abide the outcome of the main suit.

DATED and **DELIVERED** at Meru this 18th day of October, 2018.

A. MABEYA

JUDGE