



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO. 332 OF 2017

POLYPIPES LIMITED.....1ST PLAINTIFF/APPLICANT

CAPITOL SEVEN LIMITED.....2ND PLAINTIFF/APPLICANT

TRIDENT INSURANCE COMPANY LTD4TH PLAINTIFF/APPLICANT

OXBRIDGE LIMITED5TH DEFENDANT/APPLICANT

VERSUS

BANK OF BARODA (KENYA) LTD.....1ST DEFENDANT/RESPONDENT

GARAM INVESTMENTS AUCTIONEER....2ND DEFENDANT/RESPONDENT

RULING

1. This ruling relates to a Notice of Motion application dated 10th August 2017, brought under the provision of Constitution of Kenya, Rule 3(1) and (2) of the High Court (Practice and Procedure Rules) Cap 8 of the Laws of Kenya, Sections 103 and 104 of the Land Act, Section 3 and 3A of the Civil Procedure Act and Orders 40 Rules 1, 2, 3, 4, Order 51 Rule 1 of the Civil Procedure Rules 2010 and all other enabling provisions of the Law.

2. The Applicant is seeking for orders:-

(i) That pending the hearing and determination of this suit an injunction do issue restraining the Defendants/Respondents, by themselves, servants, auctioneers, receivers agents, or Advocates or any of them or otherwise from advertising, re-advertising or offering for sale, or purporting to sell, or in any other way alienating the 2nd and 3rd Plaintiffs properties known as Property Floor Number Seven of Tower One of Capitol Hill Towers situate in L.R. No. 209/9769 and Land Tiles Registry Property Tile Number Kisumu/Municipality/Block 6/407 or otherwise howsoever from dealing with the aforesaid Properties;

(ii) That an order be issued directing the 1st Defendant/Respondent to immediately conduct an audit of the 1st Plaintiff's/Applicant's Kenya Shillings and Dollar facility accounts to determine the correct principal amount and interest;

(iii) That an order be issued directing the Defendants/Respondents to conduct a fresh valuation of the 2nd and 3rd Plaintiff's properties known as Property Floor Number Seven of Tower One of Capitol Hill Towers situate in L.R. No. 209/9769 and Land Tiles Registry Property Tile Number Kisumu/Municipality/Block 6/407. (SEE THE PRAYERS BELOW WHICH ARE THE CORRECT ONES)

(iv) temporary injunctions pending the hearing and determination of their application inter-parties, and pending the hearing of the suit., restraining the Defendant, servants, auctioneers, receivers, agents, advocates or any one claiming under them from advertising, re-advertising or offering for sale, or purporting to sell or in any other way alienating the 2nd and 3rd Plaintiffs properties known as Property Floor Number Seven of Tower One Capital Hill Towers situate on L.R. No. 209/9769 and Kisumu/Municipality/Block 6/407 or otherwise from dealing with the said properties;

(v) An Order directing the 1st Defendant to immediately conduct an audit of the 1st Plaintiff's Kenya Shillings and Dollar accounts

to determine the correct principal and interest.

(vi) An Order directing the 2nd Defendant to conduct fresh valuations of the 2nd and 3rd Plaintiffs properties known as Property Floor Number Seven of Tower One Capital Hill Towers situate on L.R. No. 209/9769 and Kisumu/Municipality/Block 6/407.

(vii) Costs

3. The application is premised on the grounds on the face of it and an affidavit sworn by Bett Martin Cheruiyot, the Legal Manager of the Applicants. He averred that the 1st Plaintiff/Applicant and 1st Respondent/Defendant entered into a Loan Facility Agreement dated 31st January 2015, for provision of an over-draft facility, for an amount of Kshs 80,000,000.00, for a period of 12 months and a Letter Of Credit/Import Finance for a sum of; USD 2,000,000.00. It was that, the 1st Plaintiff/Applicant would obtain security/collateral from its sister companies to secure the facilities which were reviewable.

4. The loan facility was secured by a Legal Charge dated 1st May 2012, over a Property Floor Number Seven of Tower One Capitol Hill Towers situate in L.R. No. 209/9769, (herein “ the suit 1st property”), registered in the name of the 2nd Plaintiff/Applicant, for a sum of Kshs 120,000,000 and USD 2,000,000.

5. That the open market value of the property is Kshs 198,000,000 and forced sale value is Kshs 148,500,000, as at 23rd July 2015. Further, that the 3rd Plaintiff/Applicant guaranteed and executed a Legal Charge over its property, Title Number Kisumu/Municipality/Block 6/407, (herein “ the suit 2nd property to secure an overdraft principal amount sum of; Kshs 80,000,000.00 and USD 1,357,387. The open market value of the property is Kshs 40 million and forced sale value is Kshs 30,000,000 as at 17th September 2013.

6. The Applicant avers that, the 1st Defendant/Respondent has issued a notification of sale of the properties prematurely and advertised the same in the Daily Nation Newspaper of 7th August 2017, for sale on 22nd August 2017, and will sell them unless the prayers herein are granted.

7. It was argued that the 1st Defendant/Respondent has failed to take into account the various payments already made by the 1st Plaintiff/Applicant, an offer to settle Kshs 30,000,000 and a request to restructure the balance thereof. That The 2nd Plaintiff/Applicant’s Advocates have also issued an undertaking to the 1st Defendant to that effect.

8. Further that, the 1st Defendant/Respondent has arbitrarily varied interest rates without notifying the Plaintiffs/Applicants and significantly undervalued the suit properties, in breach of contract and with the intention to defeat and unreasonably clog of the Applicants right of redemption, an action which is oppressive and against all known principles of law.

9. The Applicants reiterated that, it will suffer irreparable loss to their business, goodwill and reputation, in view of the fact that, there is a significant likelihood the 1st Respondent will continue re-advertise the properties on various occasions. Therefore, it is just and fair to grant interim orders, pending the hearing and determination of the suit.

10. However, the Application was opposed vide a Replying affidavit dated 15th August 2017, sworn by Collins Ngetich, the Credit Manager of the 1st Defendant’s at the Industrial Area Branch, where the Plaintiffs’ account is domiciled. He joined issues on the financial facilities granted and the various securities offered to secure the same.

11. It was argued that the notification of sale of the charged properties is not premature and the advertised scheduled sale is to take place after the 1st Defendant has issued all the statutory notices. That, the loan repayment terms, of the loan sanction dated 31st January 2017, were that the overdraft of Kshs 80,000,000, would be repaid within 12 months, the letter of credit/import finance of USD 2,000,000, would be fully repaid by 31st March 2015, and the new import finance loan of Kshs 1,077,580 would be repaid by 30th June 2015. However, the 1st Plaintiff/Applicant failed to adhere to the loan repayment terms and that as at 31st August 2016, the overdraft account was overdrawn to the tune of Kshs 89,876,852.71.

12. That as at 31st August 2016, the 1st Plaintiff’s various import finance/letter of credit accounts were overdrawn as follows;-

Account Number 95870600001815 USD 265,974.87 DR

Account Number 95870600001816 USD 357,918.41 DR

Account Number 95870600001818 USD 265,976.06 DR

Account Number 95870600001819 USD 258,587.86 DR

Account Number 95870600001760 USD 219,753.92 DR

13. The 1st Respondent averred that the Plaintiffs/Applicants have been served with all the necessary notices and the prelisting notices pursuant to the Credit Reference Bureau Regulations, on 6th November 2015, 30th March 2016 and 1st October 2016.

14. The 1st Defendant averred that, all the loan repayments made by the 1st Plaintiff have been correctly reflected in the statements provided,

contrary to the assertion in supporting affidavit. That, despite the offer made to pay Kshs 30,000,000, by 3rd July 2017, to liquidate a portion of the outstanding debt, to date no payment has been made and the loans have been classified as non-performing, and cannot therefore, be re-structured, unless the 1st Plaintiff/Applicant regularizes the accounts which have exceeded the sanctioned limits and pays off all the arrears.

15. Further, the purported undertaking by the 2nd Plaintiff's/Applicant's Advocates was vague and unenforceable and that the interest rate charged on the loans, has been the contractual rate set out in the offer letter, which was subsequently amended in line with the statutory guidelines issued by Central Bank of Kenya and that the properties were valued prior to the intended public auction. Therefore the 1st Defendant/Applicant is not in breach of contract and does not intend to defeat or clog the /Applicants rights of redemption but is seeking to recover the outstanding debt due to it in accordance with the laid down law.

16. That no reasons have been adduced to warrant the grant of an injunction as no evidence has been advanced to demonstrate, a prima facie case with a probability of success, the Application should be dismissed with costs.

17. At the close of filing the responses to the Application, the parties agreed to dispose of the Application vide filing of submissions. Apparently, the Applicant did not file any submissions.

18. The 1st Respondent submitted that, the Applicants are in arrears and indebted. Reference was made to the case of; Maithya - vs - Housing Finance Co. of Kenya &Ano. [2003] 1 EA 133 where the Court stated:

“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.”

19. It was further submitted that, the 1st Defendant/Applicant having been served with all the requisite notices after its failure to pay its loans and in arrears, the 1st Defendant is therefore legally entitled to exercise the statutory power of sale. Further, in none of the communications exchanged between the parties has the 1st Plaintiff/Applicant ever disputed the interest rate, charged or the amount due and it was raised for the first time when these proceedings were filed.

20. That it is trite law that, dispute as to the amount due is not a ground for an injunction as held in the case of; Morris & Co. Ltd v Kenya Commercial Bank Ltd [2003] 2 EA 605, that, it was well settled law that, a dispute as to amount due cannot be a ground for an injunction to restrain a lender from appointing a receiver on grounds of default in payment obligations. That, the plaintiff's injury could be compensated in damages.

21. I have considered the Application in the light of the arguments and the submissions filed and I find that basically the Applicant is seeking to restrain the 1st Respondent from disposing of the suit properties. The remedy sought for is an injunction order. The principles that govern the grant thereof are settled, as stated in the case of; Giella v. Cassman Brown & Co. Ltd [1973] E.A 360, 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.”

22. It is therefore important that the Applicants demonstrate inter alia, a prima facie case with high chance of success and irreparable loss. The Applicants herein have not disputed the arrears claimed as evidenced by the statement of accounts annexed to the Replying Affidavit and have merely alleged they will suffer inter alia reputational loss. Loss ought to be proved and/or supported by evidence, thus the damage the Applicant stands to suffer must be shown for an injunction order to be granted.

23. In this regard the 1st Respondent invited the Court to resonate with the sentiments in the case of; Bii - vs - Kenya Commercial Bank Ltd [2001] KLR 458, where it was stated that, once property is offered as security, it by that very fact becomes a commodity for sale. There is no commodity for sale whose loss cannot be compensated in damages. Further that the Court stated in the case of; Daniel NdegeNdirangu v. Barclays Bank of Kenya Limited & Another Nakuru High Court Civil Suit no 8 of 2012 ‘B’, with reference to the case of; Sambai Kitur v Standard Chartered Bank & 2 others, Eld. HCCC. NO.50 of 2002 that:

“It must also be noted that when a chargor lets loose its property to a chargee as security for a loan or any other commercial facility on the basis that, in the event of a default it be sold by a chargee, the damages are foreseeable. The security is henceforth a commodity for sale or possible sale without prior concurrence and consent of the charger. How can he, having defaulted to pay loan arrears prompting a charge to exercise its statutory power of sale, claim that he is likely to suffer loss and injury incapable of compensation by an award of damages? Such an argument is definitely misplaced and has no merit. It is immaterial that the property is a family residence, a fact well known to the Chargor at the time of offering it as security to the charge. The upshot of all these is that following the Giella principles, the loss of injury that the applicant stands to suffer should he succeed in this suit is capable of being compensated in damages adequately.”

24. Similarly the case of; Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86. held that, the Applicant must not just establishes a prima facie case but must further satisfy the Court that the injury it will suffer, in the event the injunction is not granted, will be irreparable. Thus if damages recoverable in law are an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction will 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 and 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,

25. I entirely concur with the legal principles stated in the above authorities. That is the law, The Applicant has basically not disputed arrears, has been several proposals even in this proceeding to liquidate the same and failed to do so. The issue of inapplicable and/or varying interest rate, the accounts to be taken, failure to serve the requisite statutory or other notices and lack of a valuation of the suit properties do not stop the Applicants from paying the arrears.

26. I find the power of sale *arises* in favour of a chargee when the charge money has become due and the Court of law will not restrain a chargee from exercising its statutory power of or because the chargor has begun a redemption action or because he objects to the manner in which the sale is being arranged as rightfully observed in the case of; *Joseph Okoth Waudi Vs National Bank of Kenya [2006] eKLR.*

27. The upshot of all these is that the Application has no merit and I dismiss it with costs to the 1st Respondent.

28. It is so ordered

Dated, delivered and signed in an open Court on this 11th day of October 2018.

GRACE L NZIOKA

JUDGE

In the presence of:

Mr. Omuga for the Applicants

Mr. Githaiya for the Respondents

Langat.....Court Assistant