REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

COMMERCIAL & ADMIRALITY DIVISION

CIVIL SUIT. NO. 162 OF 2016

CRESTED ACRES INVESTMENTS LIMITED….....PLAINTIFF

VERSUS

NATIONAL BANK OF KENYA LIMITED…….....….DEFENDANT

RULING

1. By a Notice of Motion dated 6th May 2016 the Plaintiff seeks the court's intervention by way of a negative injunctive order to restrain the Defendant from disposing of certain non-possessory security. The security in question was pledged by the Plaintiff and its guarantors to the Defendant to secure the repayment of banking facilities advanced to the Plaintiff by the Defendant at the Plaintiff's and the Plaintiff's guarantors' request.

2. The facilities were extended in December 2014 and consisted of both term loan and overdraft facilities in addition to third party guarantee facilities. The aggregate amount advanced was Kshs 145,000,000/=. In consideration of the advances, the Plaintiff caused to be pledged to the Defendant as security, formal legal charges over the properties known as Land Reference No 5973/20, 5973/21, 5973/23, 5973/103, 19532 and 12725.

3. The Plaintiff additionally caused to be pledged to the Defendant formal legal charges over the properties known as title no. Keekonokie/Ikisumet/655 and Kajiado/Iidamat/4917. The said securities were in addition to an all asset debenture also created by the Plaintiff over all its assets , present and future, in favour of the Defendant. Some of the assets charged in favour of the Defendant by way of a floating charge were motor vehicle registration Nos. KBT 120S, KBT 119S, KBT 122S, KBU 795P and KBU 796P.The securities were perfected in December 2014. Pursuant to the agreements between the Plaintiff and the Defendant, the securities also provided for the repayment modes and mediums.

4. The Plaintiff apparently defaulted on the agreed mode of repayment prompting the Defendant to initiate the recovery process which entailed realizing its securities or calling in the guarantees as the case would be. Stressed and distressed, the Plaintiff filed the suit and sought the interlocutory orders already alluded to.

5. In support of the Motion , a director of the Plaintiff Mr Kenneth Esau Oduol filed two affidavits on 9th May 2016 and 21 July 2016. The Plaintiff's affidavits reconfirm the above narrative. The Plaintiff admits having been advanced monies by the Defendant and also having created the securities in favour of the Defendant. The Plaintiff further admits that as at the time of filing the instant suit the amount owed to the Defendant was some odd Kenya Shillings One Hundred and Five Million Five Hundred and Ninety

Thousand. The Plaintiff does not deny having default in the loan repayment. The Plaintiff however adds that the Defendant also held an additional security in the form of an insurance in the sum of Kenya Shillings Sixty Million with African Trade Insurance Agency.

6. It is the Plaintiff's case that the Defendant is bent on disposing the securities especially the movables, being the motor vehicles, at a throw away price. Whilst not denying that the Defendant has issued the Plaintiff as well as the guarantors with the requisite statutory notices with regard to the non-possessory securities, The Plaintiff states that the Defendant ought not to be allowed to dispose of the immovable property as they constitute the guarantors' matrimonial property and the spousal consent was obtained fraudulently. Finally, the Plaintiff urges the court that the Defendant ought to first recover the insurance monies valued at Kenya Shillings Sixty Million and that the Plaintiff thereafter be allowed to clear any outstanding balances by resuming the agreed instalments.

7. It is the Plaintiff's case that it has a prima facie case with a probability of success and that it will suffer irreparably if the property the subject matter of the suit and of the security pledged to the Defendant is disposed of by way of a public auction. Instead and to avert loss the Plaintiff prays that the court ought to allow the application and ultimately allow the Plaintiff to dispose of the security by way of private sale and remit the sale proceeds to the Defendant.

8. The Defendant's case is crisp. The Defendant, through the Replying affidavit of one Fatuma Mohammed sworn and filed on 31 May 2016, is to the simple point that there is no dispute as to the Plaintiff's indebtedness to the Defendant. The Defendant was simply exercising rights obtained through voluntarily and validly perfected securities and the court should not interfere with such a process. The Defendant confirms having called in the insured and guaranteed sum of Kenya Shillings Sixty Million, from African Trade Insurance Agency but the same is yet to be honoured.

9. It is the Defendant's contention that the Plaintiff has not met the set threshold of interlocutory injunctions set out in the case of **Giella *vs.* Cassman Brown & Co Limited [1973] EA 358** and reiterated in **Mrao Ltd *vs.* First American Bank of Kenya Limited & 2 Others [2003]KLR**. The Defendant also urged the court to avoid negotiating or renegotiating the terms of the transactions between the parties and to allow the Defendant to proceed with the realization of the security.

10. I have considered the respective parties cases as outlined in the affidavits filed in court. I need not detail the principles which guide the grant of a temporary injunction. They were laid out nearly four decades ago in the case of **Giella *vs.* Cassman Brown and Company Limited [1973] E.A 358.** In sum; the applicant must show a *prima facie* case with a probability of success; secondly that he stands to suffer irreparable harm which would not adequately be compensated by an award of damages if the injunction is not granted; and thirdly, if the court be in doubt, it is to decide the application on a balance of convenience by trying to determine where the greater hardship lay in the absence of an injunction or with the issuance of one.

11. Has the Plaintiff established a prima facie case with a likelihood of success?

12. The case of **Mrao Ltd –vs- First American Bank (K) Ltd & Others (supra)** clearly laid out what a prima facie case entails. The Court of Appeal stated thus**:**

> ***"…a 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."***

13. A prima facie case is not simply one which is arguable. There must be more in the sense that the court has to be called upon to interrogate the matter further and the respondent called to account for his actions. The court must however not hold a mini trial in the quest to ascertain whether or not a prima facie case has been established. Neither is the court to make any definitive findings of any factual or legal issues.

14. In the instant case, the evidence reveals that parties entered into a commercial transaction where the

Defendant availed banking facilities to the Plaintiff. In turn the Plaintiff voluntarily availed securities in the form of fixed charges as well as floating charges and guarantees. There is no dispute on the securities at all. There is also no dispute that the Plaintiff is in default and owes the Defendant a tidy sum of slightly over Kenya Shillings One Hundred and Five Million. Additionally, the Plaintiff does not question the validity or otherwise of the statutory notices given by the Defendant to ignite crystallization of the securities as well as the realization process with regard to the fixed securities. What the Plaintiff appears to question, if I understood the Plaintiff's case well, is the bona fides on the part of the Defendant whilst realizing the securities and also the right of the Defendant to chose to exercise one remedy (repossession, attachment and sale of pledged assets) in preference to another (calling in alleged insurance cover by the African Trade Insurance Agency).

15. It is no doubt true that a secured lender or his agent is under an obligation to act in good faith when realizing securities .The lender must act honestly and without reckless disregard for the borrower's interest and he has to take reasonable care to realize the true market value of the property pledged as securities. The duty is owed to the persons interested in the securities being realized and these include borrowers and guarantors: see generally **Mbuthia *vs.* Jimba Credit Finance Corporation & another [1986-89] 1 EA 340 (CAK)**.

16. In the instant case, the Plaintiff has simply stated that it is afraid that the Defendant may proceed to sell the pledged properties at an undervalue. There are no specifics or particulars to direct the court towards such an inference. The Defendant on the other hand has deponed that the intended sale will be through public auctions and subject to the proper valuations already undertaken. The Plaintiff has not contested such averments. The Defendant in the circumstances stands in better stead. A public auction sale when well conducted ekes out the best possible price. Secondly, the mutely admitted fact that valuations have been conducted would tend to show good faith on the part of the Defendant in seeking the best price possible both in the interest of the Plaintiff and the Defendant.

17. The Plaintiff's complaint that the Defendant should first call for the security pledged in the form of insurance was also thin in facts. Neither of the parties availed to the court any document to exhibit the existence of the insurance cover and to enable the court evaluate and verify its efficacy. Even though there was demand allegedly made by the Defendant for the honor of the insurance cover, my reading and understanding of the demand was that the insurance cover was to mature where there was inability to pay or default on the part of the guarantors. There is nothing before the court to show that recovery from the guarantors has failed.

18. More critically, the lender who has multiple securities has the liberty and option unless expressly prohibited by the law to decide which security to realize first: see **Aberdare Investment Ltd *vs.* Housing Finance Company of Kenya Limited & another [1999] 2 EA 1 (CAK).** The choice of a remedy for recovery of an unpaid loan under a security is that of the lender and the borrower cannot tell the lender to take such action as may suit the borrower.

19. It should not be for the debtor to suggest to the lender which security to realize first.

20. I am not satisfied that the Plaintiff has demonstrated the existence of a prima facie case with any chances of success in the circumstances.

21. Being of that persuasion, I see no reason why I should consider whether the Plaintiff will suffer irreparably suffice only to state that the allegations as to irreparable loss are more speculative than anything else. I am thus inclined to dismiss the application and it is dismissed.

22. I however make no order as to costs.

Dated, signed and delivered at Nairobi this 9th day of February, 2017.

J.L.ONGUTO

JUDGE