REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

COMMERCIAL AND ADMIRALTY DIVISIONAT NAIROBI

CIVIL CASE NO.16 OF 2016

FIRST CHOICE MEGA STORE LIMITED …PLAINTIFF/ APPLICANT

VS

ECOBANK KENYA LIMITED……..….DEFENDANT/RESPONDENT

RULING

Introduction

1. By a Notice of Motion dated 22 January 2016, the Applicant seeks temporary orders to restrain the Respondent from selling, taking possession, leasing, appointing a receiver, transferring, charging or otherwise in any manner whatsoever dealing with or interfering with all that property known as Title No Central Kitutu/ Daraja Mbili/3577(“ the mortgage property”). The Applicant also seeks orders extending time, for a period of 12 months or any such period as the court deems fit, for the Applicant to rectify any default and regularize its mortgage accounts with the Respondent.

2. In the alternative, the Applicant seeks orders suspending or postponing the Respondent’s statutory powers of sale for a period of twenty four months to enable the Applicant to redeem its security with the Respondent. The Applicant, finally, seeks declaratory orders effectively to invalidate the statutory notice issued by the Respondent as well as a Notice to sell issued by the auctioneer.

3. The application was supported by the affidavit of Denis MainaOmai sworn and filed on the same date but opposed by the Respondent through the two affidavits sworn on 25 January 2016.

Background

4. The factual background is not in dispute.

5. Briefly, the Applicant charged the mortgage property to the Respondent to secure indebtedness aggregating Kshs. 62,000,000.00. The Respondent had extended the term loan and overdraft facilities, leading to the indebtedness, to the Applicant in November 2014. The Applicant then agreed to pledge, inter alia, a non-possessory security to the Respondent to secure the indebtedness in addition to personal guarantees issued by the Applicant’s directors.The non-possessory security pledged was the mortgage property. A formal legal charge was duly registered on 29 December 2014.

6. The Applicant however appears to have run into difficulties and defaulted in its repayment obligations to the Respondent. According to the Respondent, as at 8 January 2016 the Applicant’s indebtedness stood at an aggregate sum of Kshs. 56,818,021.90.

7. After a flurry of exchanges including advise to the Applicant by the Respondent that the Applicant was in arrears and further notification that the Respondent was minded to register the Applicant with the Credit Reference Bureau, the Respondent issued a statutory notice under section 90 of the Land Act as the first step towards realization of the security. The statutory notice was issued on 23rd June 2015 to run for three months. It set in motion the contested process of realizing of the mortgage property.

The Applicant's case and submissions

8. The Applicant acknowledges the statutory notice but contends that it is defective. It is stated that it does not meet the requirements of section 90 of the Land Act and hence the Respondent's power of sale has not arisen, as the same cannot be borne out of a defective statutory notice.

9. The Applicant also asserts that, the Respondent is in breach of its statutory duty of care as chargee as, contrary to section 97 of the Land Act, it has failed to obtain the forced sale value of the property prior to purporting to put the same up for sale.

10. The Applicant further contends that the Respondent is guilty of unlawfully varying the rate of interest contrary to section 84 of the Land Act and that it is such unlawful interest that led to the default on the part of the Applicant.

11. For such transgressions, the Applicant states that the Respondent ought not be allowed to exercise its purported statutory power of sale and further that the Applicant ought to be allowed to reschedule the repayments as appropriate.

12. Counsel for the Applicant's submissions were effectively a rendition of the Applicant's case outlined in the preceding paragraphs. Suffice to point out that Mr. Stephen Nyarango, advocating for the Applicant, submitted that the Applicant had established a prima facie case with probability of success pursuant to the decision in **Giella*v* Cassman Brown & Company Ltd [1973] EA 358** as it was evident that the Respondent had acted in violation of express statutory provisions. Mr Nyarango first pointed to the statutory notice which demanded the entire debt outstanding of Kshs. 61,074,962.25 without stating the amount payable to rectify the default. In counsel's view, the entire debt outstanding could possibly not be the "amount in default". Counsel stated that demanding the entire debt simply amounted to a clog on the Applicant's right to redeem the mortgage property.

13. With regard to alleged violation of a lender's duty of care, Mr. Nyarango pointed out that contrary to the requirement that the chargee obtains the best possible price and not sell the mortgage property at an undervalue, the Respondent had obtained an obviously low forced sale value of the mortgage property. Counsel sought to illustrate this by showing that the forced sale value of the mortgage property in 2014 was Kshs.63,000,000/=, yet in 2015 the respondent was now imposing a lower forced sale value of 43,000,000/=. According to counsel, the valuation as conducted was wanting as the value of the property could not have possibly dropped. Consequently, counsel submitted, if the Respondent was allowed to sell the mortgage property it would be sold at a throw-way price.

14. Finally, the Applicant's counsel submitted that the Respondent had also acted in breach of section 84 of the Land Act by not giving the Applicant the requisite statutory notice upon variation of the interest rates on the financial facilities accorded to the Applicant. The Applicant pointed to an undated notification from the Respondent, which stated that the interest rate would be varied effective 31 October 2015 to 23.24% per annum. According to counsel, the notice was an affront of the law as the 30 day statutory period was not availed to the Applicant yet such notice was mandatory. For this proposition counsel referred to the case of **Bhalvinder Pal Singh v Equity Bank Ltd [2015]eKLR** .

15. Mr. Nyarango concluded his submissions by referring to the cases of **Jimmy Wafula Simiyu *vs.* Fidelity Commercial Bank Ltd [2013]eKLR**and **Kwanza Estates Limited *v* Dubai Bank Kenya Ltd [2013]eKLR**and stating that the Applicant would suffer irreparable loss not capable of compensation through an award of damages and further that the balance of convenience titled in favour of the Applicant in view of the impugned Valuation report which had understated the value of the mortgage property.

Respondent's case and submissions

16. The Respondent's case is that the Applicant was not before the court with clean hands as there was admitted default in the repayment of the facilities advanced, including the fact that the Applicant had issued the Respondent with cheques which upon presentment were dishonoured. There was in the Respondent's view evident default and the Respondent's statutory rights to recover the debt had accrued.

17. The Respondent further contended that the statutory notice was perfectly in order and the Respondent through a firm of professional valuers undertook the valuation of the mortgage property for purposes of exercising the right of sale in good faith. The Respondent asserts that it places all the confidence in the subsequent valuation.

18. As far as the interest rates are concerned, the Respondent contended that both the Facility Agreement and provisions of the Land Act allow a variation of interest chargeable upon notice. The Respondent stated that the Applicant was duly and appropriately served with the notice.

19. Mr. Simiyu urged the Respondent's case.

20. Counsel submitted that the Applicant had failed to bring itself within the ambit of the decision in **Giella *vs.* Cassman Brown & Co Ltd**. The Applicant had, in counsel's view, failed to establish a prima facie case with any probability of success. Further counsel also submitted that the Applicant was not likely to suffer any irreparable loss if the injunction was not granted. Counsel referred to the case of **Mrao Ltd *vs.* First American Bank Kenya Limited & 2 Others [2003] KLR 123** . On the issue of balance of convenience counsel submitted that the Applicant was not before the court with clean hands having failed to make the agreed periodic payments and also issued cheques in purported payment, which cheques were dishonored upon presentment. Counsel added that the fact that the Applicant had admitted its indebtedness also counted against the Applicant.

21. It was also counsel's submission that the Respondent was entitled to demand the entire sum due in accordance with the terms and conditions outlined in the agreement between the parties as well as the Charge instrument. The Respondent also laid the submission that the valuation report which the Respondent was seeking to rely upon in undertaking the statutory power of sale had been prepared by a professional whose qualifications had not been challenged by the Applicant.

22. Mr. Simiyu concluded his submissions by stating that there had been no unlawful variation of interest and that the application lacked merit and was only worthy of a dismissal order.

Analysis and Determination

23. I have read through the affidavits filed in support of the Motion as well as the Motion itself. I have also read through the affidavits filed in response to the motion and considered the parties respective submissions.

24. The application the subject of the ruling is largely for an interim injunction pending the hearing of the suit herein. The Applicant also seeks declaratory orders and orders for the rectification and or extension of time to comply with provisions of the facility and security agreement. The declaratory orders sought are basically correlated to the injunction application.

25. I must immediately point out that with regard to injunction applications, the law is relatively clear. The considerations as laid out in the case of **Giella *vs.* Cassman Brown & Co Limited (supra)** nearly one half of a century ago still hold sway. By way of a rehash,the claimant is expected to establish a prima facie, not just arguable, case with a probability of success. He must then also show that he will likely suffer irreparably if the injunction is denied and where,in doubt, the court is to apply the balance of convenience by ascertaining where the greater hardship would like if the injunction was granted or denied: see **Mrao Ltd *vs.* First American Bank of Kenya Ltd & Others [supra]**.

26. I hasten to add that while the grant of temporary injunctions is intended to prevent the ends of justice from being abused: see **Bonde *vs.* Steyn [2013] 2 E A 8,** temporary injunctions are equitable remedies and the principles of equity will apply including the fact that the court will closely look at the conduct of the applicant. It must also not be lost that at this stage of the proceedings;the court must not make any definitive and conclusive findings of law or fact. Rather the court should be contented with a finding that on the basis of the material before the court there is need to have the rights apparently infringed further interrogated,protected and the party accused of wrongdoingcalled to account. The court has nonetheless to sway away from holding a mini trial: see **Nguruman Limited *vs.* Jan Nielsen Bonde & 2 Others CACA No 72 of 2012**.

27. With regard to the limb of the application seeking declaratory orders, neither of the parties addressed the court on the propriety of such reliefs at an intermediary stage. Interlocutory declarations however obtain in many jurisdictions in civil proceedings: see for example **NHS Trust *v* T [2005] 1 All ER 387**, where it was stated that an interim declaration may issue where the facts are obvious or agreed upon and in exceptional cases. There must be a sound foundation for such an order as a declaration ought not to be made on an interim basis without adequate investigation of the evidence put forward by either side. The nature of the interim declaration and its legal effect would also be relevant in making the determination.

28. I can now return to and repeat the narrative.

29. The Respondent granted to the Applicant at its request financial accommodation in the form of an overdraft and a term loan. The Applicant offered the mortgage property as security. The Respondent obliged. The amounts were advanced. The Applicant agreed to repay the amounts advanced on demand. The parties also agreed that the amount advanced could be repaid through installments. A repayment mode was agreed upon. Interest rates chargeable were also agreed upon. The Respondent then issued the Applicant with a notice varying the interest rates. It is unclear when the notice was issued but revised rates were to be effective from the 31 October 2015. Events of default were also outlined and agreed upon. It was a relatively standard security.

30. In less than one year, the Applicant was in default. The installments never came through. The Applicant issued the Respondent with cheques which were dishonoured upon presentment. The Respondent demanded that the Applicant make good. The demands were made in April and May 2015.The demands were documented. The Respondent wanted the Applicant to repay the full amount then outstanding.

31. The Applicant acknowledged the default and the demand. It sought the Respondent's indulgence.Apparently not willing to reschedule the repayments, the Respondent proceeded to be more legal and formal. On 24 June 2015, the Respondent issued the Applicant as well as its guarantors with a statutory notice. The notice was stated to have been issued under section 90 of the Land Act and section 106 (6) of the Land Registration Act. The Applicant was expected to make good the default within ninety days. Failure to heed the notice and after expiry of the notice period, the Respondent was to exercise its statutory power of sale which would then have accrued.

32. The Applicant who is the registered proprietor of the mortgage property readily admits that it is in default and indebted to the Respondent. The Applicant however contests the Respondent's premise that the latter's statutory right of sale has matured. First, as proof that the Applicant has a prima facie case, it is stated that the statutory notice upon which the Respondent pegs the right to proceed and realize the security is fatally defective. More particularly, the Applicant states that though the statutory notice states that there has been default on the part of the Applicant, the notice did not state the amount payable to enable the Applicant rectify the default. The notice demanded the entire sum under the Charge. According to the Applicant, this was illegal as it was contrary to the provisions of section 90(2)(d) of the Land Act and thus vitiated the notice.

33. A statutory notice issued under section 90(2) of the Land Act, prompts a process, which leads to the chargee ultimately exercising its remedies outlined under section 90(3). The notice is issued where the chargor is in default of any obligation under the charge or has failed to pay interest or any other periodic

payment and such default continues for one month. There ought to be a prescribed format for the notice but it is common ground that the Cabinet Secretary in charge of lands and housing is yet to promulgate such a form under section 90(5) of the Land Act. The parties, especially the chargees must thus make do with the their own drafts and thus far no ubiquity has been obtained leading to challenges and questions on what truly constitutes statutory a valid notice.

34. The chargee however needs to ensure that the notice is compliant with section 90(2) which provides for matters to be included in the notice.

35. As read together with section 90(3), section 90(2) of the Land Act obligates the chargee to firstly, state the nature and extent of default.Secondly, where the default consists of non-payment, to state the amount required to be paid within three months for the purposes of making good the default or where the default is non observance of a covenant in the charge, then the notice is to state what the charger is to do or desist from doing so as to rectify the default. Thirdly, the notice ought to state the fact that if the default is not rectified within the time stated in the notice, then the chargor would thereafter sue for money due and owing under the charge, appoint a receiver of the income of the security property, lease the security property, enter into and keep possession of the security property or sell the security property. The fourth and final requirement under the notice is that the notice needs to state that the chargor has the right to apply to court and seek any relief or challenge the exercise by the charge of any of the statutory remedies. The notice crystallizes after the expiry of ninety days from the date it is received by the chargor.

36. In the instant case, the notice stated that the default was in respect of making the required repayments. It stated that demand had been made and not heeded. It stated that the amount due to rectify the default was Kshs. 61,074,962.25. It demanded payment of the default amount. It stated that the default would only be deemed rectified if payment was made as demanded and any other repayment would only be accepted on a without prejudice basis. The notice also cautioned the Applicant that upon expiry of the ninety days months period, the Respondent would proceed to exercise its statutory right to sell the mortgage property as permitted under sections 90 and 96 of the Land Act.

37. For now, I would view it that the general purpose of a notice to a chargor under section 90 is majorly to protect the chargor. The law regulates the contractual relationship between the parties by ensuring that the purpose of a charge (pledged property) is not defeated. The purpose is mainly for the property to act as security and no more. The chargor must have the chance, nay right, to redeem the property. In the absence of a notice it would be much easier for unscrupulous chargees to rid the chargor of the equity of redemption. The borrower who pledges and charges his property must be confident that the property will be held as security and when the lender must then act and start the process of selling the same , the borrower will have both notification of such action and an opportunity to redeem his property.

38. It would be appropriate to however also conclude that there is a need always to preserve a balance between the respective rights of the chargee and the chargor. In the words of Lord Bingham of Cornhill, spoken in **Royal Bank of Scotland Plc *vs.* Etridge [2002] 2 AC 733,[2]** , the law " must afford both parties a measure of protection". The lender must also feel able to advance money on security, including non-possessory security, like land, in reasonable confidence that it may at an opportune time enforce the security.

39. A purposive construction of section 90 is necessary. Section 90 must thus be read and understood with the open factor that the chargee also has a right to pursue his various remedies. Any interpretation, which curtails that right, should not be favored given that it is the same section that triggers the application of a chargee's rights and remedies.

40. In ascertaining whether there was compliance with the provisions of section 90 (2) of the Land Act, the object and purpose of the section must thus not be gainsaid. The court must also not be simply textual.

41. Section 90 of the Land Act is couched in mandatory terms in so far as the requirement of notice being given is concerned. No party can run away from that legal requirement, otherwise its absence would be a

fetter to the chargor's right of redemption. Section 90(2) however dictates substance when it stipulates that the information to be availed to the chargor ought to be "adequate". This signals both routine compliance (in issuing the notice) and also substantial (not exact) compliance in providing the stipulated information. Any deviation from statutory prescription is to be deemed as countenanced by substantial compliance hence the requirement for adequate information.

42. The Applicant argued that once there is default a chargor cannot demand the entire sum but only such sum as would help rid the default. Section 90 of the Land Act, which must be read in its entirety, requires a notice to be given where there is default of any obligation or failure to pay interest or any periodic payment. The information to be given where the default consists of non payment of amounts due under the charge is of the amount that must be paid to rectify the default and the period for payment, which must be not less than ninety days.

43. If I understood the Applicant well, the argument advanced by counsel was that when there is default then the entire amount couldn't be due. It is only the periodic payment that must be due and outstanding and it is only the aggregate of such installment amount to be demanded in the notice and a period of at least three months given to honor such payment. Mr Nyarango was categorical that in this case the Respondent could not therefore call upon the Applicant to pay the full amount due under the charge.

44. It would appear to me that to so argue would be counter the very text of section 90. The section talks of " default of any obligation". It also talks of "if the default consists of any money due under the charge". It also prescribes that the statutory notice may be served for the repayment of the amount owing. I take the view that where the charge includes a provision that the amounts secured will be payable upon demand, then that is an obligation that the chargor must honor once the demand is made. If the chargor does not do so, then at the end of one month he must be deemed to have fallen foul of section 90(1). There is default, which must be rectified within the three-month period of the notice. Redemption amounts are monies due under the charge and once demanded it ought to be paid.

45. Secondly, the Applicant's argument also falls short of basic logic , in my view. Assuming that the chargee was only to be demanding the installments due and unpaid, and giving the chargor three months to make good, then the chargor indeed makes good the default at the end the third month, it would appear that the chargee would never realize the security or even sue for the monies outstanding under the charge. I doubt that the internal logic of section 90(2) was to extend perpetually the repayment period by consistently calling upon defaulters to make good the default within three months. Unscrupulous and unwilling borrowers would most definitely take advantage of such an approach and defeat the essence of security as far as lenders are concerned.

46. The chargee may very well have the leeway and choice of demanding only the monthly amount then in arrears but it appears to me that it would be illogical to bind him to that. The demanding test is whether there is default under the charge and this may take the form of an event of default or demand specifically made by the chargee and not honoured by the chargor.

47. The Applicant herein bound itself to pay the amount due under the charge on demand. This covenant appears severally in the charge document executed by both parties. The amount payable under the charge was demanded, with good reason,following the failure to honor the agreed installments. The entire amount became due and payable under the charge. It was not paid for a period of over one month prompting the Respondent to issue the statutory notice. In these respects thus, it is apparent that there was substantial if not full compliance with the statutory prescription as to notice and what information to be availed in the notice.

48. I now move to the issue of alleged unlawful variation of the rates of interest.

49. The Applicant has not complained about any extortionate interest rate. The Applicant only faults the Respondent for allegedly not giving the Applicant thirty days notice before varying the rate of interest as dictated by section 84 of the Land Act. While the Applicant admits receiving the undated notice dispatched by the Respondent and stating that the rates of interest would be varied effective 31 October

2015, the Applicant did not disclose to the court when it received the notice.The Applicant who complains that the notice period was insufficient failed however to avail evidence along those lines. I say no more on this point only to point out that the relief sought by the Applicant is an equitable one and the Applicant was duty bound to make full disclosure of all material facts.

50. Finally, is the issue of the valuation report and a staggering forced sale value.

51. The Applicant's complaint in this respect was that the Respondent wants to exercise the statutory power of sale without undertaking a proper valuation. It is stated that in 2014 the mortgage property had a forced sale value of Kshs. 63,000,000/=. Then in the year 2015, the forced sale value of the mortgage property dipped to Kshs.40,000,000/=.Two valuations, both undertaken on the instructions of the Respondent reveal this. According to the Applicant, the Respondent is clearly in breach of its duty of care.

52. It is common ground that a chargee who exercises or seeks to exercise his power of sale owes a duty to take reasonable precautions to obtain the true market value or a proper price for the property at the time when he comes to sell : see **Cuckmere Brick Co Limited *vs.* Mutual Finance Ltd [1971] 2 All E R 633, Yorkshire Bank plc *vs.* Hall [1999] 1 All E R 879**and**Madhupaper International Ltd *vs.* Paddy Kerr and others [1985] LLR 2396 (CAK)**. The chargee is expected to act honestly and without reckless disregard for the chargor's interests. This duty, which had its genesis in equity, like much of the solicitous concern of equity for the interests of chargors, is now enshrined in statute. Inscrutably, Section 97 of the Land Act imposes the duty to obtain the best possible price reasonably obtainable at the timeofsale. The chargee is then under a duty, in the circumstances, to cause a forced sale value to be ascertained by the valuer.

53. The Applicant contends that the Respondent is or is likely to breach this duty and sell the property at an undervalue. The Respondent is contented by stating that the valuation was returned by a qualified professional who the Respondent, and by extension the court, should not question.

54. The Respondent appears to have substantially complied with the statutory prescription but that does not mean that the purpose of the required valuation would be met. The chargor is entitled to protection and the responsibility is with the chargee, in this case the Respondent. Compliance with the statutory provision is not simply a routine. The essence is to ensure that the objective of the statute is achieved.

55. In **Spero Holdings Limited *vs.* Cooperative Bank of Kenya Ltd & Another [2016]eKLR**, the court held that though a discrepancy in the forced sale value of over Kshs. 34,000,000/= was " a hefty sum", it was not good enough reason to stop the chargee from exercising its statutory right of sale as the chargors loss would in any event be quantifiable. The discrepancy herein which is Kshs. 20,000,000/= is also hefty, in my view. There is, in my view, an almost blatant disregard of the duty to ensure that an appropriate price is obtained at the time of sale.The discrepancy is so obvious as to warrant questions being posed.

56. The totality of the circumstances of this case placed along the set principles for the issuance (or denial) of an application for injunction is what ought to dictate whether the Applicant is entitled to the interlocutory orders sought.

57. The Applicant has admitted to its indebtedness. The Applicant actually seeks a rescheduling of the debt repayment through the court by seeking a suspension of any remedy the Respondent may invite. The Applicant also admits that it received the statutory notice. I have made a preliminary discovery that the statutory notice is not defective. I have also made a prima facie finding that the Respondent is not in violation of the law in so far as the Applicant admits that it was served with a notice to vary the rates of interest. Then I have returned the verdict that in the Respondent blissfully relying on a valuation report thatshows that the value of the mortgage property has depreciated, the Respondent could and is on the verge of breaching its duty of care if allowed to sell the property. The end result is that the Applicant has only established a prima facie case, in so far as the duty of care owed to it at the sell of the property is concerned.

58. I am not however satisfied that the Applicant has shown that it will suffer irreparably if the property is sold. The property having been pledged and charged as security by the Applicant, a simple promise was made to the Respondent: I agree you may sell my property subject to all the legal requirements cometh the hour. It was simply a commercial property but whose value could also be placed. I did not hear any suggestion as well that the Respondent may not pay any damages.

59. Before concluding, I deem it appropriate to say a word or two on the Applicant's alternative request that the court do suspend the exercise of any statutory remedy by the Respondent for a period of twenty four months.

60. Ordinarily, the court ought not interfere with a lender's security where the amount is proven as due and appropriate notifications of intention to call in the amount borrowed duly given. The statute has however given the court a wide discretion to suspend or postpone the exercise of any remedy by the chargor: see **section 104(2)** of the **Land Act**. The rhetoric that the court ought not get involved in drawing or redrawing contracts or agreements for parties no longer applies.

61. The wide discretion under section 104(2) of the Land Act will only be invited when the statutory remedy has actually accrued. Effectively, it would mean that the amount under the security would be outstanding. My view is that exercise of the discretion in favour of the chargor under section 104(2) of the Land Act should only take place where there is established to the court's satisfaction an ability on the part of the chargee to pay the sums due within a reasonable period. Where the ability is not established or there is no prospect at all, then it would not be appropriate to exercise the power under section 104(2) of the Land Act.

62. The Applicant herein made no effort to establish the ability to (in future and within a reasonable time) settle the amounts outstanding.

Disposal

63. My final views, in the circumstances of this case and by way of disposal are as follows.

64. It would not be proportionate to deny the Respondent the right to dispose of the mortgage property by way of a public sale. The right has both admittedly and apparently accrued. The Respondent on the other hand still has a hanging obligation, which is to ensure that it obtains the best possible price reasonably obtainable at the time of sale. I see no reason why the Respondent cannot obtain a third opinion, from a valuer of its choice, even as I decline to restrain the Respondent from exercising its statutory power of sale. The Respondent is free (in its own interest as well as that of the Applicant) to obtain another valuation and may thus of its own volition postpone the sale as it works on the valuation.

65. I find the application wanting on the requisite merits and dismiss it with costs to the Respondent.

66. Orders accordingly.

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

J. L. ONGUTO

JUDGE