REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMDIRALTY DIVISION

HCC NO. 488 OF 2014

DOHASHE ENTERPRISE LIMITED.....PLAINTIFF

VERSUS

SPEED CAPITAL LIMITED.....1ST DEFENDANT

CAREBASE INVESTMENT AUCTIONEERS.....2ND DEFENDANT

RULING

1. The Plaintiff herein filed an application dated 28th October, 2014 seeking the following orders ;-

a. ***Spent***

b. ***Spent***

c. ***That the Honourable Court do grant a temporary injunction stopping the intended sale of parcel no. 12506/224 (I.R. 40153) Juja area – Kiambu County, Mavoko town block 3/28536 & 28537 Machakos scheduled for 7th November, 2014 by the Respondents, their agents and or servants and determination of the suit herein.***

2. The application was based on the grounds contained in the application supported by the affidavit of Dominic KarungahGichehah, sworn on 28th October, 2015. It was deponed that the Plaintiff borrowed a sum of Kshs. 3,000,000 from Defendant payable within 6 months. In line with this, the Plaintiff surrendered three (3) title deeds to the Defendants to act as collateral to the said loan facility.

3. The said Titles were in respect to parcel no. 12506/224 (I.R. 40153) Juja area – Kiambu County, Mavoko town block 3/28536 & 28537 Machakos registered in the name of the respective directors of the Plaintiff Company. According to the Plaintiff's affidavit, an amount of Kshs. 2,699,450/= was dispersed into the Plaintiff's account instead of the agreed sum of Kshs. 3,000,000/=. It was further averred that the plaintiff made the first installment of Kshs. 300,000/= on 9th October, 2014 as per the loan agreement. That on or about 22nd October, 2014, the 1st Defendant advertised the suit properties for sale through the Star Newspapers without serving a statutory notice of sale to the Plaintiff.

4. The Plaintiff further contended that the 1st Defendant's power of sale had not materialized as the contract was for a duration of 6 months running from 25th June 2014 to 25th December 2014. It was also the Plaintiff's disposition that the 1st respondent had charged excessive and punitive interest rates on the

loan facilities making it impossible for the Plaintiff to service the said loans effectively.

5. The plaintiff further accused the 1st Defendant of failing to keep proper books of accounts in respect to the loan account thus failing to furnish the Plaintiff with the same. According to the Plaintiff, this was in clear breach of the laid down principles of banking and contrary to law, making it impossible for the applicant to know what it owes to the 1st Defendant. In light of these circumstances, the Plaintiff urged the court to allow the orders sought.

6. In reply to the application, the 1st Defendant filed the Replying Affidavit of James Ouma sworn on 17th November, 2014. The 1st Defendant confirmed that it had approved a loan of 3,000,000/= to the Plaintiff but dispersed only Kshs. 2,699,450/=. However, it was averred that the Plaintiff had agreed that the amount dispersed would be less the valuation expenses, and legal fees for creation of the charge.

7. According to the Defendant, the Plaintiff breached the terms of the loan agreement as it failed to repay the loan as agreed. That the loan was payable for 6 months at Kshs. 500,000/= per month with effect from 20th July, 2014 but the Plaintiff only made a single payment installment of Kshs. 300,000 since the loan was disbursed. Given these facts, it was the 1st Defendant's assertion that the Plaintiff was undeserving of the orders sought as it was part of the contractual agreement, that the Defendant can realize the security held in the event of the Plaintiff's default.

8. It was therefore the contention of the Defendant that Plaintiff is estopped from raising any objections to the mode of recovery employed by the 1st defendant as long as the plaintiff is in breach. The 1st Defendant therefore urged the court to dismiss the application accordingly.

9. Directions were granted to determine the motion by way of written submissions. The Plaintiff filed its submissions on 13th January, 2016 while the 1st Defendant filed its submissions on 27th January, 2016.
I have considered the pleadings, depositions and rival submissions including the various cases cited. The issue for the court's determination is whether the Plaintiff is entitled to the temporary injunction for the suit properties sought.

10. Before embarking on the merits of the application, it is of note that prior to the hearing of the application, the Plaintiff offered to settle the principal amounts of Kshs. 3,000,000/= to the 1st Defendant. As per the court record the last and final installment in terms of the principal amount was paid to the 1st Defendant on 27th November, 2015. The only issue therefore left for determination by this court is on the issue of interest and whether the same can be used to grant the temporary injunction sought.

11. The conditions for grant of interlocutory injunction orders are well-settled. These were enunciated in the celebrated case of **Giella vs. Cassman Brown & Co. Limited(1973) EA 358 as follows:**

> ***"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 ab application on the balance of convenience"***

12. Has the Plaintiff met the above threshold? The Plaintiff claims that notwithstanding the contractual stipulations of the charge, the 1st Defendant has levied varied interest and penalty charges contrary to section 44 of the Banking Act, Cap. 488 of the Laws of Kenya. Section 44 of the Banking Act provides that ***"no institution shall increase its rate of banking or other charges except with the prior approval of the Minister".***

13. It was also the Plaintiff's claim that the Defendant did not issue a notice to the Plaintiff indicating that there was nonperformance of the loan or that it would exercise its power of sale with regard to the suit properties.The Defendants, in response, denied that they subjected the loan to unconscionable interest rates. According to the Defendant's submissions, the applicant did not dispute that there was a loan agreement and the interest rate was 10% per month for the period of 6 months.

14. That further the issue of default interest was also contractually agreed to in clause 2(III) of the charge document. With regard to notice, it was the Defendant's contention that the Plaintiff was aware of its default given that it even annexed a statement from the 1st Defendant to its application.

15. I have considered the rival arguments by the parties. I have no doubt that the Plaintiff herein is indebted to the Defendant. Indeed, it is not in dispute that the Plaintiff has not paid the interest due to the 1st Defendant. The question to be determined at the hearing of this suit in due course is just how much?

16. In my assessment, the Plaintiff has a dispute as to the amount of interest charged to its accounts and has attached an IRAS report in its submissions which concludes that the plaintiff's loan accounts have been overcharged with interest by the Defendant.

17. Whether the same is true or false in my view is a matter that should be canvassed at the hearing of the main suit. This Court is reminded of its proper function in this regard guided by the following words of **Ringera J** (as he then was) in **Martha KhayangaSimiyu vs. Housing Finance Co. of Kenya Ltd. & 2 Others – HCCC No. 937 of 2001 (unreported)** as adopted by **Ochieng J** in the case of **J. K. Khatri& Another vs. Giro Commercial Bank Ltd** :-

> ***"****In answering that question the court is to remember that it is not required – indeed it is forbidden – to make definitive findings of fact or law at the interlocutory state particularly where the affidavits are contradictory and the legal propositions are hotly contested as is the case here".*

18. Further, with regard to questions of what amount is owed, the court is bound to follow the finding of **Kwach JA**(as he then was) in **Lavuna& Others vs. Civil Servants Housing Co. Ltd. & Another (1995) UR 3021 (case)** that :

> ***"Notwithstanding the stand taken by Mr. Nagpal, in the ultimate analysis this is a suit brought by chargors to restrain a chargee from exercising its statutory power of sale under the charges executed by them as security for money advanced to them and receipt of which they have unequivocally acknowledged. Default is not denied. Service of statutory notice is admitted. I have always understood the law to be that a court should not grant an injunction restraining a mortgagee from exercising its statutory power of sale on the ground that there is a dispute as to the amount due under the mortgage". (emphasis added)***

19. Also in the case of **PriscillahKrobought Grant vs. Kenya Commercial Finance Co. Ltd & Others being Civil Appl. No. Nai 227 of 1995(unreported)**the Court stated that :

> ***"Finally, it will bear repetition, we think, if we were to re-state that a court does not normally grant an injunction to restrain a mortgagee from exercising its statutory power of sale solely on the ground that there is a dispute as to the amount due under the mortgage"***

20. I am also persuaded by **Njagi J**'s finding in **Beatrice E. Wambuguvs. Savings & Loan Kenya HCCC No. 1865 of 2001 (unreported)** when he noted that:

> ***"There is abundant case law in this country, and it is now well established that a dispute as to the amount payable is not an adequate ground for granting an injunction restraining the sale of mortgaged or charged property in order to realize the security thereof".***

21. Accordingly I find myself unable to uphold the Applicants' submissions for an interim injunction to be granted on the ground that the Defendant has levied varied interest and penalty charges contrary to section 44 of the Banking Act, Cap. 488 of the Laws of Kenya, as this is a question for the main trial.

22. With regard to the fact that the Plaintiff was not notified of its default as it is mandatory, I have perused the documents presented by both the Plaintiff and the 1st Defendant. I note that the money lending agreement, dated 10th June, 2014 does not include any clause with regard to notice of default.

23. However, I have seen the charge document annexed to the replying affidavit of James Ouma sworn on 17th November, 2014. The same does not contain a date on the face of it and neither does it contain entries of when it was received for registration. It is also not embossed with stamp duty revenue stamp. Further to this, the document through signed by the chargor and chargee, the said affixing of the signatures were not witnessed by an advocate of the high court as required by law.

24. However upon my further perusal of the charge it is clear thatone of the director's to the plaintiff confirmed that he understood the effect of his signature on the charge document.It then goes without saying that the Charge maybe defective, null and void. In the circumstances, the said charge may not afford the 1stDefendant the powers reserved for chargee in the Land Act and the Chargee may not exercise any power of sale on that charge.

25. But that is not to say that he cannot rely on the Loan Agreement.In essence, what this means is that the charge that the 1stDefendant is relying on though unregistered, still has a binding effect as a contractual document. My thinking is fortified by the case of **M'Mella vs. Savings and Loan (K) Limited [2007] 2 EA 316 (CAK)** where the Court of Appeal stated:

> ***"…….could one say that because the charge was not valid, the appellant was released from his duties under the charge? The answer is, in our view, yes, during the period when the charge remained invalid. But we make haste to add that the appellant was only released from his duties under the charge and not under the contract" (emphasis mine)***

26. Having stated the above, I have perused the said charge at clause 9 with regard to the events of default. The same states as follows;

> "9. **Events of Default**
>
> ***The Chargor and the Bank hereby agree that the Bank shall cease to be under any further commitment to the Chargor and all money obligations and liabilities secured by this Charge shall immediately become due and payable and the Chargor shall provide cash cover on demand for all contingent liabilities of the Chargor to the Bank and for all notes or bills confirmed accepted endorsed or discounted and all bonds guarantees indemnities documentary or other credits or any instruments whatsoever from time to time entered into by the Bank for or at the request of the Chargor on the occurrence of any of the following events of default:***
>
> ***9.1 if the Chargor fails to pay when demanded any sum due and owing to the Bank under this Charge or fails to comply with any term or condition of any facility from the Bank or fails to perform or discharge any term agreement obligation or liability of the Chargor to the Bank under this Charge or in any other security created by the Chargor in favour of the Bank contained or implied or under any loan agreement facility letter or other agreement;"***

27. Given the above clause, it is clear that in the event of a default of payment, it was incumbent upon the 1st Defendant to demand for the monies owed from the Plaintiff. In my thinking, such demand can only be made by way of a notice. It cannot be assumed that the Plaintiff knew of its default and it was essential for the 1st Defendant to show this court that it had communicated to the Plaintiff with regard to its default before taking steps for the sale of the suit properties.

28. In this case, the defendant has not denied that it did not notify the plaintiff of its default. Maybe, if the Plaintiff would have been notified on its default, he would have remedied the same.

29. From the totality of facts, it is therefore my finding that the Plaintiff in this case has made out a prima facie case to warrant a temporary injunction pending the hearing and determination of the case. Accordingly, I grant an injunction in the terms of prayer 3 of the Plaintiff's application dated 28th

October, 2014 with costs of the Application to the Plaintiff.

30. The matter should however be listed for hearing at the earliest to expedite the hearing of the same and determine the issue with regard to what interest is owed to the Defendant.

31. It is so ordered.

Dated, signed and delivered in court at Nairobi this 4th day of March, 2016.

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C. KARIUKI

JUDGE