REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO. 470 OF 2012

RIDGEWAYS HOLDINGS CO. LTD. …….…… PLAINTIFF

VERSUS

MADISON INSURANCE CO. OF KENYA LTD. …… DEFENDANT

RULING

1. Before this Court is the application dated 23rd July, 2012 brought by the Plaintiff pursuant to the provisions of **Order 40 Rules 1, 2, 3(1)** of the **Civil Procedure Rules** together with **Section 1A, 1B, 3 and 3A** of the *Civil Procedure Act*. The Plaintiff seeks for the following prayers *inter alia*:

> **"1. THAT service of the application be dispensed with in the first instance and the same be heard ex-parte;**
>
> **2. THAT an order for temporary injunction do issue restraining the Defendant/Respondent herein, their servants, employees and/or agents or whomsoever from selling, transferring, alienating, disposing, interfering and/or offering the suit premises known as L.R Nos. 6725/114 and 6725/115 situate in Ridgeways Estate Nairobi** (hereinafter "the suit property") **for sale or security and/or any other transaction in any manner whatsoever and howsoever pending the hearing and determination of this suit."**

2. The application is predicated upon the grounds set out in the application and further supported by the affidavit of **Wilfred Ritho Njeru** sworn on even date. The deponent detailed that he was the Managing Director of the Plaintiff Company. He contended that he had applied for a Staff Mortgage with the Defendant by his application dated 17th July, 1995, which application was approved by the Defendant on 9th August, 1995. The facility was for Kshs. 11,000,000/- at a preferential interest rate of five (5) per cent per annum, such being repayable as to capital and interest at the rate of Kshs. 72,592.15 per month for a period of twenty (20) years. The deponent contended that the Defendant, in blatant breach of its Personnel Procedures Manual, especially Section 15 subsection 1.6 thereof, had unilaterally and arbitrarily varied the interest rate chargeable, thereby overstating and inflating the amount repayable on the loan. The deponent further contended that despite making proposals to repay the outstanding amount pegged at Kshs. 9, 341,466.47 being the amount outstanding as at 31st December, 2009 plus the deponent making further repayment proposals on 24th April, 2012 and 6th July, 2012, the Defendant rejected all such offers and proceeded to issue a Statutory Notice dated 5th February, 2010 and Notification of Sale by the Auctioneers dated 23rd May, 2012 respectively. The Plaintiff averred that the Statutory

Notice was issued irregularly as no notice of payment of outstanding arrears was issued and that the Respondent has been charging interest over and above the contractual rate contained in the Personnel Procedures Manual.

3. In opposing the application, the Defendant by the Replying Affidavit of **Samuel Chege** sworn on 3rd July, 2012 reiterated that the loan facility was offered to the said **Wilfred Ritho Njeru** as an employee of the Defendant but was later made to the Plaintiff and was secured over the suit property which had been registered in its name. At paragraph 5(ii) of the Mortgage registered on 31st January, 1997 the Defendant had the right to amend the rates of interest applicable to the loan and to require the Plaintiff to pay interest at such determined increased or decreased rates. Further, the deponent noted that the Plaintiff had obtained similar interim relief in **H.C.C.C No. 805 of 2004** which suit was later dismissed by Khamoni, J on 9th October, 2009. It was further averred that the Plaintiff's prayer for injunctive relief is fraught with inordinate delays and inequities, including default in mortgage repayments for close on seven (7) years. As a result, the application is bad in law, misconceived and otherwise an abuse of the process of the Court. The deponent maintained that the Plaintiff was employing diversionary tactics to divert the Court's attention to the fact that it was in default of a mortgage debt in the total amount of Kshs. 26,206,526.98 as at 23rd March, 2012.
4. On 23rd July, 2012 during the hearing of the application *ex-parte*, the Court determined and certified the matter as urgent as per prayer 1 in the application. The Court further allowed the prayer 2 of the application, but limited the interim relief pending the hearing and determination of the application and as a condition thereof, the payment into the Court of the amount of Kshs. 10,626,614/- which amount the Plaintiff contended was the outstanding sum due as at 31st July, 2012, and which amount was paid into the Court on 22nd January, 2013. The parties resolved to file their respective submissions in order for the Court to render its determination.
5. In the submissions filed by the Plaintiff, it was submitted that the loan facility offered was for Kshs. 11,000,000/- as evidenced in the letter dated 15th April, 1996 annexed to the Supporting Affidavit and marked as **"WRN-2"** secured over the suit property. The terms as agreed upon were contained in the aforementioned letter and a further letter dated 22nd August, 1996 marked as **"WRN-3"**. The Plaintiff submitted that the Defendant varied the interest rate chargeable on the loan facility, and reiterated the same in its letter dated 27th April, 2004 marked as **"WRN-9"**. It was further submitted that the Defendant varied the interest rates chargeable, ranging from 21% to 19% to 16% and further to 14% as contained in the annexure marked as **"WRN-12"**. The Plaintiff also submitted that under Section 15 Clause 1.6 of the Personnel Procedures Manual marked as **"WRN-12"** its Managing Director was under the Staff House Mortgage Scheme and thus entitled to the preferential rate of interest of five (5) per cent per annum having worked for over ten (10) years for the Defendant. It was the Plaintiff's submissions that the provisions of Section 120 of the Evidence Act, Cap 80 estop the Defendant from applying a higher rate of interest other than the rate agreed upon by the parties and by acting contrary to that such negates the intentions of the parties. The Plaintiff further relied on its list of authorities dated 27th January, 2014 in support of its application.
6. In its submissions, the Defendant submitted that on or about 31st January, 1997 it agreed to advance the amount of Kshs. 11,000,000/- to the Plaintiff's said Managing Director personally at the agreed rate of five (5) per cent interest per annum for a period of twenty (20) years. That facility, it submitted, was secured over the suit property. It further submitted that the Plaintiff was bound by the terms of the Mortgage and that the Respondent was at liberty to vary the rate of interest chargeable, upon giving prior notice to the Plaintiff. No evidence had been adduced before Court of any infringement of any of the Plaintiff's rights by the Defendant under the said Mortgage. It was also the Defendant's submissions that the Plaintiff was guilty of laches. It had its hands tainted with inordinate delays and inequities including defaulting with the debt repayments for over seven (7) years and that the Application before Court is calculated towards unjustly eluding the repayment of the mortgage debt. The Defendant relied on the cases of **Tenet Enterprises Ltd & 3 Others v Trust Bank Ltd (In Liquidation) & 3 Others (2013) eKLR** and **John Ayawo Oneko & 5 Others v Titus Matya Kiondo & 2 Others (2013) eKLR** in support of its case.

7. The issue for determination arising from the Application, the Supporting Affidavit thereof, the Replying Affidavit and the submissions filed by the parties is whether the relief of injunction as prayed for by the Plaintiff is justifiable. The Plaintiff relied on the case of **Giella v Cassman Brown (1973) E.A 358** under which the principles for the granting of an injunction were set out therein. In the aforementioned case, the *locus classicus* on interim injunctive reliefs, the Court of Appeal **(Law JA.)** determined *inter alia:*

"**The conditions for a 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 must otherwise suffer irreparable injury, which would not adequately be compensated by an award for damages. Thirdly if the court is in doubt, it will decide an application on the balance of convenience."**

The Court in exercise of its discretionary power in granting the equitable relief of an injunction, further stands guided by the decision of my learned brother **Onyancha, J.** In **Eleonora Cozzi v Ali Hussein Motors H.C.C.C Malindi No. 16 of 2001** and subsequently in **E. Muiru Kamau & Another v National Bank of Kenya Ltd (2009) eKLR** where the Court, in achieving the principle of the overriding objective as enunciated under Section 1A and 1B of the Civil Procedure Act, and in placing parties on an equal footing in acting justly, has to determine each case on its own particular circumstances. This is so in order for the ends of justice to be achieved and to prevent an abuse of the process of the Court.

8. The peculiar circumstances in the present case are that the parties followed a divergent and different approach in relation to the same situation. On the one hand, the Plaintiff was of the view that the terms of the loan facility was pegged on the Personnel Procedures Manual relating to the Staff House Mortgage Scheme (see **"WRN-5"**) whilst it was the Defendant's contention that the same was pursuant to the Mortgage dated 31st January, 1997. In the Mortgage deed, the Plaintiff as the "Mortgagor" and the Defendant as the "Company" entered into the deed in the terms as set out therein. The Mortgage is marked as **"WRN-4"**. It is provided in Clause 3 thereof that the Mortgagor was to pay the mortgage debt inclusive of interest ***'…or by such increased or decreased monthly installments as the Company may require under the provisions in that behalf herein contained…'*** and further to the provisions of Clause 5(ii). The said Clause 5(ii) and (iii) reads as follows:

> **"5. It is hereby further agreed that the rate of interest payable on all moneys hereby secured shall be determined as follows…..:**

ii. **The company may at any time and from time to time require the mortgagor to pay interest on the mortgage debt at such *increased or reduced rate as the Company shall in its absolute discretion* decide in lieu of the rate herein specified AND the first of such increased or reduced monthly installments shall become due and payable on demand;**

iii. **In the event of the Company requiring an increase in the rate of interest under the provisions of sub-clause (ii) of this Clause *the Company will notify the Mortgagor of the amount of the resulting increased monthly installment payable under the provisions of Clause 3* hereof and the first of such increased monthly installments shall become due and payable on the first day of the month next after notification of the amount thereof to the Mortgagor."**

9. The Plaintiff contends that the loan facility was provided under the Personnel Procedures Manual which provided for a preferential rate of interest of five (5) percent per annum, which preference was by virtue of its Managing Director's employment with the Defendant for a period of over ten (10) years. At Section 15 – House Mortgage Benefit under Staff House Mortgage Scheme (Purchase) at Clause 1.5, the preferential rate was subject to be varied where the Management deemed it necessary. The aforementioned clause reads:

> **"1.5 A preferential rate of interest of 5% on reducing balance will be charged <u>for as long as the employee is in the company's employment.</u> <u>*However, this rate may be varied in the future should it be deemed necessary by the Management.*</u>** (Emphasis added).

10. Under both the Personnel Procedures Manual and the Mortgage deed dated 31st January, 1997, the rate of interest, even the preferential rate, was subject to be varied by Management. The Mortgage deed enunciated further at Clause 5(ii) that the Applicant would be notified of the variations in the rate of interest. Between June, 1996 and July, 2002, the rate of interest was five (5) per cent. The rate of nineteen (19) percent was applicable as from August, 2002 up until September, 2002 when the rate was again varied to fourteen (14) percent, effective as from October, 2002. The Defendant however, has not adduced any evidence that the Applicant was informed of the changes in the interest rates as provided for under Clause 5(iii) of the Mortgage deed dated 31st January, 1997. Nonetheless, pursuant to the Mortgage deed, the Defendant was justified in making variations in the interest rates as per Clause 5(ii) and Section 15 sub-section 1.5 of the Personnel Procedures Manual. The claim by the Plaintiff that the variations were in breach of the express terms of the Mortgage agreement is therefore unsubstantiated. I find that the Defendant exercised its absolute discretion and mandate in varying the rates of interest as pursuant to the Mortgage deed. Further, it is obvious that the Managing Director of the Plaintiff company chose to hold the suit property in the name of the Plaintiff company as distinct from his own name. As I understand the contents of the Personnel Procedures Manual, such would apply to the individual not the individual's company – the Plaintiff. In my view, the Plaintiff company could not enjoy the preferential rate of interest of 5 percent per annum. In any event, there is no dispute that the Plaintiff's said Managing Director left the employment of the Defendant and, as a consequence, the Defendant's management had complete discretion to increase the mortgage rate of interest.
11. The Court is however, obliged to look at the principles as enunciated in **<u>Giella v Cassman Brown</u>** (supra) that the Plaintiff has to establish a *prima facie* case with the probability of success. In this regard, the Plaintiff relied on the case of **<u>Washika Waluchio Ally v Mollyn Credit Ltd</u> E.L.C No. 257 of 2013**, in which **Dulu, J.** held *inter alia*:

> **"A prima facie case is not one which must succeed but one which may succeed."**

In its submissions, the Plaintiff more than once reiterated that the Defendant unilaterally and arbitrarily varied the rate of interest, which was in breach of the terms of the Mortgage deed. At Clause 4 of the Second Schedule of the deed, the rate of interest reads five (5) percent per annum. Clause 5(ii) as read together with (iii) states that the Company would have the sole discretion of varying the rate of interest, and that it would notify the Plaintiff of the variations and the increased monthly repayments as provided under Clause 3. No such notification by the Defendant to the Plaintiff has been adduced before Court. In contrast to the circumstances in **<u>Francis Ngige v Madison Insurance Co. Ltd</u> Civil Case No. 1930 of 1998** where the Plaintiff was informed of the change in the rate of interest as per Clause 1.6 of the Personnel Procedures Manual, in the instant case, the Plaintiff was neither informed or notified of any changes or variation in the interest rates. The Defendant, however, relies on the case of **<u>Tenet Enterprises Ltd & 3 Others v Trust Bank (In Liquidation) & 3 Others</u>** (supra) and contended that the Plaintiff could not seek an equitable remedy when it had already defaulted and not made good that default for a long time. It would follow therefore that even given that the Defendant did not notify the Plaintiff of the interest rate variation as provided under Clause 5(iii), the circumstances would dictate that the Plaintiff has to establish a *prima facie* case as against the Defendant. This was as reiterated in **<u>John Ayawo Oneko & 5 Others v Titus Matya Kiondo & 2 Others</u>** (supra) where it was held:

> **"It is a case which, on the material presented to the Court, a tribunal properly directed itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."**

12. The Defendant contends that the Plaintiff has willfully defaulted in repaying the mortgage debt and further relied on the previously determined matter of **<u>Ridgeways Holdings & Co. Ltd v</u>**

Madison Insurance Ltd (2004) eKLR. In that matter, **Khamoni, J.** held *inter alia:*

"The property involved is real property which may be very valuable to the Plaintiffs who may not like to let the property go. But let them be clean as justice must be looked at from both sides. There should be no injustice or abuse of the process of the Court and an injunction should not be used to intimidate or oppress the other party."

Khamoni J. in dismissing the application for injunction in the fore stated case as well as the case itself, gave as his reasons, that there had been an inordinate delay on the part of the Plaintiff in prosecuting the matter. In that case, the interim *ex-parte* orders had been issued over four (4) years prior to the Application coming before the learned Judge and he found that the same was prejudicial to the Defendant. In my view, the same element of inordinate delay exists in the present Application before Court. The interim Orders were granted by me on the 23rd July 2012, almost 2 years ago. It is just such delay and that the Rules Committee envisaged to put an end to by including in **Order 40 rule 6** a provision that interim injunctions should only remain in place for a maximum of 1 year unless extended for good reason by the Court. Although this Court has extended the interim orders, I take cognizance of the wise words of **Khamoni J.** on page 4 of his Ruling in the previous **Ridgway's Holdings** case in 2004 (supra):

> **"The Defendant was taking steps to recover loaned money at the time the Defendant felt Plaintiffs were in default. That would have been proved or disproved in the trials of the two suits. If truly the money was due, now five years ago and still its recovery time is unknown, how can it be said that the Defendant is not suffering prejudice as mortgagor. Plaintiffs use every trick to escape or obstruct or delay payment? How about availability of relevant evidence? The property involved is real property which may be very valuable to the Plaintiffs who may not like to let the property go. But let them be clean as justice must be looked at on both sides. There should be no injustice or abuse of the process of the court and an injunction should not be used to intimidate or oppress the other party. It is only granted as a temporary short measure where it is thought a party's right is in danger or threatened by violation."**

13. In the Replying Affidavit, the Defendant has detailed at paragraph 14 thereof that as at 23rd March 2012, the Plaintiff's mortgage debt stood at Shs. 26,206,526/98. No evidence has been brought before this Court that the Plaintiff has made any effort to clear this sum and, in my view, is before this court with unclean hands. In this connection, I adopt the holding of **Ringera J**. (as he then was) in the **Kenya Project and Investments Ltd v Kenya Post Office Savings Bank HCCC No. 2811 of 1995 (unreported)** case when with reference to the **Giella** principles he detailed:

"That stand has been so often restated in other decisions of the East African Court of Appeal as well as those of the present Kenyan Appeal Court that this court must decide applications for interlocutory injunction in conformity therewith. All that need be added for the sake of clarity is that the 'doubt' mentioned in the third condition must in logic refer to the existence or otherwise of a prima facie case. Judicial practice also supports that understanding. It should also be borne in mind that the remedy of injunction is equitable in origin and accordingly the court must decline to exercise its discretion in favour of an applicant whose conduct is shown not to meet the approval of a court of equity. Delay, acquiescence and unclean hands would disqualify an applicant from equitable relief."

14. The Plaintiff made much of the fact that the suit property was a matrimonial home. It is not clear to this Court how a company , which is the Plaintiff in this case, can have a matrimonial home. I presume that the Plaintiff is referring to the fact that the suit property may be the matrimonial home of its Managing Director and his family. In my view there is no sentiment as regards any real property that is mortgaged for the purposes of raising monies. Here again I adopt the holding again of **Ringera J**. in the **Isaac O. Litali v Ambrose W. Subai & 2 Ors HCCC No. 2092 of 2000 (unreported)** case as follows:

"However, since the plaintiff has in his pleading and affidavit made a mountain out of the fact that he has developed the land in question to a home and its sale would therefore occasion pain and loss which cannot adequately be compensated in damages, I think it would be fair to express a view on the matter. I am of the opinion that once land has been given as security for a loan, it becomes a commodity for sale by that very fact, and any romanticism over it is unhelpful. I say so for nothing is more clear in a contract of charge than that default in payment of the debt will result in the sale of the security. In that respect, land is no different from a chattel such as a motor vehicle or any other form security. And needless to state, there is no commodity for sale whose loss cannot be adequately compensated by an appropriate quantum of damages."

15. Cognizance must be had of the fact that the matters raised in this suit and in the Application before this Court had been closely examined as aforesaid by **Khamoni J.** in **HCCC Nos. 804 and 805 of 2004**. Although not raised by counsel for either party, this Court needs to consider the principles of *res judicata*. On this point, **section 7** of the *Civil Procedure Act* provides as follows:

> **"7. No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in any former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."**

Explanation. (4) under **section 7** as above reads:

> **"Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit."**

As per **Deverell JA** in the case of **Ukay Estate Ltd & Anor. v Shah Hirji Manek Ltd Civil Appeal No. 243 of 2001** reported at **(2006) eKLR** the learned Judge stated:

"The key phrase in both the main section and the Explanation is 'the matter directly and substantially in issue'. It has to be borne in mind that neither the Section nor the Explanation mentions of the 'cause of action'.

I consider that what the court hearing the subsequent suit has to decide is whether the matter directly and substantially in issue in the former suit is the same as the matter directly and substantially in issue in the subsequent suit. In cases where the cause of action is the same the task will be easier than in cases where the cause of action is different but the matter directly and substantially in issue is the same."

Such matters were further considered by my learned brother **Ochieng J.** who dwelt upon the case of **Kanorero River Farm Ltd & 3 Ors v National Bank of Kenya Ltd HCCC No. 699 of 2001** as per **Ringera J.** as follows:

> **"As I understand the law, the doctrine of *res judicata* applies to both suits and applications, whether they be final or interlocutory. Indeed section 2 of the Civil Procedure Act defines a suit to mean any civil proceeding commenced in any manner prescribed. And prescribed is defined as prescribed by rules. Applications for a temporary injunction are prescribed for by Order 39 of the Civil Procedure Rules. It follows that the determination of such an application by a court of competent jurisdiction would in appropriate circumstances operate as a plea in bar called *res judicata*."**

Ochieng J. then quoted from the well-known Court of Appeal decision in **Uhuru Highway Development Ltd v Central Bank of Kenya & 2 Ors Civil Appeal No. 36 of 1996** where it was

held as follows:

> **"That is say, there must be an end to applications of similar nature; that is to say further, wider principles of *res judicata* applying to applications within the suit. If that was not the intention, we can imagine that the courts would be inundated by new applications filed after the original one was dismissed. There must be an end to interlocutory applications as much as they ought to be an end to litigation. It is this precise problem that section 89 of the Civil Procedure Act caters for."**

16. In my opinion, the Plaintiff's Application dated 23rd July 2012 (as well as this whole suit) quite clearly falls under the plea in bar of *res judicata*. I also find that there has been inordinate delay in bringing the Application. Further, I find that the Plaintiff has not established a *prima facie* case in line with the **Giella** principles sufficient to justify the extension of interim injunctive Orders until the hearing of this suit. As a result, I dismiss its said Application with costs to the Defendant.

DATED and delivered at Nairobi this 14th day of May, 2014.

J. B. HAVELOCK

JUDGE