



**IN THE HIGH COURT OF**

**AT NAKURU**

**CIVIL SUIT NO. 62 OF 2014**

**MWATEC ENTERPRISES LIMITED.....PLAINTIFF**

**VERSUS**

**EQUATORIAL COMMERCIAL BANK LIMITED.....DEFENDANT**

**RULING**

1. The application is brought by way of a Notice of Motion dated 26<sup>th</sup> August 2014 under **Section 3A** of the **Civil Procedure Act** and **Order 40 Rules 1,2 and 3** of the **Civil Procedure Rules**. The Applicant seeks the following orders
  - (a) **pending the hearing and determination of this application, the Defendant/Respondent by itself, officers, servants or agents be restrained by way of temporary injunction from selling the property known as L.R. NO. NYAHURURU/MUNICIPALITY/BLOCK 4/132 by public auction or otherwise on 18<sup>th</sup> September 2013 or any other time thereafter and from disposing of, alienating, transferring or otherwise interfering with the Plaintiff/Applicant's interest in the said property; and**
  - (b) **the costs of this application be provided for.**
2. The application is premised on the grounds on its face and on the further grounds in the Supporting Affidavit sworn by the Plaintiff's Director, Douglas Mwangi Muteru, on 26<sup>th</sup> August 2014 and his Supplementary Affidavit sworn on 14<sup>th</sup> September 2014. In opposition to the application, the Respondent filed a Replying Affidavit sworn by its senior Manager on 8<sup>th</sup> September 2014.
3. Briefly the undisputed facts are that the Applicant applied for and was granted by the Respondent an overdraft facility of KES. 15,000,000/= and a term loan of KES 5,000,000/= for purposes financing and expanding its business operations. The term loan was payable in 60 equal monthly installments of KES 177,753.90/= whereas the overdraft facility was payable on demand. This loan was secured by the personal guarantee of each of the Applicant's directors for KES 20,000,000/= and a first legal charge over the property known as Title Number Nyahururu Municipality/Block 4/132 (the suit property).
4. The Applicant concedes that it has not serviced the loan from November 2013 due to financial constraints. As a result, the Respondent issued demand notices to the Applicant and further commenced the process of realising the charge created over the suit property by issuing Notices dated 28/11/2013, 10/03/2014 and 07/01/2014 demanding for full payment of the outstanding sum

- of KES 23,070,353.40/= as at 07/01/2014. Thereafter, the applicant was served with a 45 days redemption notice dated 12/07/2014 and a letter notifying him that the property would be sold by way of public auction on 18/09/2014.
5. Having successfully prevented the sale of the suit property on 18/09/2014, the Applicant now seeks to restrain the Respondent from selling his property pending the hearing and determination of the suit.
  6. The Applicant contended that the Respondent failed to comply with the law when exercising its power of sale. In this regard, the Applicant argued that the redemption notice and notification of sale do not constitute valid notices under the Auctioneers Rules. The Applicant has also faulted the Respondent for failing to negotiate with it and refusing to accept its proposals for payment. It was also aggrieved by the interest rates applied to the loan and claimed that they are inordinately higher than those of other banks. In the suit the Applicant also seeks an order compelling the Respondent to render a true account of the loan facility and that the rate of interest be reviewed to conform with the legal or current prevailing rates of all financial institutions.

## **SUBMISSIONS**

7. The application was argued before this court on 17<sup>th</sup> September 2014 Counsel for the Applicant argued that although the charge was created in 2011, it is governed by the provisions of the Land Act, 2012 by virtue of **Section 78 (1)** thereof. Counsel then submitted that the Respondent failed to comply with the provisions of this Act which regulate the process of realisation of a charge by the chargee.
8. Firstly, it was contended that the Respondent subjected the loan to unreasonably high interest rates without giving notice to the Applicant. Counsel cited the provisions of **Section 84** of the **Land Act** which provide that where it was contractually agreed that the interest rate is variable, such interest may be increased or reduced by a written notice of thirty days to the chargor stating clearly and in a manner that can be readily understood the new rate of interest to be paid in respect of a charge. The Respondent did not give the Applicant the thirty days notice before increasing the interest to 28.5% p.a. He argued that the provision in the charge document allowing for increase or reduction of interest rates at any time and without notice to the Applicant is of no effect in light of the said **Section 84**.
9. Counsel also contended that in exercising its power of sale the Respondent failed to comply with the procedures under the Land Act. Counsel pointed out that the Respondent had not issued the required statutory notice under **Section 90** of the **Act**. The purported notice dated 28/11/2013 only gave the Applicant 7 days within which to settle the loan whereas **Section 90 (2)** provides for a minimum period of three months. In addition there was no proof that these notices were served upon the Applicant.
10. Therefore, failure to comply with the law rendered the intended sale of the suit land premature which provides sufficient reason to the grant the injunctive orders sought.
11. Submitting for the Respondent, Mr. Nyamwange relied on the Replying Affidavit and list of authorities dated 05/03/2014. He contended that the Applicant had failed to establish the principles for grant of an interlocutory injunction stated in **Giella V. Cassman Brown, [1973] E.A. 358**. Firstly, he argued that the Applicant is undeserving of the orders of injunction sought as it has come before the court with unclean hands. Having admitted to being in default, and that it presented its property as security for this loan, the intended auction of the charged property may only be stopped if the Applicant offers to pay the outstanding sum before the date of the auction.
12. The Respondent denied acting in contravention of the Law in pursuing its statutory right to sell the charged property and maintained that all notices were issued in strict compliance with the Land Act. Accordingly, the Applicant has not demonstrated a *pima facie case*.
13. Secondly, Counsel submitted that the Applicant has not demonstrated that it stands to suffer irreparable damage which cannot be compensated by an award of damages. The Respondent being a financial institution of means is in a position to compensate the Applicant for any monetary damage suffered if the suit is determined in its favour.
14. Counsel submitted that if the court were inclined to grant the orders of injunction sought, then it should condition it on the Applicant depositing 50% of the outstanding sum together with auctioneers fees and costs as stated in the Notification of Sale in court or with the Respondent.

## ISSUES FOR DETERMINATION:

- a) Notification of change of rate of applicable interest
- b) Proof of service of the Statutory Notice
- c) Proof of service of the Notification of Sale
- d) Auctioneers fees and costs.

## ANALYSIS

15. The renowned case of **Giella V. Cassman Brown** (supra) that was cited by the Respondent sets down the principles for a grant of injunctive orders. One, the applicant must make out a prima facie case; The applicant must also demonstrate that it stands to suffer irreparable damage which cannot be compensated by an award for damages. Lastly when in doubt the court can determine which party will be inconvenienced if the sought is not granted; that is the balance of convenience tilts in whose favour, the applicants or the respondents.
16. It is not in dispute that the applicant is the registered proprietor of the subject property and that the respondent has issued notices of its intention to dispose of the property by public auction.
17. The issue of notification of the varying interest rates has been raised by the applicant. This court has had occasion to peruse the Letter of Offer, the Charge and the Statutory Notice.
18. It is noted that the interest rate stipulated in the Letter of Offer is 17% , whereas the Charge is silent and the rate stipulated in the Statutory Notice is 28.5%.
19. What is of interest is at Item 3(i) of the Charge which is headed “**INTEREST**” and reads as follows and I quote;

**“...the Bank shall not be required to advise the Chargor prior to any change in the interest so payable....”**

20. It is the courts view that the new Land Registration Act was enacted to curb such mischief. I will say no more on the issue of notification of the interest rate and leave this issue for the trial court to hear and determine at full trial.
21. On the next issue which was raised by the applicant in its submissions is that there was no proof of service of the statutory notice. This court has taken note of this issue with interest as there are various addresses used by the respondent and are as set out hereunder;

On the Letter of Offer dated the 15<sup>th</sup> December, 2010 the address is stated to be : **Mwatec Enterprises Limited, P. O. Box 95567, Mombasa.**

On the Charge Document dated the 23<sup>rd</sup> November, 2011 the address used is; **P.O. Box 95567 Mombasa.**

The demand notice dated the 28<sup>th</sup> November, 2013 which is written by the respondent to the applicant the address is; **P. O. Box 95567-80106, Mkomani.**

The Statutory Notice issued by the Respondents Advocates and dated 10<sup>th</sup> March, 2014 reads; **P. O. Box 95567-80106, Mombasa.** The Certificate of postage annexed as “**LM 7**” also reads likewise.

22. The address used by the Respondent has a postal code 80106 and reads Mkomani whereas the statutory notice has the postal code but reads Mombasa. The question that comes to mind is which is then, the correct address and which party has the best information on the applicant’s last known address. This would definitely be the Respondent and not its advocates therefore it follows that the address used on the statutory notice raises issues as to whether the statutory notice was sent to the

correct address.

23. On the Notification of Sale the Auctioneer is found to have used an irregular address as the postal code is incorrectly stated as **80100** and there is no Certificate of postage annexed to support postage. The Certificate of Service is found to offend the rules of procedure on service as it does not state who pointed out the subject property to the Auctioneer. He also failed to provide the date and time that he effected service upon the applicant's director.

### **FINDINGS AND DETERMINATION**

24. For the reasons stated above this court makes the following findings and determination;
25. The issue of notification of interest applicable is found to be a non-issue at this juncture and this court will not belabor itself with this issue as it can be heard and determined at the full trial.
26. There are different addresses used on the Charge document, Demand Notice and the Statutory Notice and it cannot be ascertained which was the last known address and this court finds that the applicant has made out a *prima facie* case on the issue of dispatching of the Statutory Notice dated 10<sup>th</sup> March, 2014 and finds that the notice may not have reached the applicant.
27. The address on the Notification for Sale is also found to be erroneous and the supporting certificate of service found to be defective. The above notwithstanding the Statutory Notice having been found to be irregular, it therefore follows that the Notification of Sale is also found to be irregular.
28. This court reiterates that the Applicant has made out a *prima facie* case and is entitled to the injunctive orders sought.
29. The Defendant/Respondent by itself, officers, servants or agents are hereby restrained by way of injunction from selling the property known as NYAHURURU/MUNICIPALITY/BLOCK 4/132 by public auction or otherwise and from disposing of, alienating, transferring or otherwise interfering with the Plaintiff/Applicant's interest in the said property pending the issuance of a proper statutory notice.
30. The auctioneers fee deposited into court shall be held in court as security for costs. The sum of Kshs.500,000/= to be released to the Respondent Bank towards loan repayment.
31. The costs of this application shall be costs in the cause.

It is so ordered.

**Dated, Signed and Delivered at Nakuru this 7th day of October, 2014.**

**A. MSHILA**

**JUDGE**