



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**CIVIL CASE NO. 12 OF 2013**

**PRESTON (K) WOODS LTD. .... PLAINTIFF**

**V E R S U S**

**EQUATORIAL COMMERCIALBANK LTD. .... 1<sup>ST</sup> DEFENDANT**

**NYALUOYO AUCTIONEERS ..... 2<sup>ND</sup> DEFENDANT**

**R U L I N G**

The application dated 26.3.2013 seeks an order of injunction restraining the defendants jointly and severally from putting for sell, advertising, disposing or in any other way from dealing with four properties namely- plot number **KAKAMEGA/1/611**, **KAKAMEGA/LUBAO/564**, **TIRIKI/CHEPTULU/830** and **NANDI/KOIBARAK/381** pending the hearing and determination of this suit. The application is supported by the affidavit of **ALFRED GODIA** sworn on the 26.3.2013. The respondents filed a replying affidavit sworn by **BRIAN ASIN** on the 28.5.2013. Parties agreed to file written submissions in determination of the application.

From the pleadings and submissions it is established that the plaintiff obtained a loan of KShs.13 million from the 1<sup>st</sup> defendant. The above four properties were used as securities for the loan. According to the applicant the loan was approved in the year 2010 but the disbursement was done in 2012. The loan was used to buy a jaggery that was a running business known as **MUNGAKHA FARM MILLERS** located at Lubao on plot number **KAKAMEGA/LUBAO/564**. The applicant contends that by the time the loan was disbursed the seller of the business had run down the operations and vandalized some of the machines. The business was therefore dead. The money was paid directly to the seller of the business. The applicant notified the 1<sup>st</sup> defendant that the machines were mere shells and there was also lack of raw materials which was mainly sugarcane due to competition in the sugar industry.

The applicant further contends that it purchased the business on the advice of officers of the 1<sup>st</sup> defendant. The valuation of the property was done by the 1<sup>st</sup> defendant and it is purported that the business at Mungakha Farm was overvalued. The applicant is willing to negotiate the terms of the loan and has re-located the business to South Nyanza due to availability of raw materials in that area. Counsel for the applicant maintains that the plaintiff has established a prima facie case with a probability of success and the applicant will be able to repay the loan if the terms are renegotiated.

On their part the defendants maintain that the loan was disbursed as agreed but the plaintiff has failed to service the loan. The 1<sup>st</sup> defendant denies that the valuation of the properties was meant to advise the plaintiff to purchase the business but was merely to determine the suitability of the securities offered as collateral. No irreparable damage will be suffered by the applicant as he has failed to settle the loan. The loan balance is currently standing at KShs.14,767,363.25. The 1<sup>st</sup> defendant contends that it is the applicant who took time to fulfill the conditions of the loan. The applicant has admitted its indebtedness to the 1<sup>st</sup> defendant and has no prima facie case with a probability of success.

The main issue for determination is whether the applicant has established a prima facie case with a probability of success and whether the applicant will suffer irreparable damage should the orders of injunction fail to be granted. There is no dispute that the applicant applied for the loan facility from the 1<sup>st</sup> defendant. There are minutes of the 1<sup>st</sup> defendant showing that the Board met and resolved to

apply for the loan facility. The loan was meant to facilitate the purchase of **MUNGAKHA FARM MILLERS**. The 1<sup>st</sup> defendant annexed the statement of the loan account and it is indicated that the loan was disbursed on the 23.3.2012. The applicant started servicing the loan on 25.4.2012 but fell in arrears. The contentions by the applicant that the business was run down by the time the loan was disbursed is farfetched. The applicant is the one who identified the business. It was the applicant who knew the value of the business and it is clear that it had access to the business premises. It is not established that the applicant never visited the premises between December 2010 and March 2012. The applicant was at liberty to stop the loan if it had found that the premises were run down. The applicant started operating the business and from the pleadings it is clear that due to competition the business somehow suffered losses. The applicant contends that it has relocated to South Nyanza and this shows that it is the same machinery that has been relocated. There are no photographs annexed to show that the premises were rundown. There is no evidence to the effect that it is the officers of the 1<sup>st</sup> defendant who lured the applicant to obtain the loan.

Whenever a property is used as a security for a loan it remains at the risk of being auctioned should the borrower fail to repay the loan. The contentions that some of the securities are family land cannot stand. The properties were given as securities while fully aware that the bank would auction them should the loan fall in arrears. The bank does not have of its own but relies on deposits from its customers to advance loans to borrowers. The customer deposits attract interest and if the borrowers fail to repay their loans then the bank suffers losses. My deduction of this application is that the applicant is only buying time to see if its business can improve so that the loan can be repaid. The application was filed in March 2013 and the applicant has been enjoying interim orders since that time. The applicant has had ample time to reorganize its finances and repay the loan. The applicant took the loan knowing that it was an obligation to repay it. There is no contention that there were no statutory notices issued to the applicant.

In the end I do find that the applicant has failed to establish a prima facie case with a probability of success against the defendants. No irreparable damage shall be suffered by the applicant as the securities were meant to be sold should the loan fall in arrears. The application lacks merit and the same is dismissed with costs.

**Delivered, dated at Kakamega this 8<sup>th</sup> day of October 2014**

**SAID J. CHITEMBWE**

**J U D G E**