REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT BUSIA

ELC CASE NO. 152 OF 2016

SHALOM AGENCIES LIMITED

REMJIUS NYAKINA OTIENO.....PLAINTIFFS

VERSUS

FAMILY BANK LIMITED.....DEFENDANT

R U L I N G

INTRODUCTION

1. The application before me for determination is dated 9.11.2016 and was filed here on 10.11.2016. It is a Notice of Motion brought under Section 1A, IB, 3, 3A and 63 (e) of the Civil Procedure Act (Cap 21) and order 40 Rules 1(a), 2, 3 and 9 and all other Provisions of law. The applicants **– SHALOM AGENCIES LIMITED** and **REMJUS NYAKINA OTIENO –** are the plaintiffs in the suit while the respondent **– FAMILY BANK LIMTED** - is the defendant**.**

2. The application first came up in court on 10.11.2016, when the applicant sought a restraining order ex parte. No such order was granted and the court directed that service be effected on the respondent first. On the next date, 23.11.2016 to be specific, the court granted a restraining order upon being satisfied that the respondent had been served but had shilly-shallied in making a response.

3. The application has five (5) prayers on the face of it but only three (3) – prayers 3,4 and 5 - are for consideration now. The others were for consideration at the exparte stage. The prayers for consideration are as follows:

> **Prayer 3**: Pending the hearing and determination of this suit, the defendant/respondent company, by itself, its officers, servants, agents be restrained form selling the property known as **SIAYA/PAP ORIANG/1242** and **EAST ALEGO/PAP ORIANG/1391** or otherwise howsoever, and from interfering with the said property.
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> **Prayer 4**: The defendant to furnish the plaintiff with a true
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> statement of payment received from 1st plaintiff and the outstanding balance if any or in the alternative an order of taking of accounts.
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> **Prayer 5**: The costs of the application be awarded to the
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> Plaintiff/Applicants.

BACKGROUND AND OVERVIEW

4. There was initially a tri-partite arrangement involving the applicants, the respondent and a third party – Nation Media Group – in which the respondent was to play the role of a guarantor in a business deal between the 1st applicant and the third party. In order for the arrangement to work, the respondent required some securities from the 1st applicant. The 1st applicant obtained two securities – **SIAYA/PAP ORIANG/1242** and **EAST ALEGO/PAP ORIANG/1391** from 2nd applicant and proceeded to avail them to the respondent. The respondent in turn guaranteed the 1st applicant to the tune of 4,000,000/- in its business deal with the 3rd party. The understanding was that if the 1st applicant defaulted in its business deal with the third party, then the respondent would cover its liability to the third party to the tune of Kshs.4,000,000/-

5. The business deal between the 1st applicant and the third party soon floundered when the 1st applicant apparently flouted its terms. The

3rd party then called in the guarantee and was paid Kshs.4,000,000 by the respondent. The respondent in turn demanded payment of the same amount plus some interest from the 1st applicant and made it clear that the securities would be sold if no payment was forthcoming. It seems clear that the 1st applicant was also given a chance to make proposals as to the acceptable mode of payment.

6. The 1st applicant made some proposals but the respondent, apparently not satisfied with the proposals, decided to press on with the intended sale. The two applicants are opposed to the intended sale. That is why the suit was filed. The applicants also desire that before the outcome of the suit there should be temporary restraining orders. That is why this application was filed. Infact the application was filed contemporaneously with the suit.

7. According to the applicants, it was a show of bad faith for the respondent to pooh-pooh their proposal for intended payment. They argue that where a borrower shows serious commitment to pay, the lender is under statutory duty to afford such borrower reasonable opportunity to pay. The applicants explained that they faced unforeseen business challenges which affected progress in repayment. The 2nd applicant also averred that he has his home on the parcels of land and is also dependent on the same parcels of land for income and/or sustenance.

8. The respondent responded vide a replying affidavit dated 13.7.2017 and filed on 17.7.2017. According to the respondent, the guarantee was for 12 months. It was offered on 2.8.2014. Then the 3rd Party called in the guarantee sometimes in February 2016. The respondent paid the guaranteed sum to the 3rd party. It in turn demanded payment of the same plus some interests from the applicants. The applicants are said to have failed to honour the demand. That is why the process of sale of the securities was initiated.

9. According to the respondent, the default by the applicants has given it legitimate interest in the securities offered. The sale, the respondent posited, should be allowed in order to safeguard the interest of its shareholders and depositors.

10. The respondent also averred that the application does not meet the threshold required for grant of temporary restraining orders. In other words, no prima facie case is demonstrated. There is no demonstration of likelihood to suffer irreparable loss. And the balance of convenience is said to favour the respondent.

11. Not to be outdone, or possibly to even out scores, the applicants filed a supplementary affidavit on 21.3.2018. In it, the applicants urged for rescheduling or adjustment of the payment. It was averred too that the 1st applicant is serious concerning payment and such seriousness is said to be shown by payment of some Kshs.456,000 during the pendency of this application.

SUBMISSIONS

12. The application was canvassed by way of written submissions. The applicants' submission were filed on 21.3.2018. The applicants cited the celebrated case of ***GIELA VS CASSMAN BROWN & Co Ltd (1973) EA, 358*** that spells out the principles for grant of temporary restraining orders. They pointed out that the principle requires establishing a prima facie case with probability of success, demonstrating likelihood of suffering irreparable loss not compensable with damages, and/or considering balance of convenience where the court is in doubt regarding the first two principles.

13. A prima facie case is established, the applicants submitted, as it is shown that the 2nd applicants is the title holder, and hence the registered owner, of the securities offered. It was submitted also that the contract between the parties envisaged a situation where there can be variation of terms. The respondent is seen to be taking a hard line stance on the issue of such variation and the applicants would wish the court to intervene.

14. On the issue of irreparable loss, the 2nd applicant is said to have his home on the land and that is where he has brought up his family. According to the applicants, loss of matrimonial home or ancestral land would amount to irreparable loss.

15. As regards the balance of convenience, it was pointed out that the securities offered did not comprise the parcels of land only. This being the case, the respondent would not be prejudiced if the restraining orders are granted. This is so because the respondent would still have recourse to other aspects of securities to realise the debt. The balance of convenience therefore was said to lie in favour of the applicants.

16. The respondent's submissions were filed on 19.3.2018. To the respondent, a prima facie case is not established. This is so because the validity of the legal charge is not disputed and the applicants have also conceded to have defaulted in payment. Besides, all the requisite notices have been served. It was further submitted that the balance of convenience tilts in favour of refusal to issue retraining orders as the debt owed is likely to grow to the point where it could exceed the value of the subject property. The applicants were also faulted for not identifying the irreparable loss likely to be suffered if the orders sought are not granted.

17. To drive home these espoused positions, the respondent cited the cases of ***MILIMANI MOTORS (K) LTD Vs KENYA COMMERCIAL BANK LTD, HCC NO. 171 OF 2012, KISUMU, JAMES KIPRUTO LANGAT & another Vs FAMILY BANK LIMITED & another: ELC NO. 121 OF 2015, ELDORET, SAMMY JAPHETH KAVUKU Vs EQUITY BANK LIMTED & another: HCC NO. 84 OF 2013, MOMBASA & WYCLIFE MUTALI OKWARO Vs THE KENYA WOMEN MICRO FINANCE BANK LIMITED & another ELC NO. 98 OF 2017, ELDORET***. I have read and considered these authorities together with the others not mentioned here that were also cited and availed.

ANALYSIS & DECISION

18. As pointed out earlier, the initial arrangement was tripartite in nature as it involved a third party who later opted out at some point. As a matter of fact, the main arrangement was between the 1st applicant and the third party. The 1st applicant then seems to have initiated and entered into collateral arrangements with first, the 2nd applicant, to obtain securities, and, second, the respondent, to accept the securities in

order to issue a guarantee in favour of the third party. The main arrangement has already collapsed, with the respondent already having made good it's undertaking to the third party.

19. The 1st applicants has already conceded default. Its approach in this matter seems aimed at forcing a rescheduling of payment to the respondent. The court is supposed to intervene in order to ensure rescheduling. According to the applicants the respondent is statutorily obligated to allow such rescheduling. No specific statutory provisions however were shown to this effect. There was also no decided case law availed.

20. In my view, the matter of rescheduling would require voluntary negotiations between the parties. Where one side is not willing to negotiate, there is little or nothing that anybody can do. The court would perhaps legitimately intervene if the terms of contract between the parties provide for negotiations or other modes of dispute resolutions. This however is not the case here. The best way forward then is to follow and apply the applicable law. And that is what I will do here.

21. The applicant concedes default and blames its predicament on unfavourable business challenges. Where default is admitted or demonstrated, it becomes difficult to issue a restraining order. It is clear that the applicants are objecting to respondents approach to the issue of sale. It is clear they want the taking of accounts ordered. And as the court grapples with these issues, they want a restraining order issued. Does the law favour such issuance? The circumstances in which a restraining order can be issued are stated clearly in Halsbury's laws of England, Vol. 32 (4th Edition***)*** at paragraph 725. It is as follows:-

> ***"725. When the mortgagee may be restrained from exercising power of sale.***
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> ***The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has began a redemption action, or because the mortgagor objects to the manner in which the sale is being arranged. He will be restrained however if the mortgagor pays the amount claimed in court, that is, the amount the mortgagee claims to be due to him, unless, on the terms of the mortgage, the claim is excessive."***

22. It becomes clear then that where there is default, there is really no basis of granting a temporary injunctive order unless the amount owing is paid in court or is prima facie excessive. In this matter, there is default. The applicants have not paid the amount owing in court. And it does not appear to me that the amount claimed can be said to be excessive.

23. The 2nd applicant tried to persuade the court to grant the orders because his matrimonial home is on the land and he also derives his livelihood from there. The law on this is again clear. The respondent correctly cited the case of Wycliffe Mutali Okwara (ante) where M.A. Odeny J cites with approval the observations of Warsame J (as he then was) in the case of **MALTEX COMMERCIAL SUPPLIES LIMITED & another Vs EURO BANK LIMITED (N LIQUIDATION) HCC NO. 82 OF 2006** where the following appears:

> ***"…. Any property whether it is a matrimonial or spiritual house, which is offered as security for loan/overdraft, is made on the undertaking that the same stands the risk of being sold by the lender if default is made on the payment of the debt secured."***

24. I think I may add the case of ***Andrew Muriuki Wanjohi Vs Equity Building Society & another, (2006) eKLR*** where the court held as follows:-

> ***"Whenever the applicant offered the suit property as security, he was fully conscious of the fact that if the borrower did not meet his obligations, the suit property would be sold off by the chargee. The chargor could not be heard to complain that his loss was incapable of being compensated in damages. He had had the said property evaluated in monetary terms. He then told the chargee that he knew the property to be capable of providing the chargee with the peace of mind, of knowing that the money given as a loan would become recoverable, even if the borrower did not pay it.***
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> ***By offering the property as security the chargor was equating the same to a commodity which the chargee may dispose of, so as to recover his loan together with interest thereon. Therefore if the chargee were to sell the suit property, the chargor's loss could be calculable, on the basis of the real market value of the said property"***

On the score also, the applicants fail. They cannot be heard to say that the property is matrimonial or ancestral yet, knowing that, they proceeded to have it evaluated in monetary terms and subsequently offered it as security. Arguments of the type advanced by the applicants are generally meant to attract sympathy. It is the law, not sympathy, that should guide the court.

25. When all is considered, it is clear that the applicants' are in default in payment. The respondent has issued all the requisite notices. The amount owed continues to rise as interests are obviously accruing. Besides, the business deal upon which repayment was envisaged has already collapsed and the applicants are now talking of other business prospects which were not under focus under the arrangement. The respondent itself honoured its side of the bargain when called upon to do so. But the applicants themselves are pussy footing and dilly-dallying when called upon to play their part. And in all this they want to use the judicial process to achieve their aim. It would be against the interest of justice to allow this.

26. It is therefore the courts finding, in light of the foregoing, that the application herein entirely is without merit. The same is hereby dismissed with costs.

Dated, signed and delivered at Busia this 30th day of January, 2019.

A. K. KANIARU

JUDGE

In the Presence of:

Plaintiffs/Applicants: Absent

Defendant/Respondent: Absent

Counsel of Plaintiff: Absent

Counsel of Defendant: Present

Court Assistant: Nelson Odame