**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT NAIROBI**

**ELC SUIT NO. 54 OF 2013**

**KHALID YAMIN KHAN & ABDUL WAHEED KHAN**

**T/A HIGHLAND DISTRIBUTORS VENTURES.....PLAINTIFFS**

**VERSUS**

**EQUITY BANK LIMITED.....1ST DEFENDANT**

**ANTIQUE AUCTIONS AGENCIES.....2ND DEFENDANT**

**RULING**

What is before me is the plaintiffs' application brought by way of Notice of Motion dated 30th April, 2018 in which the plaintiffs sought the following prayers:

1. That the court do grant a stay of the intended purported illegal, unlawful and unprocedural sale by public auction of all that property known as House Number 3 on Land Reference Number 209/9771 situated at Kileleshwa estate in Nairobi (hereinafter referred to as "the suit property") scheduled to be conducted on 30th May, 2018 or at all pending the hearing and determination of the suit herein.

2. That the court do review and/or set aside its ruling and consequential orders issued on 12th August, 2018 and in its place grant a temporary injunction restraining the defendants from alienating, selling or interfering with the plaintiffs' peaceful and quiet ownership or interest in the suit property pending the hearing and determination of the main suit.

3. That the court be pleased to allow the plaintiffs to amend their pleadings.

4. Any other or further relief which the court deems fit and just to grant.

5. The costs of the application.

The application was brought on the grounds that the court delivered a ruling on 12th April, 2018 dismissing the plaintiffs' application for injunction dated 8th January, 2013 in which the plaintiffs' had sought a temporary injunction to restrain the defendants from in any way interfering with the plaintiffs' ownership of the suit property pending the hearing and determination of the suit. The plaintiffs averred that they wished to review the said ruling on the grounds that they had discovered new and important matter and/or evidence which after exercise of due diligence could not be produced by them at the time when the said ruling was made and that there was sufficient reason to review the said ruling.

The plaintiffs averred that they had paid to the 1st defendant a sum of Kshs.9,860,222.70 towards the repayment of the loan and that the 1st defendant was still demanding from them an additional sum of Kshs.33,273,331.30 as outstanding loan as at 21st April, 2018. The plaintiffs averred that if the amount being claimed by the 1st defendant was paid, the 1st defendant would have recovered from the plaintiffs a total sum of Kshs.43,133,554.00 against a principal loan of Kshs.18,400,000.00. The plaintiffs averred that their failure to fully comply with the terms of the loan agreement was not deliberate but was as a result of financial burden which ensued following the sickness and ultimate death of their parents. The plaintiffs averred that they had exhibited good faith by constantly and regularly repaying their loan and that they had even proposed to settle the entire loan amount which proposal was ignored by the 1st defendant. The plaintiffs averred that the sum of Kshs.33,273,331.30 which the 1st defendant claimed as the outstanding loan as at 21st April, 2018 was illegal as it offended the provisions of section 44A(1) to (3) of the Banking Act, Chapter 488 Laws of Kenya which limits what a financial institution may recover from a debtor with respect to a non performing loan.

The plaintiffs averred that the 1st defendant's demand was not only illegal but also fraudulent. The plaintiffs averred that a mortgagee may be

restrained from exercising its power of sale if on the terms of the mortgage, the claim is excessive. The plaintiffs averred that the sale of the suit property that was scheduled to take place on 30th May, 2018 was illegal also on account of the failure by the 1st defendant to serve the plaintiffs with a mandatory notice required under section 96(2) of the Land Act, 2012.

The application was opposed by the defendants through a replying affidavit sworn by the 1st defendant's Legal Services Manager, Kariuki King'ori on 8th June 2018. The defendants contended that the plaintiffs had not placed before the court any new and important matter or evidence which was not within their knowledge when they brought the application for injunction dated 8th January, 2013 which was dismissed by the court on 12th April, 2018. The defendants averred that the issues raised by the plaintiffs as new and important evidence which they had discovered after the determination of their application were within their knowledge and formed part of the court record when their earlier application for injunction was being considered.

The defendants contended that the plaintiffs' application for review was an attempt by the plaintiffs to re-litigate the same issues that the court had ruled on in its ruling of 12th April, 2018 through which the plaintiff's application for injunction was dismissed. The defendants contended that the plaintiffs had in their application called upon the court to sit on appeal against its own ruling. The defendants averred that the plaintiffs had not been servicing their loan regularly such that as at 18th September, 2017, the plaintiffs were in arrears in their loan repayment to the tune of Kshs.33,973,331.30. The defendants averred that as at 18th May, 2018, the loan balance owed to the 1st defendant by the plaintiffs stood at Kshs.31,398,031.30. The defendants averred that the plaintiffs were aware of the status of their loan account as at 12th April, 2018 when their application for injunction was dismissed. The defendants averred that the plaintiffs' loan account had been periodically non performing and that they had paid a total of Kshs.6,666,295.45 towards the repayment of the loan. The defendants averred that the plaintiffs had made periodic payments to their loan account and as such their loan was not non performing within the meaning of Section 44A (1) to (3) of the Banking Act, Chapter 488 Laws of Kenya. On the plaintiffs' allegation that they were not served with a notice under Section 96(2) of the Land Act, 2012, the defendants averred that the plaintiffs were served with all statutory notices in 2012 a fact which they admitted in their affidavit in support of the earlier application for injunction dated 8th January, 2013.

The plaintiffs' application was argued on 9th July, 2018. The plaintiffs' advocate Mr. Ogada relied entirely on the plaintiffs' written submissions dated 6th July, 2018 which were filed in court on 9th July, 2018 and the authorities cited therein and urged the court to allow the application. In his submissions in reply, Mr. Obok who appeared for the defendants reiterated the contents of the defendants' replying affidavit and submitted that the court had considered the plaintiffs' application for injunction and found the same to be without merit and that the court was being called upon to sit on appeal against its own decision. He submitted that the facts that were being presented to the court as new evidence had been presented to the court and considered by the court in its ruling of 12th April, 2018. Mr. Obok submitted that the grounds that had been put forward by the plaintiffs did not warrant the review sought. On the issue of statutory notices, Mr. Obok submitted that in their earlier application for injunction, the plaintiffs had admitted having been served with a statutory notice. He submitted that the 1st defendant was not obliged to serve upon the plaintiffs a fresh statutory notice before putting up the suit property for sale after the dismissal of the injunction application. With regard to the limb of the application seeking leave to amend the plaint, Mr. Obok submitted that the plaintiffs had not annexed to their application a draft amended plaint indicating the amendments they intended to carry out and as such it was not possible to respond to the prayer.

In a rejoinder Mr. Ogada denied that the plaintiffs had called upon the court to sit on appeal against its earlier decision. He submitted that the plaintiffs had placed new evidence before the court on the basis of which the court should grant the injunction it had refused to grant earlier.

I have considered the plaintiffs' application together with the supporting affidavit. I have also considered both written and oral submissions which were made by the plaintiffs in support of the application. I have further considered the replying affidavit that was filed by the defendants in opposition to the application and the submissions by the defendants' advocate. The plaintiffs' application had three limbs. The plaintiffs sought stay of the sale of the suit property that was scheduled to take place on 30th May, 2018 pending the hearing and determination of the suit, a review and setting aside of the ruling and order that was made by the court on 12th April, 2018 and in place thereof, granting of an injunction restraining the defendants from selling or interfering with the plaintiffs' ownership or interest in the suit property pending the hearing and determination of the suit and finally, leave to amend the plaint.

In their submission, the plaintiffs contended that the stay sought in the application was a conservatory order which the court had power to grant once the plaintiffs demonstrated that they had a prima facie case with a likelihood of success and that there was real danger that they will suffer prejudice as a result of violation or threatened violation of the constitution. The plaintiffs cited a number of authorities in support of their prayer for this relief which included Martin Nyaga Wambora *v* Speaker of the County Assembly of Embu & 3 others (2014) eKLR and Gatirau Peter Munya *v* Dickson Mwenda Githinji & 2 Others, Supreme Court Petition No. 2 of 2013. I am of the view that the plaintiffs' prayer for stay or conservatory order as they have referred to it in their submission is misconceived as it has no basis in law in the circumstances of this case. What is before the court is purely a civil dispute between a bank and its customers. The plaintiffs have not claimed either in their plaint or application that any of their constitutional rights have been violated or are threatened with violation by the defendants. Conservatory orders are normally sought in constitutional petitions pursuant to The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013. These reliefs in my view have no application in civil proceedings which have their own elaborate procedures for interlocutory reliefs. This explains why all the cases that were cited by the plaintiffs in support of their prayer for this relief were concerned with constitutional petitions. For the foregoing reasons, I find no merit in the plaintiffs' prayer for stay of the sale that was scheduled to take place on 30th May, 2018.

With regard to prayer for review, the law on the subject is settled. The plaintiffs' prayer for review was based on Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules. The review was sought on the grounds that the plaintiffs had discovered new and important matter or evidence which with due diligence was not within their knowledge when the order of 12th April, 2018 was made and that other sufficient reason existed to warrant the review of the orders of the court made on 12th April, 2018. I am in agreement with the defendants that the plaintiffs did not place before the court any new fact or evidence which was not within their knowledge when the order of 12th April, 2018 was made. The plaintiffs contended that the 1st defendant had sought to recover from them the principal amount of the loan and interest in excess of what is provided for in Section 44(1) to (3) the Banking Act, Chapter 488 Laws of Kenya. This to me is not something new. The plaintiffs knew of the status of their account and whether it was performing or not. The limitation on the amount

recoverable in respect of non-performing loans is provided for in law. It is not something the plaintiffs can claim not to have been within their knowledge. I have noted from annexure "AWK-6" to the affidavit in support of the plaintiffs' application that the provisions of section 44A of the Banking (Amendment) Act, 2006 was discussed extensively in the report that was submitted to the plaintiffs by the Interest Rates Advisory Centre (IRAC) on 11th August, 2015. It is not true therefore that the plaintiffs only learnt of the provisions of Section 44A (1) to (3) of the Banking Act after the ruling of the court on 12th April, 2018 or that its account was non performing and that the 1st defendant had charged interest in excess of what was provided for under that section.

I would add that in the earlier injunction application that was dismissed by the court on 12th April, 2018, the plaintiffs main argument was over the interest rate that was being levied on the loan account. If the plaintiffs' loan account was non-performing at that time and as such was subject to section 44A of the Banking Act, this is an issue that the plaintiffs ought to have raised in the said application. The plaintiffs cannot be allowed to re-open their application that was dismissed for argument on new grounds in the pretext that they have discovered new evidence.

With regard to the alleged non-service of a notice under Section 96(2) of the Land Act, 2012, the plaintiffs admitted in a letter to the 1st defendant dated 20th December, 2012 that was annexed to the affidavit of Abdul Waheed Khan sworn on 8th January, 2013 in support of the earlier application for injunction as annexure "AWK7" (page 48) that the plaintiffs had been served with a notice to redeem the suit property. The plaintiffs also admitted in paragraph 13 of the plaint that they had been served with a statutory notice. I am in agreement with the defendants that they were not obliged to serve the plaintiffs with a statutory notice and redemption notice each time the plaintiffs defaulted and an auction sale was to be conducted. The alleged non-service of a notice under section 96(2) of the Land Act, 2012 is in the circumstances not a ground for review of the order of 12th April, 2018.

Due to the foregoing I am not satisfied that the plaintiffs have established that new and important matter or evidence or any sufficient reason exist to warrant the review of the ruling and orders made herein on 12th April, 2018.

With regard to the limb of the application seeking leave to amend the plaint, I am in agreement with the defendants that no proper basis was laid for this prayer. The plaintiffs did not make any attempt to inform the court and the defendants as to what the proposed or intended amendment entailed. In the circumstances, there is no material before the court on the basis of which the court can exercise its discretion on the plaintiffs' prayer for leave to amend the plaint.

The upshot of the foregoing is that the plaintiffs' application dated 30th April, 2018 has no merit. The application is dismissed with costs to the defendants.

**Delivered and Dated at Nairobi this 24th day of January 2019**

**S. OKONG'O**

**JUDGE**

**Ruling read in open court in the presence of:**

Mr. Oriri for the Plaintiff

Mr. Obok for the 1st and 2nd Defendants

Catherine-Court Assistant