REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

ENVIRONMENT AND LAND COURT

ELC NO. 164 OF 2017

AUGUSTINE L. OKECHI …..…….. 1ST PLAINTIFF/APPLICANT

MARGARET AGULE OKISAI …... 2ND PLAINTIFF/APPLICANT

VERSUS

LETSHEGO KENYA LIMITED …… DEFENDANT/RESPONDENT

R U L I N G

1. The application for determination before me is a Notice of Motion dated 3/10/2017 and filed on the same date. It was brought under Sections 1, 1B, 3, 3A and 63e of Civil Procedure Act (cap 21), order 40 Rules 1, 2, 3 of Civil Procedure Rules, and article 159 of the Constitution of Kenya. The Applicants **– AUGUSTINE L. OKECHI** and **MARGARET AGULE OKISAI –** are the Plaintiffs in the suit while the Respondent **– LETSHEGO KENYA LIMITED –** is the Defendant.

2. The court first entertained the application exparte on 4/10/2017 and declined to issue a restraining order. Later however – specifically on 10/10/2017 – such order was given by consent of both sides. The application came with a total of seven (7) prayers but prayers 1 and 2 are now deemed spent, having been for consideration at an earlier stage. The prayers for consideration now are as follows:

> Prayer (3): That the Respondent be ordered to provide statements of accounts in respect of loan advanced to the 1st Applicant/Plaintiff to date.
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> Prayer (4): That Pending hearing and determination of the suit interparties there be an order of injunction restraining the Defendants by themselves, agents, and/or those claiming under them from disposing, selling, alienating and/or dealing in any way adverse to interest of Applicants all that parcel of land known as MARACHI/BUMALA/990 or part thereof.
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> Prayer (5): that the Respondent be ordered to pay the Applicant balance owing of the loan advanced of Kshs.5,000,000/= or in the alternative, the Applicant be allowed to source for a third party Financial Institution to pay out determined loan owing to the Respondents, and take over the charged property as bail out.
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> Prayer (6): That the honourable court to issue any and all such orders as are necessary in the circumstances of this case.
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> Prayer (7): That costs be provided for.

3. The application is anchored on grounds, *interalia*, that the Respondent caused to be advertised for sale the Applicant's property by public auction in 45 days; that it is the Respondent who breached the terms of contract by not giving additional Kshs.5,000,000 to the Applicants as the agreed amount was 10,000,000/=; that the Applicants have paid Kshs.1,480,000 as repayment for the loan already advanced and they continue to pay; that the Respondent has refused to avail a statement of account; and finally that the Applicants have already looked for a third party who wants to take over the loan.

4. The application came with a supporting affidavit that reiterate and amplify the grounds advanced. More specifically, it was reiterated that the Applicants were to be advanced a loan of 10,000,000/= but were only given 5,000,000/=.

5. The Respondent responded vide a replying affidavit filed on 15/11/2017. One Donald Makokha said to the Respondents Branch Manager at Kakamega swore the affidavit. According to Donald, it is 5,000,000/= that was applied for; it is 5,000,000/= that was given. And, deponed he, that is clear both from the application for the loan and the letter of offer. He also disputed that any statement of account has been refused to the Applicant. He averred that the Applicants have failed to repay the loan thus necessitating the setting in motion of the process to sell the property offered as security. He further stated that the Applicants have not demonstrated the irreparable loss they are

likely to suffer and that if anything, the Respondent is able to pay damages. And the Applicant were also said not to have established a *primafacie* case.

6. According to the Respondent, irreparable loss is likely to occur to it, not to the Applicants, and the court should find that the balance of convenience lies in its favour and decline to allow the application.

7. The application was canvassed by way of written submissions. The Applicants' submissions were filed on 6/3/2018. The submissions generally capture and reiterate the averments made in both the application and the suit. It is unnecessary to repeat it here, having already made reference to it elsewhere in the ruling.

8. The Respondent's submissions were filed on 16/4/2018 and the thrust and focus is not much different from that of the Applicants. The Respondent however cited some decided authorities like **LALJI KARSAN RABADIA & 2 others Vs COMMERICAL BANK OF AFRICA LIMITED: CA No. 63 of 2012, NAIROBI, ORION EAST AFRICA LIMITED Vs ECO-BANK KENYA LIMITED & Another: [2014] eKLR** and **ST. ELIZABETH ACADEMY – KAREN LIMITED Vs HOUSING FINANCE OF KENYA LIMITED [2015] eKLR,** among others.

9. I have considered the application, the response made, and rival submissions. I have also had a look at the suit as filed. One problem that remains unresolved relates to the amount of money that the Applicants were supposed to get as a loan. The applicants talk of 10,000,000/=. The Respondent talks of 5,000,000/=. The issue of what is supposed to be granted and even the manner of granting is one of contract documents. The application made by the Applicant's show 5,000,000/=. The letter of offer shows 5,000,000/=. It is the Applicants who mentioned 10,000,000/= and as evidence for it, they proceeded to avail a copy of search certificate from the area land registry indicating 10,000,000/= as the amount charged on the land. A copy of search certificate is not a contract document. It cannot be held as an authoritative indication of the amount agreed upon.

10. In the supporting affidavit accompanying the application, the charge documents, which is a crucial contract document, is indicated to be annexture A.L.O-2. Annexture A.L.O-2 however turned out to be a totally different document. It is a document from the respondent indicated to be a loans repayment Schedule Summary. Curiously, it also indicates the loan as 5,000,000/=. The amount of 10,000,000/= seems to me to be a creation of the Applicants. They mention it and on the basis of it proceed to make serious allegations of fraud and/or dishonesty on the part of the Respondent. As things stand, I am unable to go by this figure for now.

11. Having taken this position, I am constrained to observe that the foundational aspects of the application herein are either wrong or misleading.

12. I have also had a look at what is availed by both sides and I think that overall, the Applicants appear to be in arrears in repayment. They blame the Respondent for not availing enough money to them to complete their project but the contract documents availed do not show that repayment was pegged on such completion. The Applicants would have done a better job of convincing the court if they succeeded in showing that they applied for 10,000,000/= but were given only 5,000,000/=. The contract documents are supposed to show this. They would also have done a good job if they demonstrated that they have faithfully been paying the Kshs.121,831.89 agreed as the amount to be repaid monthly. But even the document availed by them – A.L.O-2- tells a different story. All along, there is reflected in the document substantial monthly shortfalls of the required re-payment.

13. It would appear that the Applicants are disputing the amount owed without expressly saying so. I say so because they are asking for a statement of accounts. From the Respondents response, it does not appear to me that such statement has been denied or withheld. In any case, it would not matter even if such were the case. For the law is as stated in Halsbury's Laws of England Vol. 32 (4th Edition) paragraph 725 which says:

> **"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 begun a redemption action, or because the mortgagor objects to the manner in which the sale is arranged. He will be restrained however if the mortgagor pays the amount claimed into court, that is, the amount which the mortgagee claims to be due to him, unless, on terms of mortgage, the claim is excessive".**

14. The authorities cited by the Respondent were also generally instructive and, additionally, I am further guided by the decision of the court in the case of **EURO BANK LTD Vs DR. JULIUS GIKONYO KIANO: CA NO. 125 of 1998, NAIROBI** where the court held, *interalia*, that where default in repayment is demonstrated or admitted, injunction should not be granted to the mortgagor.

15. The Applicants have also not shown that damages are not an adequate remedy. They offered the property as security and knew, or ought to have known, that it would be sold in case of default. In my view, whatever loss they may suffer can easily be quantified in monetary terms and paid as damages. In this regard, I am guided by the holding of the court in **WILFRED OANDA KIROCHI Vs DAVID PIUS MUGAMBA: CA No. 76 of 1995, NAIROBI,** where the court held, *interalia*, that if damages can suffice, injunction should not be granted.

16. Given all this, I hold, without equivocating, that the application herein is unmeritorious. I hereby dismiss it with costs.

Dated, signed and delivered at Busia this 29th day of May, 2019.

A. K. KANIARU

JUDGE

<u>In the Presence of</u>:

1st Plaintiff/Applicant: Absent

2nd Plaintiff/Applicant: Absent

Respondent: Absent

Counsel for the Plaintiffs/Applicants: Absent

Counsel for the Respondent: Absent

Court Assistant: Nelson Odame

Delivered on Notice