REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

THIKA LAW COURTS

ELC.814 OF 2017

STEPHEN KARIUKI PAUL.....PLAINTIFF/APPLICANT

-VERSUS-

CO-OPERATIVE BANK (K) LIMITED....1ST DEFENDANT/RESPONDENT

MELLECH ENGINEERRING &

CONSTRUCTION CO. LTD.....2ND DEFENDANT/RESPONDENT

RULING

The Plaintiff/Applicant herein ***Stephen Kariuki Paul*** filed this ***Notice of Motion*** application dated ***3rd November 2017***, and sought for the following orders against the Defendants/Respondents:-

> ***2) That an order for injunction do issue restraining the 1st Defendant by itself, its servants, agents or any one of them from interfering with the property known as LR.No.Sigona/195 either by sale, offering for sale, auction, sale by private treaty, transfer or disposal by any means whatsoever and howsoever pending the hearing and final determination of the application herein.***
>
> ***3) That a permanent injunction do issue forthwith restraining the 1st Defendant whether by itself, its employees, servants, agents or auctioneers form auctioning the property LR.No.Sigona/195 pending the hearing and determination of the case.***
>
> ***4) That an order to issue directing the Defendants to provide properly all documentation relating to the loan account including reconciled accounts hereto.***
>
> ***5) Any other consequential order.***

The application is premised on the grounds stated on the face of the application and on the Supporting Affidavit of Stephen Kariuki Paul. These grounds are:-

> ***1. The Defendant has wrongfully and unlawfully issued a notification of sale for the property known as LR.No.Sigona/195.***
>
> ***2. The 1st Defendant has not shown any efforts made to exercise and/or exhaust its rights if any against the 2nd Defendant.***
>
> ***3. The 2nd Defendant is the one who had a loan facility with the 1st Defendant.***
>
> ***4. The two Defendants had entered into an agreement for enhancement of the loan amount behind the Plaintiff's back.***
>
> ***5. The Plaintiff's interest in their land is threatened by the unlawful activities of the Defendants, their agents and servants and interim injunction will be an effective means of preserving the subject of the dispute.***
>
> ***6. The Defendants have both shown bad faith.***
>
> ***7. The activities of the Defendants have subjected and will further subject the Plaintiff to irreparable loss, damage and harm.***

8. It is in the interest of justice that the orders sought be granted to avert gross miscarriage of justice to the Plaintiff/Applicant.

The application is also supported by Affidavit of ***Stephen Kariuki Paul*** who averred that he is the owner of ***LR.No.Sigona/195***, which is located at Kikuyu in ***Kiambu County*** which is a one acre parcel of land. He also averred that initially, the 2nd Defendant had approached him with a scheme for development of his property. That the 2nd Defendant had promised to construct apartments on his property after which they would share whatever profits that would arise with him and he even shared building plans with him. Further that ***Gerald Wamalwa*** one of the Directors of 2nd Defendant approached him and wanted him to guarantee them a loan which they were obtaining form 1st Defendant and was promised Kshs.6.6 Million per month. That he signed to guarantee the loan to the tune of ***Kshs.105,000,000/=.***

Further that in ***March 2017***, he received a Notice from the 1st Defendant that action would be taken over his property (***SKP-1).*** The Notice claimed a sum of ***Kshs.308,470,395/57*** from 2nd Defendant. It was therefore apparent that the 1st Defendant did give more loan facilities to the 2nd Defendant without involving the Plaintiff. That both Defendants have declined to give him any evidence to show how much money had been disbursed over the years and how it had been paid and what was due. He also contended that the property is Family property which has not been valued before the intended sale. He urged the Court to protect the property as its sale would render his family destitutes as they are in occupation of the said property.

That the Notification of Sale shows the amount owed is now ***Kshs.335,439,643/77*** and he is not aware of the terms and consequences of the alleged loan. Further that the sale of the property cannot recover the amount demanded. He urged the Court to grant him protective orders over the suit property herein.

The application is contested. The 1st Defendant through ***Jama Michael,*** the ***Remedial Management Officer*** filed a ***Replying Affidavit*** on ***22nd December 2017,*** and produced exhibits marked ***JM-1 to JM-21*** which showed that sometimes in 2011, the 2nd Defendant ***Mellech Engineering & Construction Co. Ltd*** approached the 1st Defendant for the overdraft facility and various Letters of Offer were issued. The said facilities were guaranteed by a legal Charge and ***LR.No.Sigona/195*** registered in the name of the Plaintiff was used as security and the Plaintiff also gave personal guarantee of various amounts. He also averred that despite the initial timely payments, the 2nd Defendant soon fell into arrears and the Bank (1st Defendant) issued various demand letters.

However, the 2nd Defendant failed to rectify the default and on ***15th March 2017***, the 1st Defendant issued ***Statutory Notice*** to the various guarantors under the facility being ***Mswati Ole Sipala***, the Plaintiff and ***Stephen Sonto Sipala***. The particulars included extend of default that was made and the loan amount stood at ***Kshs.308,470,395/57***. That the Notices were sent to the Chargors and the guarantors using the registered address provided under the Charge. However, the 2nd Defendant and the guarantors failed to rectify the default and a Notice to Sell was issued ***28th September 2017.*** By then the outstanding debt was ***Kshs.335,439,643/77***.

He also averred that neither the Plaintiff nor the 2nd Defendant have made any payment so far to settle the loan amount of over ***Kshs.335,439,643***. It was his contention that the Plaintiff has always been in the picture from the point of borrowing having signed the various Letters of Offer and he cannot therefore feign ignorance of all the facility advanced to the 2nd Defendant which he offered his land as security and he also executed the various guarantees and indemnities. Further that the Plaintiff personally signed the general terms and conditions to the Letters of Offer dated ***21st March 2014*** and ***29th May 2015*** and was fully aware of the facilities.

He contended that the Plaintiff was at all times aware of his responsibilities vide the various facilities which he consented to secure under the various guarantee and indemnity that the executed. He also contended that contrary to the Plaintiff's averments, the Bank has actively pursued its remedies in law against the 2nd Defendant and the other Chargors but the 2nd Defendant is still indebted to the 1st Defendant and the said loan continues to accrue interest. He also contended that the application lacks merit and is brought in bad faith and is a collusion between the Plaintiff and 2nd Defendant to delay and frustrate recovery proceedings and thus deprive the Bank of its security for the sums advanced to the Plaintiff. He urged the Court to dismiss the same for the interest of fairness and expeditious dispensation of justice.

Gerald Reuben Wamalwa, on behalf of 2nd Defendant/Respondent swore a Replying Affidavit dated ***21st February 2018*** and denied that the 2nd Defendant colluded with the 1st Defendant to defraud the Plaintiff as alluded. That if the 1st Defendant did not comply with the requirement of the law, then the 2nd Defendant cannot be blamed for the said mistake and/or illegality committed by the 1st Defendant. He admitted that the 1st Defendant did advance various financial facilities to the 2nd Defendant to complete various projects that it was undertaking but not the alleged amount stated in the Replying Affidavit. That the 1st Defendant failed or by mischief misled the 2nd Defendant to believe that it was managing its loan account with the required legal parameters.

Further that the 1st Defendant embarked on an exercise of frustrating the 2nd Defendant by converting the overdraft facility to a term loan with a threat to auction the security held by the said 1st Defendant should the 2nd Defendant fail to agree to execute the documents and this left the 2nd Defendant with no alternative but to comply to execute the document under duress. It was his contention that between 2011 and 2014, the 2nd Defendant diligently honoured its contractual obligations and serviced its facility in a timely manner operating an account with the 1st Defendant with a monthly turnover running into tens of millions of Shillings being banked. He further contended that the 2nd Defendant has variously requested the 1st Defendant to provide to it an explanation or how it arrived at the figure demanded which is erroneous and exaggerated to no avail. He also deposed that it was his believe that the 1st Defendant did not handle the 2nd Defendant loan account according to the law but made it difficult for the 2nd Defendant to service the account by grossly exaggerating the monies allegedly owed. He therefore denied that the 2nd Defendant has been a party to any scheme to defraud the Plaintiff/Applicant herein. That the 2nd Defendant has ever forwarded the account statement to the ***Interest Rates Advisory Centre Ltd(IRAC***), to advise on the interest Charged by the 1st Defendant/Respondent.

The application was canvassed by way of written submissions. The Plaintiff/Applicant through the ***Law Firm of James T. Makori & Co.***

Advocates, filed his submissions on ***23rd February 2008*** and urged the Court to allow his application. The Plaintiff relied on various decided cases among them the case of ***Joseph Siro Mosioma…Vs…HFCK (2008) eKLR***, where it was held that:-

> ***" The question is therefore whether the Plaintiff is entitled to an order of injunction in the circumstances the Bank tried to exercise its authority over the suit property. In my view the minds of the Bank officials and the purchaser must be directed to the fact their relationship, action and conduct would have the drastic effect of depriving the owner of the suit property. Therefore they must totally and individually ensure that everything concerning the sale is above board. The owner must be given a fair amount of time/notice that his property is about to be sold to a 3rd Party because of his default".***

The 1st Defendant though the ***Law Firm of Mulondo, Oundo Muriuki & Co. Advocates*** filed its written submissions on ***13th April 2018,*** and also relied on various decided cases. The 1st Defendant urged the Court to dismiss the instant application. The 1st Defendant quoted the case of ***New Age Developers & Construction Co.Ltd…Vs…Jamii Bora Bank Ltd (2017) eKLR***, where the Court held that:-

> ***"The Court notes that the Plaintiff has admitted its indebtedness to the Defendant and requests for time to repay the loan. The Plaintiff however does not say how much he intends to pay nor the period of repayment. I am persuaded by the case of Labelle International Ltd & Another…Vs…Fidelity Commercial Bank & Another, Civil Case No.786 of 2002, where it established that;- when part of amount claimed is admitted or proved to the due, a Chargee cannot be restrained by an injunction". It is hence the Court's finding that in the instant case the Defendant cannot be restrained from realizing the security since the Plaintiff already admitted its indebtedness to the Bank"***

The 2nd Defendant elected not to file any written submissions.

The Court has now carefully read and considered the instant ***Notice of Motion*** and the annextures thereto. The Court too has considered the written submissions, the cited authorities and the relevant provisions of law and renders itself as follows:-

There is no doubt that the 2nd Defendant herein ***Mellech Engineering & Construction Co. Ltd*** did obtain a loan from the 1st Defendant in the ***year 2011***. There is also no doubt that the said loan was varied on several occasions. There is no doubt that the Plaintiff herein stood as a guarantor for the 2nd Defendant and did give ***LR.No.Sigona/195*** as security for the said loan. The Plaintiff alleged that the 2nd Defendant took a loan of ***Kshs.37,000,000/=*** with a maximum of ***Kshs.105,000,000/=.*** He however said that he was not aware that the said loan was varied from ***Kshs.105,000,000/=*** to a higher figure since he was not involved in the said variation. It is also evident that then the 2nd Defendant took a loan from the 1st Defendant, a Charge in favour of 1st Defendant was executed on ***6th June 2011*** and the Chargor was the Plaintiff herein. The said Charge was executed by the Plaintiff and the borrower was 2nd Defendant herein and the amount borrowed was ***Kshs.37,000,000/=.*** The security offered was ***LR.No.Sigona/195***.

Thought the Plaintiff alleged that he was not aware of the variation of the terms of the borrowed money, the 2nd Defendant did aver that it was coerced by the 1st Defendant to convert the overdraft to a loan term and thereafter the 1st Defendant exaggerated the amount owed to it by the 2nd Defendant. However, the 1st Defendant has produced various Letters of Offer in which it offered various loan facilities to the 2nd Defendant. The 2nd Defendant has not disputed having received the said letters and even having been offered the various loan facilities. It is therefore safe for this Court to find and hold that indeed the 2nd Defendant did receive loan facilities from the 1st Defendant and the Plaintiff herein was the Chargor who guaranteed the said loan facilities.

It is also evident that when the Plaintiff signed the Charge document, it contained terms and conditions. The Chargee had a duty to advance the borrowed money to the borrower and the Chargor and/or borrower had a duty to pay the loan facility as per the Charge document. It is also evident that under the Charge document, the Chargee had various remedies in the event of default of repayment of the loan facility by the borrower one of such remedy was Statutory Power of Sale of the parcel of land used as security or realization of security.

It is not in doubt that the 2nd Defendant is in default of repayment of the loan advanced to it by the 1st Defendant. The Plaintiff has acknowledged this fact and so has the 2nd Defendant. However, the Plaintiff/Applicant has alleged that he has only acknowledged having guaranteed the 2nd Defendant of ***Kshs.37,000,000/=*** upto a maximum of ***Kshs.105,000,000/=*** but nothing more.

It is apparent that the 2nd Defendant is in default and even if the Plaintiff/Applicant is questioning the accuracy of the loan owed to the 1st Defendant, he has not offered to pay any of the outstanding amount. The 2nd Defendant too has not offered any scheme of payment of the outstanding amount. Both the Plaintiff and 2nd Defendant have not disputed that the 1st Defendant is owed money by the 2nd Defendant and that 2nd Defendant is in default. The Court will be persuaded by the findings in the case of ***New Age Developer & Construction Co. Ltd… Vs…Jamii Bora Bank Ltd (2017) eKLR***, where the Court held that:-

> ***"The Court notes that the Plaintiff has admitted its indebtedness to the Defendant and requests for time to repay the loan. The Plaintiff however does not say how much he intends to pay nor the period of repayment. I am persuaded by the case of Labelle International Ltd & Another…Vs…Fidelity Commercial Bank & Another, Civil Case No.786 of 2002, where it established that;- when part of amount claimed is admitted or proved to the due, a Chargee cannot be restrained by an injunction". It is hence the Court's finding that in the instant case the Defendant cannot be restrained from realizing the security since the Plaintiff already admitted its indebtedness to the Bank"***

Further, it is clear that the 2nd Defendant is only disputing the sum owed and not being indebted to the 1st Defendant. It has been held by courts severally that mere disputes of accounts cannot excuse a borrower from servicing a loan or a Chargee from realization of security. See the case of ***Maurice Okelo Alata…Vs…Kenya commercial Bank(KCB) eKLR***, where it was held that:-

> ***"superior courts have time and again held that a Chargee willnot be restrained form excising its power of sale merely because the amount outstanding is in dispute or where the Chargor has commenced the redemption action or where the Chargor is uncomfortable with the way the sale is being arranged. The courts have held that the Chargee will nevertheless be restrained if the Chargor completes the redemption or pays the whole amount claimed by the Chargee unto the court.[See Moris & Co. Ltd..Vs..Kenya Commercial Bank Ltd & Ano.(2003) EA 605, Maltex Commercial Supplies Ltd & ANo…vs..Euro Bank Ltd (in liquidation) [2007] eKLR, Mrao Ltd..Vs..First American Bank of Kenya & 2 Others [2003]eKLR, Elijah Kipngeno Arap Bill..Vs..Kenya Commercial Bank Ltd[2001'KLR 458 and Hyundai Motors Kenya Ltd..Vs..East African Development Bank Ltd, [2007] eKLR.***

On whether the Plaintiff/Applicant has derived any benefit from the 2nd Defendant as per their agreement, that should not be visited on the 1st Defendant and it cannot be used to prevent the 1st Defendant from exercising its remedies as provided by the Charge document. For the above reasons, the Court finds that the Plaintiff/Applicant has not established that he has a *prima-facie* case with probability of success at the trial.

On whether the Plaintiff will suffer irreparable loss which cannot be compensated by an award of damages, the Court has not found that the 1st Defendant in in any ***Statutory breach*** or that the Plaintiff/Applicant as a guarantor was not aware that exercise of Statutory Power of Sale was one of the remedies available to the 1st Defendant. The Plaintiff/Applicant gave out his land parcel ***No.LR.Sigona/195*** as security for the loan advanced to 2nd Defendant. See the case of ***Jopa Villas LLC…Vs…Private Investiment Corp & 2 Others, Machakos HCCC No.215 of 2008***, the Court held that:-

> ***"I am clear in my mind that the applicant is running away from the obligations lawfully imposed and with its knowledge and participation court should not aid in that quest but will instead uphold the rights of the 1st Defendant to recover the monies lawfully advanced…. Our courts must uphold the sanctity of lawful commercial transactions".***

Further, it is trite that once a property is given out as security, it becomes a commodity for sale and the Applicant cannot allege that he will suffer irreparable loss which cannot be compensated by an award of damages. See the case of ***Andrew M. Wanjohi …Vs….Equity Building Society & 7 Others (2006) eKLR***, where the Court held that:-

> ***"By offering the suit property as security, the chargor was equating it to a commodity which the chargee may dispose off so as to recover his loan together with interest. Therefore if the chargee were to sell off the suit property, the chargor's loss could be calculable on the basis of the real market value of the said property***".

Further, any loss can be mitigated as provided by Section 97(1) of the Land Act.

Having considered all the available evidence, the Court finds that the Plaintiff/Applicant has not established that failure to grant the Order sought herein, he will suffer irreparable loss which cannot be compensated by an award of damages.

On the third limb, this Court is not in doubt but even if it was to decide on balance of convenience, the same tilts in favour of the 1st Defendant who is still prejudiced by the fact that the 2nd Defendant owes it a colossal sum of money and has not yet offered any scheme of payment. If

the said arrears are not cleared, the loan arrears might continue to escalate and outstrip the value of the security held. See the case of ***Andrew M. Wanjohi …Vs….Equity Building Society & 7 Others (2006) eKLR***, where the Court held that:-

> ***"In my considered view if the 1st and 2nd Defendants were restrained from selling off until the suit was heard and determined, there is a very real risk that the debt may outstrip the value of the suit property, as the borrower has never made any repayments for more than three years. That fact, coupled with the status of the 1st and 2nd Defendants, persuades me that the balance of convenience is in favour of the said Defendants. If the property was sold, the Plaintiff can find other accommodation. And if it were finally held that the property should not have been sold, the 1st and 2nd Defendants would be able to compensate the Plaintiff. In contrast, the stoppage of the intended sale by the Chargor would result in the continued growth of debt and thus exposing them potentially substantial irrecoverable losses. I therefore find that provided the Chargee complies with all other legal requirements, he should be permitted to realize the security".***"

On the issue of providing proper account documents or documentation relating to the loan account, the Court finds that is a matter that should be raised at the main trial and not at this interlocutory stage.

For the above reasons, the Court finds the Plaintiff/Application ***Notice of Motion*** application dated ***3rd November 2017*** is not merited and consequently, the said application is dismissed entirely with costs to the 1st Defendant/Respondent.

For avoidance of doubt, any interim orders or *status quo* orders in place herein are hereby discharged and/or vacated.

The parties to prepare the main suit for hearing expeditiously.

It is so ordered.

***Dated, Signed* and *Delivered* at *Thika* this *24th day* of *May 2019*.**

L. GACHERU

JUDGE

24/5/2019

In the presence of

Mr. Kimanzi holding brief for Mr. Makori for Plaintiff/Applicant

Mr. Otenyo holding brief for Mr. Muriuki for 1st Defendant/Respondent

No appearance for 2nd Defendant/Respondent

Lucy - Court Assistant

L. GACHERU

JUDGE

24/5/2019