REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO.32 OF 2018

MOHAMED ABDALLAH SWAZURI.....................................PLAINTIFF

VERSUS

1. CONSOLIDATED BANK OF KENYA

2. AUTOLAND AUCTIONEERS.......................................DEFENDANTS

RULING

1. By Notice of Motion dated 12th February, 2018 and brought under Sections 1A, 1B, 3, 3A and 63 (e) of the Civil Procedure Act and Order 40 Rule 1, 2 and 3 and Order 51 Rule 1 of the Civil Procedure Rules and any other enabling provisions of the law, the Plaintiff/Applicant seeks the following orders.

> **1. That this Application be certified as urgent and service be dispensed with in the first instance.**
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> **2. That this Honourable court be pleased to issue injunction orders preventing and/or restraining the Respondent herein jointly and severally either by themselves their servants and/or agents and third parties from interfering, charging, proceeding with the sale and/or transfer of PLOT NO.KWALE/DIANI/823 or in any way dealing with the plot pending hearing and determination of this Application.**
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> **3. That this Honourable court be pleased to issue injunction orders preventing and/or restraining the Respondent herein jointly and severally either by themselves their servants and/or agents and from third parties interfering, charging, proceeding with the sale and/or transfer of PLOT NO.KWALE/DIANI/823 or in any way dealing with the plot pending hearing and determination of the suit.**
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> **4. That the Honourable Court do and hereby stop any further action or transaction on the property known as PLOT NO. KWALE/DIANI/823 that have taken place after the 8th February, 2018 pending hearing and determination of the Application and suit herein.**
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> **5. That this Honourable court do and hereby declare the purported auction to be null and void abinitio in that any events/transaction carried out on the 8th February, 2018 be declared annulity.**
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> **6. That the Applicant herein be and hereby declared to have acquired proprietary interest in the property known as KWALE/DIANI/823.**
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> **7. That the Respondents herein jointly and severally be hereby restrained permanently from interfering, dealing, auctioning, selling, transferring, charging until the payment is paid fully to the 1st Respondent.**
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> **8. That the Applicant herein be and is hereby directed to pay the outstanding loan in instalments until payment in full without any interference from the Respondent by themselves, agents and/or third parties.**
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> **9. That the court may grant any other orders it may deem fit in the circumstances.**
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> **10. That costs be provided.**

2. The Application is premised on the grounds on the face of the motion and supported by the affidavit of Mohamed Abdallah Swazuri sworn

on 12th February, 2018 and a further affidavit sworn on 19th June, 2018. The Applicant avers that he is the beneficial owner of **PLOT NO.KWALE/DIANI/823** having purchased it from one Kavunza Nzumbi on 30th June, 2016. That at the time of purchase, the said property was charged to the 1st Respondent and had an outstanding balance of Kshs.12,000,000/=. The Applicant states that prior to the purchase of the property he consulted the bank and confirmed the balance and it was agreed that the Applicant would continue servicing the loan in monthly installment of Kshs.290,000/= using the vendor's account known as Julius Nzumbi T/A Julius Tact Safaris. That the Applicant continued servicing the loan from June 2016 and as of February, 2018 the Applicant was to pay Kshs.5,800,000/= but had so far paid Kshs.6,550,000/= and continues to service the loan. The Applicant avers that despite having been in communication with the 1st Respondent, he was shocked when the 1st Respondent authorized the 2nd Respondent to auction the property. The Applicant states that he was not served with any notice of intention nor did he receive any demand. The Applicant further states that unless the Respondents are stopped by an order of this Honourable Court, they will proceed to sell the property to the detriment of the Applicant.

3. In opposing the Application the Respondents filed a replying affidavit sworn by David Ndirangu on 14th April, 2018. It is the Respondents case that the 1st Respondent provided to Kavunza Nzumbi t/a Julius Tact Safaris with certain banking facilities to the tune of Kshs. 12,000,000/= which was secured by inter alia a First Legal Charge dated 22nd October, 2013 over the suit property. That the charge was a continuing security securing advances made to the chargor by the bank from time to time together with all interest thereon and other costs, charges and expenses. It is the Respondents case that the purported sale agreement entered into between the Applicant and the chargor is unlawfully, illegal, null and void by dint of the document that the chargor solemnly committed to. This include covenants by the chargor not to sell or transfer the charged property or any part thereof, without the prior consent in writing from the bank. The Respondent's state that the Applicant made a last ditch effort to forestall the auction exactly two days before the due date vide a letter from his advocates dated 6 th February, 2018. That this was the first communication between the bank and the Applicant.

4. It is the Respondents case that the chargor defaulted in payment and the bank opted to enforce its security by exercising its statutory power of sale, and the bank authorized the 2nd Respondent to sell the suit property by public auction after issuance of the requisite notices to the chargor. The 1st Respondent avers that it had no obligation whatsoever with the Applicant who is a stranger to the charge. That the filing of this suit by the Applicant and the Application for injunction is an afterthought and/or belated attempt to frustrate the bank in exercising its legal right to exercise a statutory power of sale which had properly arisen when the chargor's account fell into arrears of Kshs.7,845,565.41/=. The Respondents urged the court to dismiss the Application with costs.

5. The Application was canvassed by way of written submissions. The Applicant submitted inter alia that he has fulfilled the principle in **Giella –v- Cassman Brown & Co. Ltd (1973) EA 358** by demonstrating that his case has a probability of success considering that he is the beneficial owner of the suit property and continues to service the loan amount and that he will do so until payment in full. The Applicant submitted that he stands to suffer irreparable loss incapable of being compensated a he has expended a substantial sum of money and continues to do so on the strength that upon successful completion of the loan, the suit property will be transferred to him after discharge of charge by the 1st Respondent. That if the property is sold, the Applicant will lose both the property and the money paid to the 1st Respondent through the chargor's account. That the 1st Respondent on the other hand will not suffer any prejudice if the Application is allowed as the Applicant will continue to service the loan and the 1st Respondent still holds the title to the suit property which is duly charged in their favour. The Applicant avers that he will pay the loan in full as he has interests in the suit property having purchased it from the chargor. The Applicant further submitted that the balance of convenience tilts in his favour, arguing that should the Application be allowed, he will continue servicing the loan using the chargor's account and the 1st Respondent will continue holding the Title to the Suit Property and will receive all the sum due until payment in full.

6. It is the Respondents submission that there is no contractual relationship between the Applicant and the 1st Respondent bank in respect of the Suit Property and that the Applicant is not privy to the loan agreement entered into between the chargor and the bank. They relied on the case of **Devcon Group Limited –v- Timsales Limited (2016)eKLR** which cited **Charles Mwarigi Miriti –v- Thanaga Tea Growers Sacco Limited & Another (2014)eKLR**; and **Savings and Loan (K) Ltd & Another –v- Kanyenje Karangaita Gakombe & Another (2015)eKLR**. It was the Respondents submission that since the Plaintiff was not privy to the charge agreement entered into between the Bank and the Chargor, the Bank was under no legal or any obligation to issue any statutory notices to the Plaintiff prior to or in respect to the sale of the Suit Property. The Respondents further submitted that indeed all requisite statutory notices were served upon the chargor as required yet the chargor failed to rectify his default within the stipulated period or even thereafter.

7. The Respondents submitted that the Applicant has not satisfied the principles of granting an injunction under Order 40 of the Civil Procedure Rules, and relied on the case of **Paul Gitonga Wanjui –v- Gathuthi Tea Factory Company Ltd & 2 Others (2016)eKLR** and the case of **Mrao –v- First American bank of Kenya Limited & 2 Others (2003)KLR 125**. It is the Respondents' submission that the Applicant has not proved a *prima facie* case with a probability of success for the reasons that the chargor has defaulted in repaying the loan, that the plaintiff is not the chargor nor spouse of the chargor and therefore lacks the *locus standi* to challenge the statutory and contractual rights of the bank to realize its security by way of sale of the Suit Property; that there is no contractual relationship between the Applicant and the bank in respect of the suit property, neither did the Applicant nor the chargor seek the consent of the bank prior to the sale of the Suit Property by the chargor to the Applicant. The Respondents argued that the Applicant has not demonstrated that he will suffer irreparable harm and submitted that the realization of the security in this matter cannot in any way occasion a loss which an award of damages cannot remedy, adding that in the unlikely event that in the very end the court finds in favour of the plaintiff, the bank is able to adequately compensate the Plaintiff in damages. The Respondents relied on the case of **Amos Wangeera Njoroge & 9 Others –v- Serah Wamuyu Muriuki & Another (2014) eKLR**. Relying on the case of **Argos Furnishers Limited –v- Ecobank Kenya Limited & Another (2014)eKLR**, the Respondents submitted that the balance of convenience tilts in favour of the bank realizing its security, because if the amounts due and owing continues to increase, there is a real risk that it shall outstrip the value of the securities held. The Respondents urged the court to dismiss the Application with costs.

8. I have considered the Application, the affidavits in support and against and rival submissions as well as the authorities cited. The orders sought by the Applicant in this Application are of temporary injunctions and the courts apply the established principles as laid down in the case of **Giella –v- Cassman Brown Ltd (1973) EA. 358**. At the interlocutory stage the court is not concerned with the merits or demerits of the case itself as filed in the suit. The principles to be considered are that:

i. The Applicant must show a prima facie case with a probability of success.

ii. The Applicant must show that he would suffer irreparable injury which would not normally be compensated by an award of damages.

iii. When the court is in doubt it will decide the Application on the balance of convenience.

9. The procedure followed is to decide the issues by affidavit and such Application are meant to effect a speedy and effective remedy to a person aggrieved by clear breach by another party and where the dispute turns on a question of fact about which there is conflict of evidence the courts will genuinely decline to interfere and leave the matter to be determined through a hearing by evidence. The Application for interlocutory reliefs are made through Order 40 of the Civil Procedure Rules, Sections 1A, 1B and 3A by invoking the inherent jurisdiction of the court.

10. Having gone through the facts and evidence, I would like now to apply them to these principles of law. At all times I bear in mind the caution that the court of Appeal has issued with regard to what I should apply my mind to at this stage. In the case of **Stanley Munga Githunguri –v-Jimba Credit Corporation Limited, Civil Appeal No. 144 of 1988**, the Court of Appeal stated that at the stage at which this matter is presently, all that I am required to do is to determine whether the Plaintiff/Applicant in this case has presented a prima facie case which may well succeed.

11. The Plaintiff in his Application dated 12th February, 2018 sought amongst other prayers, mandatory injunction directing the Plaintiff to pay the outstanding loan in installments until payment in full. In the case of **Locabail International Finance Limited –v- Agro Export (1986) 1 All ER 901**, it was stated that:

> **"The matter before the court is not only an Application for a mandatory injunction, but is an Application for a mandatory injunction, which, if granted, would amount to the grant of a major part of the relief claimed in the action. Such an Application should be granted only in a clear case."**

From the above decision, it is quite evident that mandatory injunction requires its grant to be made in cases which are clear or where the guilty party has undertaken a blatantly illegal course of action which the court needs to remedy.

12. It is also quite evident that besides the orders for injunction the Plaintiff in the Application seeks final orders as sought in the plaint. The Court of Appeal in the case of **Olive Mwihaki Mugenda & Another –v- Okiya Omtata Okoiti & 4 Others (2016)eKLR** considered a persuasive decision of India in issuance of final orders at interlocutory stage and stated:

> "**2. Ashok Kumar Bajpai –v- Dr. (Smt) Ranjama Bajpai, AIR, 2004, ALL 107, 2004 (1)AWC 88 at paragraph 17 of the decision the Indian Court expressed as follows:**
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> **… it is evident that the court should not grant interim relief which amounts to final relief and in exceptional circumstances where the court is satisfied that ultimately the petitioner is bound to succeed and fact situation warrants granting such a relief but it must record reasons for passing such an order to make it clear as what are the special circumstance for which such a relief is being granted to a party….**
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> **a) Applying the decisions of this case in Vivo Energy Kenya Limited –v- Maloba Petrol Station Limited and 3 Others (2015)eKLR and Stephen Kipkebut t/a Riverside Lodge and Rooms –v- Naftali Ogola (2009) eKLR it has been stated that an order which results in granting of a major relief claimed in the suit ought not to be granted at an interlocutory stage."**

13. The Plaintiff's case is not a clear case nor has the Plaintiff shown that the conduct of the Defendants is in any manner illegal. On the facts before the court there is no showing that the defendants have prima facie case, acted illegally. The Defendants' action may very well be held, after full hearing, to have been lawful and not in breach of any of the Plaintiff's right. Therefore, in my view the plaintiff has failed to put before the court evidence that would enable the court order a mandatory injunction or the grant of final orders as sought in the Application. I cannot at this stage without further evidence being adduced make a safe determination that the Defendants have violated any rights of the Plaintiff or that any of the Defendants has committed a wantonly illegal act or that the Plaintiff's case is clear one.

14. I also find that this is not a case in which I can fall back on the residual powers of a court of equity to do justice. The general position of the courts of equity has always been that, in determining whether to exercise its discretionary power to grant an equitable remedy, a court will not grant the remedy where the result would necessitate a breach by the chargor of a prior contract with the 1st Defendant. In this case, the orders sought by the Plaintiff are such that if granted would compel the inclusion of the Plaintiff into a contract which is clearly between the 1st Defendant and a third party, the chargor. That is an issue that has to be determined at the hearing of the main suit. So the exercise of this court's equitable jurisdiction at this stage cannot aid the Applicant. In my view, no special circumstances have been shown by the Applicant and the case is not one that I can consider a clear one that can be decided at once or in a summary manner.

15. Quite apart from the orders of mandatory injunction and the final orders sought by the Plaintiff against the Defendants which I have alluded to hereinabove, the Plaintiff also seeks restraining orders by way of injunction against the Defendants. The Plaintiff does not deny that the Suit Property was charged to the 1st Defendant. There is also no denial that the chargor has defaulted in payment of the banking facilities advanced to him by the 1st Defendant, and the Bank opted to enforce its security by exercising its statutory power of sale conferred to it under the Land Act as read together with the Land Registration Act. The Plaintiff was not privy to the loan agreement. Indeed, the Plaintiff admits that he made payments for the benefit of and under the chargor's account. In the case of **Saving & Loans (K) Limited (su**pra) the court stated:

> “**In its classical rendering, the doctrine of privity of contract postulates that a contract cannot confer rights or impose obligations on any person other than the parties to the contract. Accordingly, a contract cannot be enforced either by and/or against a third party**.”

16. The Plaintiff has stated that prior to the purchase of the Suit Property from the chargor, he consulted the 1st Respondent and confirmed the balance and it was agreed that the Plaintiff would continue servicing the loan in monthly instalment of Kshs.290,000/= using the chargor’s account. However, the Plaintiff has not shown evidence of such consultation or indeed an agreement as alleged. Moreover the 1st Respondent has denied that there were such consultations.

17. Without having to decide or go into the merits of the respective cases of the Plaintiff and 1st Defendant, it suffices to state that from the evidence on record, I find that the Applicant has not established a prima facie case with a probability of success against the Defendants. Secondly, the Applicant has not shown that he stands to suffer irreparable harm not compensable in damages. The loss that the Applicant may suffer in my view, can adequately be compensated by an award of damages as the amount paid either to purchase the suit property or to repay the loan can be quantified. Because of these, I would not grant the prayers sought.

18. The upshot of the foregoing is that the Plaintiff has failed to satisfy the conditions for granting the orders sought. In the result, I find no merit in the Notice of Motion dated 12th February, 2018 and the same is hereby dismissed with costs.

DATED, SIGNED and DELIVERED at MOMBASA this 22ND day of May 2019.

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Lutta holding brief for Kibara for 1st and 2nd Defendants

No appearance for Plaintiff

Yumna Court Assistant

C.K. YANO

JUDGE