REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 927 OF 2017

WILFRED OMONDI OPIYO……...….PLAINTIFF

VERSES

MWANANCHI CREDIT LTD…….DEFENDANT

RULING

The Application before Court is the Plaintiff's Notice of Motion dated the 14th November, 2017 brought pursuant to Section 1A, 1B and 3A of the Civil Procedure Act and Order 40 Rule 1 (a) & Order 51 Rule 1 of the Civil Procedure Rules and all the other enabling provisions of the law. It is based on the following grounds which in summary is that the Plaintiff's property being land parcel number KAJIADO/KAPUTIEI NORTH/ 27495 hereinafter referred to as 'the suit property', is due for sale on 4th December, 2017 following instructions by the Defendant to recover the sum of Kshs. 4, 250, 743.00. The Plaintiff is not indebted to the Defendant and has paid the sum of Kshs. 4, 027, 333.00 which covers the loan advanced to him including interest. The Defendant's demand for an extra sum of Kshs. 4, 250,743 amounts to unjust enrichment and offends the principle of *in duplum* rule. The Defendant has no valid charge in its favour pursuant to the provisions of the Land Act and the Land Registration Act hence it cannot purport to exercise its statutory power of sale. The purported Charge is defective as the Consent of the Land Control Board was never obtained prior to charging suit property, with the intended exercise of the statutory power of sale being premature as the Defendant has not followed the procedures set out in the Land Act. The Plaintiff is apprehensive that the Defendant will proceed to advertise for sale and sell the suit property if the orders sought herein are not granted thus rendering the instant application nugatory and useless. The Plaintiff will be subjected to irreparable loss and damage if the orders sought are not granted and the Defendant's action clogs the Plaintiff's equitable right to redemption.

The application is supported by the affidavit of WILFRED OMONDI OPIYO who states that he is the registered proprietor of the suit land that measures 0.05 hectares and on 4th October, 2014, he entered into a loan agreement with the Defendant which advanced him Kshs. 2 million. He avers that it was a term of the said agreement that the loan would be repaid in three (3) instalments within three (3) months with an interest rate of Kshs. 661,998. He confirms giving out his title deed as security to the loan and he repaid the first instalment on the due date and a substantial amount of the second instalment being paid on the second month. Further, that he was not able to clear the loan amount on the scheduled date due to financial constraints at that particular time. He claims his inability to clear the loan amount within the scheduled date did not stop him from repaying the loan amount and interest totaling Kshs. 4, 027, 333.00. Further, that he was surprised to learn from the loan statement supplied by the Defendant that he owned it Kshs. 8, 278, 076 from the sum of Kshs. 2 million advanced to him hence the balance due as at 9th May, 2017 stood at Kshs. 4,250,743.00. He reiterates that he was served with a 45 days redemption notice to pay the sum of Kshs. 4,250, 743.00 failing which the suit property would be sold by public auction on 4th December, 2017. He insists he has paid the loan in full and the Defendant actually owes him Kshs. 27,

333.00 and that the Valuation Report prepared by the Defendant's Valuer grossly undervalues the suit land purposely to have the property sold at a throwaway. Further, that he engaged a Valuer prior to the Defendant's valuation being done and the suit property was valued at Kshs. 14, 500,000 against the Defendant's valuation of Kshs. 6, 800,000.

The application is opposed by the Defendant whose Director DENNIS MWANGEKA MOMBO filed a replying affidavit where he deposed that the Defendant is non deposit taking entity that advances loans to its customers on a willing lender – willing borrower basis. He explained that when advancing loans to its customers, the Defendant and the borrower execute a loan agreement which binds the parties to the terms and conditions contained thereon which are always made known to and understood by the borrower. He insists the Defendant is governed and operated within the confines of the common law principles of Contract and Contract Act and it is non deposit taking entity, cannot be said to be carrying out banking business nor is it a financial institution as provided for under the Banking Act, therefore not regulated by the Central Bank of Kenya Act. He opines that the *in duplum rule* does not apply to the Defendant. Further that the Plaintiff took a loan with the Defendant, and the Loan Agreement dated the 24th October, 2014 disclosing the terms and conditions thereon. He deposes that the Plaintiff was awarded a loan of Kshs. 2 million which 1st instalment was to be repaid on 24th November, 2014 and the succeeding two months thereafter at a compounded and fixed interest rate of 10% per month on the principle. As per the Loan Agreement, the repayment was to be made on or before the last day of the scheduled payment. He contends that the Loan Agreement contained a default penalty which the Plaintiff was well aware of, with the repayment together with interest to attract Kshs. 887,332/= per month of which was to be completed on or before the 24th January, 2015. Further that the Plaintiff defaulted and was always in arrears. He reiterates that the loan ledger as exhibited is clear on interest rate accrued and the Plaintiff issued a cheque of Kshs. 270,000 which bounced, making the Defendant incur unnecessary bank charges. Further that the payment alluded to by the Plaintiff is not the entire accrued sum owing by him in view of the fact that he was in default and amount owing had accrued pursuant to loan agreement terms. He further claims that the Plaintiff has always been elusive whenever the Defendant's personnel attempt to call him to repay the loan, hence the redemption notices. Further, that by the Defendant's letter dated the 10th October, 2016 it wrote to the Plaintiff and posted the letter by registered post informing him that his loan was now Kshs. 3, 141,160 but he did not respond. He reaffirms that he instructed the Defendant's advocates on record to issue the Plaintiff with a notice under section 96(2) of the Land Act which they did vide their letters dated the 25th August, 2016 and 4th July, 2017 respectively. Further that copies of the same letters were served upon the Plaintiff's wife who had given the spousal consent to charge the suit land. He denies that the interest and sums demanded cannot therefore be said to be unjust or unconscionable where the contractual terms are very clear. He confirms that by a legal charge dated the 7th September, 2015 the suit land was charged in favour of the Defendant for the loan sum, which is demanded from the Plaintiff including the interest; with the consent of the Isinya Land Control Board obtained by its advocates. Further that the Plaintiff's application is frivolously trying to frustrate the Defendant from realizing the security.

The Counsels for the Plaintiff and Defendant made their respective submissions to the application on 27th November, 2017 where they reiterated their respective claims which arguments I have considered.

Analysis and Determination

Upon perusal of the Notice of Motion application dated the 14th November, 2017 including the supporting and replying affidavits as well as the annexures thereon, the only issue for determination at this juncture is whether a temporary injunction should issue pending the outcome of the suit.

It is not in dispute that the Defendant granted the Plaintiff a loan of Kshs. 2,000,000 in October, 2014 to be repaid in three instalments as well as an interest of Kshs. 661, 998. What is in dispute relates to the amount owing, value of the suit property as valued by the Defendant's valuer and whether the in **duplum rule** applies to the Defendant. The Plaintiff claims he has paid Kshs. 4, 027, 333.00 to the Defendant and hence does not owe the Defendant. The Defendant does not deny that the Plaintiff has paid Kshs. 4, 027, 333. 00 but insists that he still owes it Kshs. 4,250,743.00. The Plaintiff further contends that the

Valuation Report prepared by the Defendant's Valuer grossly undervalues the suit land purposely to have the property sold at a throwaway. He reiterates that he engaged a valuer prior to the Defendant's valuation being done and the suit property was valued at Kshs. 14, 500,000 against the Defendant's valuation of Kshs. 6, 800,000.

On the issue as to whether the Plaintiff is entitled to the temporary injunction pending the outcome of the suit, the principles for consideration in determining whether temporary injunction can be granted or not is now well settled in the case of **Giella Vs. Cassman Brown & Co. Ltd (1973) EA 358** as follows:

"First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."

In relying on the case above, as to whether the Plaintiff has established a prima facie case, I note the basis of the Plaintiff's claim in this suit and the application herein is that he has repaid the loan owed to the Defendant including the interest thereon and will suffer irreparable harm if the Defendant exercises its statutory power of sale. He insists the amount claimed amounts to unjust enrichment by the Defendant as it is unconscionable. He further claims that the statutory notices were not properly sent to him. I note there is a certificate of posting for the Letter dated 25th August, 2016 but it is not clear who the sender is. As for the letter sent by messrs A.S. Kuloba & Wangila Advocates on 4th July, 2017, the Certificate of Posting indicated the Sender is Mwananchi Credit Ltd while the letter is addressed to the Plaintiff. These are discrepancies which ought to be clarified. Further the said statutory notice dated the 4th July, 2017 does not indicate the principal amount owed and the extent of the default nor the amount required to rectify the default at required by law.

The Defendant avers that it is not a Financial Institution but a non deposit taking hence it is not governed by the Central Bank for the in duplum rule to apply to it. The in Duplum Rule was given Statutory clothing in Kenya by Section 44A of The Banking (Amendment Vide Act No.9 of 2006) Act and is applicable to Institutions as defined in the Act. Under the Act Bank means:-

> ***"a company which carries on, or proposes to carry on, banking business in Kenya but does not include the Central Bank".***

While a financial Institution means;-

> ***"a Company, other than a bank, which carries on, or proposes to carry on, financial business and includes any other company which the Minister may, by Notice in the Gazette, declare to be a financial Institution for the purposes of this Act".***

I note at the introductory section of the contract signed between the plaintiff and the Defendant, the Defendant is described as a financial institution. However the Defendant in its replying affidavit states that it is not a financial institution. In my view, in so far as the Defendant is denying the in-Duplum Rule does not apply to it. It defined itself as a financial institution on the loan agreement and this rule applies to financial institutions.

I note from the annexure of the bank statement that it is not clear how the interest rates were charged. Further the Defendant claims that the rates on the agreement was 10 % per month but this is not expressly stated in the Contract. These are issues which can only be determined once viva voce evidence is adduced.

As per the valuation report dated 2nd May, 2017 at annexure WOO – 5 b, I note the Capital Valuers Ltd who was commissioned by the Defendant stated that the open market value for the suit land was KShs. 6,800,000 while mortgage value is Kshs. 5,800,000 and reserve price is Kshs. 5,100,000 and insurance value standing at Kshs. 5,750,000. While LOSDOS Valuers commissioned by the Plaintiff prepared a

Valuation Report dated 6th March, 2017 stated that the Market Value of the suit land is Kshs. 14, 600,000.

Section 97(1), (2) and (3) of the Land Act provides as follows: ' **A chargee who exercises a power to sell the charged land, including the exercise of the power to sell in pursuance of an zw47j,0020order of a court, owes a duty of care to the chargor, any guarantor of the whole or any part of the sums advanced to the chargor, any chargee under a subsequent charge or under a *lien* to obtain the best price reasonably obtainable at the time of sale. (2) A chargee shall, before exercising the right of sale, ensure that a forced sale valuation is undertaken by a valuer.'**

I find that the discrepancy in the two valuation reports are two wide and these raise triable issues which can only be determined after a full hearing. I find that the Defendant as the Chargee has not obtained the best reasonable price for the suit land and the forced Sale Valuation is too low. The Defendant has further not controverted the Plaintiff's allegation that the Valuation of the suit land is low.

In the case of **Mrao Limited Vs. First American Bank of Kenya Limited & 2 others (2003) KLR 125** the court held that: ***' In civil cases, a prima facie is a case in which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard, which is higher than an arguable case.'***

In the circumstances and in relying on the cases above, I find that the Plaintiff has established a prima facie case with a probability of success

As to whether the Plaintiffs will suffer irreparable loss which cannot be compensated by way of damages. The Plaintiff is registered proprietor of the suit land, which fact is not denied by the Defendant. The Plaintiff alleges the Defendant intends to sell the suit land claiming he owes it some money which he is disputing. In the case of **Case of Nguruman Ltd. Vs. Jan Bonde Nielsen CA No. 77 of 2012,** it was held that **' …the applicant must establish that he 'might otherwise' suffer irreparable injury which cannot be adequately compensated remedied by damages in the absence of an injunction, this is a threshold requirement and the burden is on the applicant to demonstrate, prima facie, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot 'adequately' be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy. '**

In relying on the case above and based on the circumstances at hand, I find that the Plaintiff's alleged injuries are not speculative and it was demonstrated the harm he will suffer if the injunctive orders are denied.

As to the balance of convenience, I find that the balance tilts in favour of the Plaintiff who has proven that he will suffer injuries if the injunctive orders sought are not granted and yet he has paid double the loan given.

It is against the foregoing that I find the Plaintiff's Notice of Motion dated the 14th November, 2017 is merited but noting that there is a dispute on the interest charged on the loan, I will allow it in the following terms:

1. The parties will observe and maintain the obtaining status quo pending the hearing and determination of the suit'.

2. The costs of the application will be in the cause

Parties are urged to comply with Order 11 within 30 days from the date hereof, and set the suit down for hearing as soon as possible

Dated signed and delivered in open court at Kajiado this 26th day of February, 2018

CHRISTINE OCHIENG

JUDGE

Present:

Cc Mpoye

Odoyo for Plaintiff

N/A for Kuloba Wangila for Defendant