REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC NO. 90 OF 2017

NEW AGE DEVELOPERS AND CONSTRUCTION

CONSTRUCTION COMPANY LTD.....PLAINTIFF/APPLICANT

-VERSUS-

SIDIAN BANK LIMITED.....DEFENDANT/RESPONDENT

RULING

1. By a plaint dated **24th May, 2017** the plaintiff herein, New Age Developers Construction Co. Ltd, brought this suit seeking judgment against the defendant, Sidian Bank Limited, for the following reliefs:

i. A declaration that it has no contractual relationship with the defendant;

ii. A permanent injunction to restrain the defendant, its employees and agents including Antique Auctioneers Agencies from selling, advertising for sale, alienating or disposing off its properties namely Nyeri/Municipality/Block 1/887, LR Number 6392/226 Nyeri, LR Number 6392/227 Nyeri and Kajiado/Kaputiei/ North/914 (hereinafter referred to as the suit properties);

iii. A declaration that the defendant is not entitled to charge it any penalties;

iv. A declaration that the defendant is not entitled to interest on its account beyond the maximum rates prescribed under Section 33B 1(i) of the Banking Act;

v. A declaration that the manner of dealing by the defendant in this matter was in breach of Central Bank of Kenya guidelines on consumer protection-CBK/PG/22;

vi. A declaration that the manner of dealing by the defendant in this matter was in breach of the fairness principle articulated at article 3.2 of the prudential guidelines;

vii. A declaration that the manner of dealing by the defendant in this matter was in breach of articles 3.2.2, 3.4.1(i) and (ii), of the Central Bank of Kenya prudential guidelines on consumer protection

viii. Aggravated damages;

ix. Punitive damages

x. In the alternative,

a. Accounts to be taken of the loan amount due, if any, and compiled by the Interest Rates Advisory Centre (IRAC) and report filed in court accordingly;

b. A refund be issued to it by the defendant, in respect of any amounts found to have been overcharged and/or illegally charged;

c. It be permitted to dispose off and sell each of the 830 plots sub-divided from the property known as Kajiado/Kaputiei /914 and dispose each at a minimum of KES 395,000 each and remit payment to the defendant from time to time as sales are

made, without imposing any deadlines upon the plaintiff as the time full payment, to cover such amount of debt as shall be verified as truly owing by IRAC after taking accounts and the actual debt owing, if any, verified.

d. Any other or further relief that the court may deem fit to grant;

xi. Costs of the suit.

2. Simultaneously with the plaint, the plaintiff filed the notice of motion of even date seeking the following reliefs:

a. Certification of the application as urgent and deserving to be heard *ex parte* within the first instance;

b. A temporary injunction to restrain the 1st respondent by itself, its employees and agents including Antique Auctioneers Agencies from selling, advertising for sale, alienating or disposing off the suit properties pending the hearing of the application;

c. A temporary injunction to restrain the 1st respondent by itself, its employees and agents including Antique Auctioneers Agencies from selling, advertising for sale, alienating or disposing off the suit properties pending the hearing and determination of the suit;

d. Cost of the application to be awarded to it.

3. The application is premised on the grounds that the plaintiff has no contractual relationship with the defendant; that the plaintiff was not served with the mandatory statutory notices; that the charge is defective for want of the land control board consent; that the proposed sale of the suit properties is illegal (1st respondent does not have statutory power of sale); that the statutory notice purported to have been issued by the respondent is illegal/void; that the interests levied by the respondent are illegal; extortionate and untenable; that the respondent has violated the guidelines on consumer protection issued by the Central Bank of Kenya-CBK/PG/22 as well as the principles of fairness articulated in those guidelines; the respondent is also said to have violated **Section 13(2**) of the Consumer Protection Act by pricing its services at grossly exaggerated prices thus prejudicing the applicant; that the respondent lacks capacity to impose any rights which accrued to K-Rep Bank with which it contracted; that the respondent had agreed with K-Rep Bank that they would dispose of the 830 plots sub-divided from the property known as Kajiado/Kaputiei/914 and dispose each at a minimum of KES 395,000/- each, in order to clear a debt to be verified by the IRAC as properly owing and only where it is established that the respondent has any rights to the same; that the applicant is likely to suffer loss and damage if the suit properties are sold.

4. In the affidavit sworn in support of the application, **Peter Mahu Muthee**, a director of the applicant, has *inter alia* deposed that the applicant is the owner of the suit properties; that the respondent advertised the suit properties without issuing the applicant with the requisite statutory notices; that the applicant has no contractual relationship with the respondent and that the charge in respect of which the sale is premised is void for want of the consent of the land control board. Further, that the respondent is charging the applicant illegal and punitive interest; that the respondent has failed to respond to a request by its advocate for information relating to all fees, charges, penalties, relevant interest rates and any other consumer liabilities or obligations relating to the loan advanced to it; that the respondent cannot enforce the terms of the charge because it is not a party to it; that the respondent is in breach of its banking obligations to the applicant and that the respondent lacks capacity to enforce the charge executed between the applicant and K-Rep Bank.

5. Maintaining that the applicant had agreed with K-Rep Bank that it sells one of the suit properties and applies the proceeds therefrom to meet its obligations to it, the deponent avers that sale of the suit properties shall result in a loss incapable of being compensated by way of damages.

6. In reply and opposition to the application, the legal manager of the respondent, **Kwesiga Arnold**, has through the replying affidavit he swore on **31st May, 2017** deposed that the respondent is the successor in title to K-Rep Bank with which the applicant executed the charge in respect of which the impugned sale is premised; that the respondent as the legal successor to K-Rep Bank assumed all the assets and liabilities of its predecessor in title; that the applicant offered the suit property to the respondent to secure various loans advanced to it; that prior to the perfection and registration of the securities, the respondent conducted due diligence and complied with all statutory prerequisites including obtaining the necessary consents to charge the suit properties from the relevant authorities.

7. It is further deposed that shortly after the disbursement of the loan facilities, the plaintiff defaulted and continued to default in its repayments leading to a number of meetings and exchange of correspondences between the applicant and the respondent.

8. Vide its letter to the respondent dated 4th August 2016, the applicant is said to have expressly admitted being in arrears and contended that it is false, misleading, dishonest and lack of candor for the deponent of the affidavit sworn in support of the application, to claim that the applicant has no contractual relationship with the respondent.

9. Concerning the contention that the applicant was not issued with the requisite statutory notices, it is deposed that the notices were issued and sent to the applicant through its known postal address.

10. Explaining that the applicant was truly and justly indebted to the respondent to the tune of over 160 million shillings, the respondent's legal manager deposes that the respondent's power of sale had crystallised and was properly and regularly exercised.

11. According to the respondent, the application by the applicant should fail because:

i. The applicant has not made up a *prima facie* case with a probability of success at trial;

ii. The applicant has approached the court with dirty hands (misled the court that the respondent is unknown to it yet the correspondences exchanged between them show that the applicant was aware of the change of name from K-Rep Bank to Sidian Bank Ltd).

iii. The suit and motion herein are meant to clog and/or frustrate the lawful exercise of the respondent's statutory power of sale hence a gross abuse of the court process.

12. On **6th June, 2017** the respondent filed a further affidavit to introduce copies of certificates of postage of statutory notices which he states that he inadvertently forgot to annex to the replying affidavit.

13. In a rejoinder, the applicant through the affidavit of **George Gakuo** filed on **15th June, 2017** deposed that the replying affidavit and further affidavit filed by the respondent are fatally defective for offending the provisions of **Rule 9** of the Oaths and Statutory Declaration Rules; that the affidavits do not rebut the main points in the applicant's supporting affidavit; that if indeed the respondent acquired K-Rep Bank, all the security held by K-Rep Bank should have been endorsed with that change in order for the applicant to know that it is dealing with the right entity.

14. According to the respondent because the respondent was issued with a new banking license after the change of name, it is not true that the respondent and K-Rep Bank are one and the same entity.

15. The applicant further contends that K-Rep Bank was acquired by the respondent, without its approval being sought or obtained.

16. The applicant is said to have communicated to the 1st respondent that it has no contractual obligation with it, which communication was not responded to by the 1st respondent.

17. In view of the foregoing, the court is urged to preserve the suit properties pending the hearing and determination of the suit.

18. The application was disposed of by way of submissions.

19. On behalf the applicant, it is reiterated that the affidavits sworn in reply to the application herein, sworn on **31st May, 2017** and **6th June, 2017** respectively, are defective for failure to comply with the mandatory provisions of **Rule 9** of the Oaths and Statutory Declarations Rules which requires that all exhibits to affidavits be secured under the seal of the Commissioner and be marked with serial letters of identification.

20. Arguing that the annexures referred to in the affidavits filed by the respondents do not comply with the said provision of the law as they are not marked with serial letters of identification and are not properly sealed. Based on the decision in the case of **Juja Coffee Exporters Limited & 3 Others v. Bank of Africa Limited & Another (2016)e KLR** the court is also urged to strike out the respondents' affidavits filed on 6th June, 2017 on the aforementioned grounds.

21. The applicant further maintains that no contractual relationship existed between it and the 1st respondent and that it was not served with the mandatory auctioneers' notices issuable under **Rule 15 (c) and (d)** of the auctioneer's rules.

22. The applicant contends that the 1st respondent did not validly take over K-Rep Bank and if it did acquire the bank, it did not acquire the rights and liabilities of K-Rep Bank as the securities held by K-Rep Bank were not endorsed with the changed circumstances as required by **Section 9(8)** of the Banking Act.

23. According to the applicant, the only way it would know whether it is dealing with the right entity is if the securities it offered were endorsed with the changed circumstances.

24. Because the 1st respondent was issued with a new banking licence by the Central Bank of Kenya after the change of name, the applicant contends that the 1st respondent is a totally different entity from K-Rep Bank.

25. The applicant explains that it communicated to the 1st respondent that it had no contractual obligation to it, which communication was not responded to.

26. The applicant maintains that it was neither served with the mandatory notice of not less than 45 days under **Rule 15(d)** nor the notification of sale required under **Rule 15 (c)** of the Auctioneer's Rules.

27. The applicant further contends that it was not issued with the statutory notice issuable under **Section 56(2)** of the Land Registration Act, 2012.

28. The charges over the properties known as Nyeri Municipality LR.No.6392/226 and 6392/227 and over Title No.KJD/Kaputiei North/914 are said to be void for want of the consent of the land control board.

29. The documents held by the 1st respondent showing that the consent of the land control board was obtained in respect of Title No.KJD/Kaputiei North/914 are said to be fake, fraudulent and a nullity.

30. In respect of Nyeri Municipality LR.No.6392/226 and 6392/227 the advocate for the applicant is said to have admitted that no consent of the land control board was obtained in respect of those properties.

31. With regards to interest chargeable on the loan facility advanced to it, the applicant submits that the maximum interest chargeable is fixed by the central bank under **Section 33B** of the Banking Act. The applicant also relies on **Section 52(3)** of the Banking Act which provides that no institution shall be permitted to recover in any court interest and other charges which exceed the maximum permitted under the provisions of the Banking Act or the Central Bank Act.

32. The 1st respondent is said to have been maliciously charging the applicant interest way beyond the one permitted by law. The applicant is also said to be in breach of principles of fairness espoused in the Central Bank of Kenya guidelines on consumer protection, **Article 3** thereof.

Submissions for the respondents

33. On behalf of the respondents, a brief overview of the cases of the parties herein is given and submitted as follows: -

a. That the 1st respondent's statutory power of sale had crystallised and was properly and regularly exercised.

b. That the consent of the land control board was sought and obtained in respect of the property known as KJD/Kaputiei North/914.

c. That the letter relied by the applicant is support of the contention that no consent was obtained in respect of KJD/Kaputiei North/914 should be disregarded because the letter was obtained with a pre-determined intention of challenging these proceedings; lacks the stamp of the board and that the fact that there was no board meeting on the material day does not mean that no consent was issued on the material day.

d. That no consent of the land control board was required in respect of L.R No.6392/226 and L.R No.6392/227 Nyeri Municipality. In that regard reference is made to **Section 2 (a)(i)** of the Land Control Act, Cap 302 Laws of Kenya which excludes land within a municipality or township from the definition of Agricultural Land and the case of **Musa Nyanbari Gekone v. Peter Miyienda;** Civil Appeal No. 2 of 2014.

e. That valid statutory notices were issued and served upon the applicant; there is evidence to that fact.

f. That since the 1st respondent has provided evidence of postage of the statutory notices to the applicant's address; the burden is on the applicant to prove that it did not receive the notices. In that regard reference is made to the case of **Nyagilo Ochieng & Another v. Fanuel Ochieng & 2 Others (1996) eKLR** where the Court of Appeal held that upon proof of service of statutory notice, the burden of proving non-receipt of such notices shifts to the addressee as is contemplated by **Section 3(5)** of the Interpretatation and General Provisions Act, Cap 2 Laws of Kenya.

34. In the circumstances of this case, receipt of the statutory notices by the applicant is said to be admitted vide ground 10 of the notice of motion herein.

35. The applicant's contention that there exists no contractual relationship with the 1st respondent and that if there was takeover of K-Rep bank, the takeover was not valid, is said to be a misinterpretation of the facts and the law applicable to this case because of the following reasons:

a. The change of name from K-Rep Bank to the 1st respondent was gazetted vide Kenya Gazette No.2315 of 4th April, 2016 and a banking licence No. CBK/BSD/01/78 issued-the gazettement of change of name and issuance of licence to the 1st respondent by the Central Bank of Kenya is said to be *prima facie* evidence of the regularity and legality of the change of the name;

b. That **Section 9** of the Banking Act was not applicable as what happened was merely a change of name as opposed to an amalgamation or arrangement for transfer of assets of liabilities-the applicable law is said to be **Section 66(2)** of the Companies Act, Cap 486 Laws of Kenya which provides that change of name does not affect any rights and obligations of the company or invalidate any legal proceedings by or against it.

c. That in the charge dated 19th November, 2014, 11th March, 2015 and 18th June, 2015 there was a clause stating that the expression K-Rep Bank Limited included the bank's successor's in title and assigns whether immediate or derivative;

d. That by a letter dated 4th August, 016 addressed to the 1st respondent, the applicant admitted being in arrears and made various proposals to regularize its accounts.

36. Based on the decision in the case of **Equitorial Commercial Bank v. Animal Health Advantage Ltd HCCC NO. 614 OF 2017** and extracts from **Palmer's Company Law**; it is submitted that the applicant's contention that it was not obligated to the 1st respondent is untenable.

37. In the case of Equitorial Commercial Bank v. Animal Health Advantage Ltd supra, it was *inter alia* observed:

"The defendants' argument that they did not know about this merger and the subsequent change of name cannot therefore

stand as it was expected they had notice of that change of name through the Kenya Gazette notice."

38. The allegation of excessive interest is said to be baseless, an afterthought, generalised, unfounded and unsubstantiated.

39. Contrary to the said allegation the 1st respondent avers that the interest charged is as contracted and in strict compliance with the law.

40. The allegation that the 1st respondent has violated the banking principles of fairness are equally said to be unsubstantiated, deceptive, misleading, fictitious and imaginary.

41. Even assuming that the 1st respondent had charged excessive interest, which is not the case, based on the decision in case of **Shimmers Plaza Limited v. National Bank of Kenya Civil Appeal No. 33 of 2012,** it is submitted that the charging of excessive interest would not entitle the applicant the orders sought.

42. Based on the principles that guide the court in award of interlocutory injunctions espoused in the case of **Giella v. Cassman Brown** and restated in many decisions, it is submitted that the applicant has not made up a case for being granted the orders sought or any one of them.

Analysis and determination:-

43. This being an application for interlocutory injunction, the onus at this stage, is upon the Applicant to persuade the court that upon the facts he has relied on and on the application of the law, he has a *prima facie* case with a probability of success at the trial; that an award of damages will not be adequate compensation if the injunction is not issued; and finally that the balance of convenience is in his favour. See **Giella V. Cassman Brown & Company Limited** (1973) E.A 358.

44. On whether the applicant has made up a prima facie case with a probability of success, I note that it has made several allegations against the 1st respondent, which if proved may entitle it to the orders sought. Those allegations include the contention that it has no contractual obligations with the 1st respondent to warrant the exercise of the statutory power of sale by the 1st respondent against it; that the charges executed between it and K-Rep Bank for want of the consent of the land control board and that it was not issued with the requisite statutory notices before the respondents attempted to exercise its statutory power of sale against it.

45. The said allegations by the applicant are denied and/or controverted through the affidavits sworn in response to the applicant's claim.

46. As pointed out herein above, the affidavits filed by the respondents are said to be fatally defective for the reasons provided herein above.

47. As the issue as to whether the affidavits filed by the respondent has a bearing on the determination of the application by the applicant by making the response by the respondent devoid of evidence, I will determine it first.

48. As pointed above, the applicant's plea for striking of the affidavits by the respondents is premised on the provisions of **Rule 9** of the Oaths and statutory declarations Rules which the respondent is said to have failed to comply with. The plea is also premised on the persuasive decision of **Juja Coffee Exporters** (supra) where it was stated:

"Rule 9 of the Oaths and Statutory Declaration Rules requires that annextures to affidavits should be sealed and stamped. The rule reads:-

All exhibits to affidavits shall be securely sealed thereto under the seal of the commissioner and shall be marked with serial letters of identification.

In the case of Fredrick Mwangi Nyagah vs. Garam Investments & Another (2013) e KLR, Havelock J., (as he then was) considered the application of Rule 9 of the Oaths and Statutory Declarations Rules. The judge in holding that an exhibit annexed to an affidavit which is not marked is for rejection cited with approval a ruling by Hayangah J, (as he then was) in the case of Abraham Mwangi vs. S.O Omboo & Others HCCC No.1511 of 2002 where the judge held thus-

'exhibits to affidavits which are loose fly sheets for identification attached to them and do not bear exhibit marks on them directly must be rejected. The danger is so great. These exhibits are therefore rejected and struck out from the record. That makes the affidavit incompetent and hence also rejected.'

Another decision addressing the matter of annextures to affidavits was made by judge Mutungi in the case of Solomon Omwega Omache & another v. Zackery O. Ayieko & 2 others (2016) e KLR where he stated as follows-

'Although the point was not taken up by the plaintiffs the court has the duty to uphold the sanctity of the record noting that this is a court of record. Before the court is a replying affidavit with anextures which are neither marked nor sealed with the commissioner's stamp. Are they really exhibits' I do not think so and they cannot be properly admitted as part of the record. I expunge the exhibits and in effect that renders the replying affidavit incomplete and therefore the same is also for rejection as without the annextures it is valueless. This should serve as a wake up call to practitioners not to be too casual when processing documents for filing as it could be extremely costly to them or their clients as crucial evidence could be excluded owing to counsels or their assistant's lack of attention and due diligence. A perusal of the annextures attached to the affidavit relied upon by the 1st respondent do not bear the seal of a commissioner for oaths and are not marked with any

serial letters for identification as specified in the 3rd schedule to the Oaths and statutory declaration Rules. Taking into account that the provisions of Rule 9 above are in mandatory terms, the order that comments itself to me is that of striking out the annextures, which I hereby do…"

49. I have carefully read and considered the law espoused in the cases cited in support of the preposition that court documents that are not properly marked should not be allowed to form part of the record of the court.

50. Based on the special circumstances of this case, where the documents referred to are contained in a paginated bundle which has been identified and sealed by the Commissioner and where the applicant has not demonstrated any prejudice, if any, suffered by the failure by the respondents to singly identify each of the documents in the bundle, I find and hold that it will be an abdication of the duty of this court if it were to strike out the entire bundle for want of serialization of the annextures without any proof of prejudice to the applicant or proof that the applicant stands to suffer any prejudice on account of the said lack of serialization of the annextures.

51. With regard to the further affidavit filed on 6th June 2017, which is challenged for having been filed without the leave of the court, noting that the applicant vide the further affidavit he filed on 15th June 6, 2017 got an opportunity to respond to the issues raised in the affidavit, I reject the plea to have it struck out of the court record on the ground that the applicant got an opportunity to respond to the issues raised therein and will, therefore, not suffer any prejudice if the affidavit is not struck off the court record.

52. The upshot of the foregoing is that I decline to strike out the affidavits out of the court record in order to dispense substantive justice to the parties.

53. Turning to the merits of the application, I have carefully considered the cases urged by the respective parties and the affidavit evidence adduced in support thereof.

54. As pointed out herein above, at this stage of the proceedings, the burden is on the plaintiff /applicant to persuade the court that he has a prima facie case with a probability of success at trial, that unless the orders sought are granted, he stands to suffer damage incapable of being compensated by way of damages and that the balance of inconvenience tilts in his favour.

55. Starting with the second last principle**,** the answer was provided by the Court of Appeal in the case of **Nyanza Fish Processors Ltd.** V **Barclays Bank of Kenya** Civil Appeal NO. 114 of 2009 where the Judges said;

"If the property, the subject matter of this litigation is sold, the loss to the Applicant will be financial. True, it may be the property is unique. Its value however is ascertainable... The Applicant itself had offered the property as security. No matter that the validity of the charge is being challenged. The conduct of the Applicant in charging the same made it a commercial property the loss of which in an appropriate case would entitle the Applicant to damages. The Respondent is a bank and there is no gain saying that it will be able to satisfy the loss."

That is the situation the present Applicant finds himself. On the balance of convenience, the Applicant has not rebutted the assertion by the 1st Respondent that the last payment was on 29th June 2004, some seven years ago and only Kshs.161, 667/= was paid and the outstanding unpaid balance is a whooping Kshs.151,980,772.23/=. This amount will continue to escalate to the detriment of the Respondent.''

56. In applying the above principle to the circumstances of this case, unless the plaintiff/applicant is able to successfully challenge the realization of the security commenced by the respondent on other grounds, having offered the properties which are subject matter of this suit as security, they became commercial property the loss of which in an appropriate case would entitle the Applicant to damages.

57. The Respondent being a bank, there is no gain saying that it will be able to satisfy the loss if any that might be occasioned on the applicant.

58. Turning to the question of *prima facie* case, the question must be determined without going to the merits of the applicant's suit. In the circumstances of this case, the applicant has inter alia argued that the respondent is charging illegal interest and failed to adhere to consumer protection guidelines set down in our laws. That contention is seriously contested by the respondent.

59. Having considered the affidavit evidence adduced in this case, I found nothing that, at this stage, can assist this court in determining the question as to whether or not the respondent has charged or has been charging the applicant illegal interest. Be that as it may, it is trite law that a court will not restrain a mortgagee from exercising its power of sale because the amount due is in dispute. In this regard see the case of **Joseph OKoth Wando** V **National Bank of Kenya** Civil Appeal No. 77 of 2004, where the law was stated as follows;

"It is trite law that a court will not restrain a mortgagee from exercising its power of sale because the amount due is in dispute."

60. The other issue relied on by the applicant to challenge the proceedings commenced by the respondent is that it has no contractual obligation with the respondent. Concerning that contention, the evidence adduced in this case shows that the respondent is the same entity with which the applicant transacted only that there was a change of name. There is evidence that the change of name was gazetted. There is also evidence that the applicant dealt with the respondent concerning the subject matter of this suit even after the change of name. It is therefore dishonest for the applicant to argue that it had no contractual obligation with the respondent on which the realisation of the securities hereto could hinge.

61. The applicant also contended that the charge over the suit property was void for want of the consent of the land control board in respect of some of the properties. With regard to that contention, upon considering the evidence adduced in this case and the law applicable, I agree with the respondent that no consent was required in respect of the properties within Nyeri Municipality as such properties are by dint of the provisions of **Section 2** of the Land Control Act exempted from the requirement of the land control consent. As concerns the land in Kajiado, the evidence adduced is incapable of proving that no consent of the land control board was issued in respect thereof. The respondent who had a duty of proving that no consent was obtained in respect of that parcel of land failed to discharge that duty.

62. As to whether the applicant was issued with statutory notices, the evidence adduced through the respondent's further affidavit, filed on 6th June, 2017 shows that the applicant was served with the requisite statutory notices.

63. From the above analysis of the applicant's case, I entertain no doubt that the applicant has not made up a prima facie case for being granted the orders sought.

64. Though not in doubt as to adequacy of damages in compensating the applicant should the court ultimately find the exercise of the power of sale to have been unlawful, there being no evidence that the applicant is meeting its contractual obligations to the respondent, I find and hold that the balance of convenience tilts in favour of the respondent whose right of realizing the security offered by the applicant has accrued.

65. The upshot of the foregoing is the applicant's notice of motion dated 24th May, 2017 is found to be lacking in merits and is dismissed with costs to the respondent.

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

L N WAITHAKA

JUDGE

Coram:

N/A for the plaintiff

N/A for the defendants

Court assistant - Esther