REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC NO. 152 OF 2017

BANTU AFRICA RESORT LIMITED …..... PLAINTIFF/APPLICANT

-VERSUS-

I & M BANK LIMITED …….1ST DEFENDANT/RESPONDENT

GARAM INVESTMENT AUCTIONEERS ….. 2ND DEFENDANT/RESPONDENT

RULING

1. By a plaint dated 26th September 2017 and filed on the same day, the plaintiff herein, Bantu Africa Limited Resort, hereinafter referred to as "the applicant", filed the suit herein *inter alia* seeking to permanently restrain the defendants (I & M Bank Limited and Garam Investment Auctioneers) from advertising for sale, selling, alienating, disposing off the property known as Title No. **Ruguru/Gachika/ 1764** (the suit property) without complying with the provisions of the Land Act.

2. Simultaneously with the plaint, the applicant filed a notice of motion of even date seeking the following orders:

> **i. Certification of the application as urgent and deserving to be heard *ex parte* in the first instance;**
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> **ii. A temporary injunction to restrain the 1st and 2nd respondents whether acting by themselves or through their employees, servants and/agents, assigns and/or any other person whatsoever from alienating, advertising for sale, offering for sale, selling, taking possession of, leasing, transferring or in any manner dealing with the suit property pending the hearing and determination of the application;**
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> **iii. A temporary injunction to restrain the 1st and 2nd respondents whether acting by themselves or through their employees, servants and/ agents, assigns and/or any other person whatsoever from alienating, advertising for sale, offering for sale, selling, taking possession of, leasing, transferring or in any manner dealing with the suit property pending the hearing and determination of the suit;**
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> **iv. In alternative to prayer (iii) above, extension of the time for compliance and/or for rectifying any default to redeem the suit property by a period of 12 months or for such other period as the court may determine pursuant to powers conferred on it under Section 104(2) as read with Section 90 of the Land Act 2012.**

v. In alternative to prayer (iii) and (iv) above, suspension and/or postponement of the respondent's power of sale for a period of 12 months or such other period as the court may determine to enable the applicant redeem the suit property.

vi. Costs of the application be provided for.

3. The application is premised on the grounds that-

a. The respondents had not complied with the provisions of **Section 96** and **97** of the Land Act before attempting to realise the security;

b. that the applicant was not issued and served with a notice that complies with **Section 90(1)** and **90(2**) of the Land Act;

c. That the applicant was not issued and served with the 40 days statutory notice under **Section 96(2)** of the Land Act, 2012;

d. That the respondent's statutory power of sale had not crystallised;

e. That the process of realisation of the suit property commenced by the respondent's is a nullity in law;

f. That **Section 104(2)** of the Land Act provides for cancellation, variation, suspension or postponement of any scheduled sale or extension of the period of time for compliance by the charger or substitution of a different remedy other than outright sale;

g. That the respondents have put clogs and fetters on the applicant's equity of redemption by imposing illegal charges and interests contrary to laid down provisions of the banking law;

h. That unless the intended sale is stopped, the applicant shall suffer irreparable loss as it has put heavy investment on the property;

i. That the application should in the interest of justice be allowed.

4. The application is supported by two affidavits of **Rawling Thuo Mathenge**, a director of the applicant, filed on **26th September, 2017** and on **27th September, 2017**.

5. In those affidavits, the deponent has reiterated the grounds on the face of the application and *inter alia* deposed that the applicant was advanced Kshs. 95,000,000/- by the 1st respondent; that the loan facility was secured by among other securities, a charge over the suit property; that after the loan facility was disbursed, the applicant began meeting its obligations under the charge; that the 1st respondent has been charging interests at unconscionable and unlawful rates thus clogging and fettering the applicant's equity of redemption; that the respondents have advertised the suit property for sale by public auction without complying with the applicable law; that the 1st respondent is aware that the applicant's sister company, Brade Gate Holdings, (also a guarantor of the loan facility hereto) is in the process of disposing some of its properties in Ruiru, proceeds of which will be applied to the loan herein. In support of the averments contained in the affidavits, the deponent annexed the following documents:

i. Copy of resolution by the applicant authorising the deponent to plead on behalf of the applicant, marked **RTM-1**;

ii. Copy of the letter of offer of the loan facility dated 25th November 2014, marked **RTM-2**;

iii. Copy of bill of quantities in respect of the development being effected in the suit property, marked **RTM-3**;

iv. Copy of the letter of offer from the 1st respondent extending the period of repayment of the loan to 13th April, 2017;

v. Copy of letter from the applicant to the 1st respondent requesting for further facilitation dated, 5th October, 2016;

vi. Copy of letter from the applicant to the 1st respondent advising it that its sister company was in the process of disposing of some prime properties in Ruiru to inject further capital in the project;

vii. An extract of the Daily Nation advertisement dated 25th September, 2017 containing the advertisement of the suit property for sale by public auction;

viii. A copy of bank statement marked **RTM-1** in the affidavit filed on 27th September, 2017; and

ix. A photograph of the project being implemented in the suit property.

6. In reply and opposition to the application, **Musa Ng'ang'a Dumbuya**, an employee of the 1st respondent (a debt recovery manager), swore the affidavit filed on **9th October, 2017** in which he details the terms of the loan facility hereto and deposes that the applicant defaulted in its contractual obligation under the charge instrument leading to the 1st respondent exercising its rights under the charge instruments; that contrary to the allegation by the applicant that the 1st respondent did not comply with the law in attempting to realise it's statutory right of sale, the respondents complied with every applicable provision of the law.

7. The applicant is faulted for knowingly misleading the court that the 1st respondent had not served it with the requisite statutory notices and/or carried a valuation of the suit property, when it knew such averment to be false.

8. Arguing that the said contentions by the applicant amounted to serious material none disclosure of facts, the respondents submit that the applicant is undeserving of any equitable remedy.

9. In support of the averments contained in the affidavit sworn in support of the respondents' case, the deponent has annexed a bundle of documents marked, **DMD-1**. The bundle of the documents contains the following documents, among others:

a. Letter from the 1st respondent to the applicant dated 25th November, 2014 informing the applicant that it had sanctioned the facility referred therein on terms and conditions set out in the letter of offer and subject to the Bank's General Terms and Conditions;

b. Letter from the 1st respondent to the applicant dated 27th January, 2015 informing the applicant about some amendments to the letter of offer referred to in (a) above;

c. Letter from the 1st respondent to the applicant dated 4th July, 2016 advising the applicant that the Bank had agreed to extend the moratorium on the term loan facility referred in (a) above;

d. The charge over the suit property;

e. Bank statements;

f. Letter from the 1st respondent to the applicant dated 5th October, 2016 showing that the 1st respondent and the applicant were in discussion over outstanding loan obligations;

g. Letter dated 16th November, 2016 from the 1st respondent to the applicant reminding the

applicant of its promise to meet its loan obligation under the charge instrument hereto which it had failed to meet;

h. Letter from the applicant to the 1st respondent dated 7th December, 2016 acknowledging that it was in arrears and urging for patience as it was in the process of selling land to raise funds to meet the arrears;

i. Letter from the applicant to the 1st respondent on the progress it was making in the sale of its land for the purpose referred to in (h) above;

j. Letter from the applicant to the 1st respondent dated 13th September, 2017 urging the 1st respondent to withdraw the advertisement of the suit property for sale by public auction;

k. Copy of statutory demand notice issued to the applicant dated 6th February, 2017;

l. Copy of a delivery book showing that the statutory notice was received by among others, the applicant.

m. Copy of notification of sale dated 20th July, 2017

n. Certificate under **Section 15(c)** of the Auctioneers Rules showing that the notification of sale was served on among others the applicant's agent (the deponent of the supporting affidavits herein);

o. Valuation report in respect of the suit property dated 26th July, 2017.

10. When the application came up for hearing counsel for the applicant relied on the supporting affidavits sworn by Mr. Mathenge and urged the court to order that an independent valuation be conducted before the statutory power of sale is exercised. In reply, counsel for the respondent submitted that there was a valuation report with a forced sale value on record. He urged the court to vacate the orders earlier granted because there was material nondisclosure by the applicant who had lied to the court that he was not served with the statutory notices and that valuation had not been done.

The law applicable to the application:-

11. The law applicable to the application was stated by **William Ouko J**., (as he then was in the case of **Patrick Karimi Wairagu t/a Thigi General Stores vs. Barclays Bank of Kenya Ltd & Another; Nakuru HCCC NO. 93 OF 2011** thus:-

> **"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.**

> **Starting with the second last principle, the answer was provided by the Court of Appeal in 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.

Turning to the question of *prima facie* case, the question must be determined without going to the merit of the Applicant's suit. The Applicant has in the first place argued that the interest charged was outrageous and unascertainable. The answer to such a claim was provided in 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"

See **also Maithya V. Housing Finance Company of Kenya (2003) 1 E.A 133…….**

It is incredible that having borrowed such a large sum of money in 2001, the Applicant has never bothered to demand a statement of his account if indeed none had been supplied. The Applicant also has not annexed to his affidavits in this suit or in the Nairobi suit any evidence that he has been servicing the loan, yet he has categorically stated that he has "dutifully and promptly" met his obligation under the lending contract…

For the reason that he has denied being served on account of the two matters above, I will give him the benefit of doubt as the onus was upon the 1st Respondent to show that the Applicant was indeed properly served."

Analysis and determination:-

12. In applying the above principles to the circumstances of this case, whilst the applicant has averred that he stands to suffer irreparable loss and detriment unless the orders sought are granted, having offered his property as security to guarantee the loan granted to itself by the 1st respondent, it cannot be heard to say that if the property is sold to meet the purpose for which it was given it would suffer irreparable loss. If such argument were to be sustained, it would defeat the object for which the security was sought and obtained. For that reason, and in accordance with decision of the Court of Appeal in the case of **Nyanza Fish Processors Ltd.** V **Barclays Bank of Kenya Civil Appeal NO. 114 of 2009** (*supra),* I find and hold that, the loss and damage if any, that the applicant may suffer owing to denial of the orders sought, is compensable by way of damages.

13. On whether the applicant has established a *prima facie* case with probability of success at trial, from the affidavit evidence adduced in this matter, there is no doubt that the applicant is in breach of its obligation to the 1st respondent. It is also clear that contrary to the applicant's assertion that the applicant did not comply with the applicable law while executing its right of sale, the respondents complied with the applicable law.

14. There being no evidence that the applicant is meeting its obligations under the charge instrument, I find that the balance of convenience tilts in favour of the 1st respondent whose right to realise the security has crystallised.

15. The upshot of the foregoing is that the application has no merit and is dismissed with costs to the respondents.

Dated, signed and delivered in open court at Nyeri this 19th day of February, 2018.

L N WAITHAKA

JUDGE

Coram:

Mr. Gisemba h/b for Mr. Kioni for the applicant

Ms Wanjira h/b for Mr. Wawira for the respondent

Court assistant - Esther