REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

MILIMANI LAW COURTS

ELC NO. 401 OF 2017

THE TRAVEL HOUSE LIMITED.....1ST APPLICANT

MICHAEL MWATHE.....2ND APPLICANT

=VERSUS=

CHASE BANK KENYA LIMITED IN RECEIVERSHIP.....RESPONDENT

RULING

1. The Applicant filed a Notice of Motion dated ***15th June, 2017*** in which they seek the following orders:-

1. Spent

2. Spent

3. That pending the hearing and determination of this suit, the respondent whether by themselves, agents, servants or otherwise howsoever be restrained from offering for sale, auction, selling by public auction or from any other way whatsoever alienating and/or encumbering the property Number A1 erected on land Reference Number 209/12732 at Tsavo Court Estate, South C Nairobi (herein referred as the "suit property").

4. That an order does issue declaring null and void the statutory notice and the notices issued by the Auctioneer as the same do not comply with the law.

5. That an order do issue to the effect that the interest on the overdraft account number 0012004362003 against the Applicant's over and above what has been recovered is illegal.

6. The cost of this application be provided for by the Respondent.

2. The second Plaintiff/Applicant is a director of the first Plaintiff/ Applicant Company. Sometime in November 2010, the second applicant in his capacity as director of the first applicant applied for an overdraft facility of Kshs.2,000,000/= from the respondent and offered property number A1 erected on LR No.209/12732,Tsavo Court Estate South C Nairobi as security (suit property).

3. The first applicant serviced the overdraft with difficulties until June 2013 when the second applicant requested that the overdraft facility be converted into a short term loan. The first applicant's request for

conversion was accepted and a letter of offer was signed. The first applicant fell into arrears in repayment of the loan prompting the respondent to write demand letters and statutory notices.

4. The first applicant requested for the sale process to be put on hold for 180 days as it organized repayment but did not receive any response. On 8th July 2016, the second applicant received a 40 days' notice to pay up failing which the suit property was to be sold by public auction. On 28th April 2017, a 45 days' notice and notification of sale was served. The amount indicated in the notice was Kshs.6,690,226.13.

5. The applicants now contend that the statutory notices which were given by the auctioneer did not comply with the law;that a deposit of Kshs.3,000,000/= was made into the loan account which effectively cleared the principal sum owed and that the bank owes the applicant's Kshs.31,960/= which was an overpayment. The applicants argue that the overdraft account stood closed upon signing letter of offer upon conversion of the overdraft facility into a loan and therefore no interest should have been charged on that account.

6. The respondent opposed the applicants' application based on a replying affidavit sworn on 9th October 2017 by its Assistant Legal Manager. The first applicant was given an overdraft facility of Kshs.2,000,000/= on 21st March 2011. On 9th September 2013 the applicant requested for conversion of the overdraft into a loan. As at this time the outstanding amount was kshs.2,296,706.26. On 31st March 2014 the applicants were notified of default in payment of the overdraft.

7. On 18th May 2015, the applicants were given a 30 day notice which indicated that the outstanding amount was Kshs.4342,324.46. On 25th January 2016, the applicants were given a 90 days' notice which indicated that the balance outstanding was Kshs.5,220515. The applicants requested for postponement of the intended sale for 180 days. This request was declined. The suit property was valued as required and auctioneers were instructed to take up the matter. The respondent therefore states that the applicants' application should not be granted.

8. I have considered the applicant's application as well as the opposition thereto by the respondent; I have also considered the submissions filed by the parties herein. The applicants are mainly seeking injunctive orders against the respondent. Prayer 4 and 5 of the application cannot be granted at interlocutory stage as they are reliefs which can only be granted after a hearing of the main suit. The only issue for determination is whether the applicants have demonstrated that they are entitled to grant of injunctive orders.

9. It is clear that the applicants took an overdraft facility which was later converted into a loan. The applicants were notified of the default in payment and the necessary demands and statutory notices were issued. The applicants at some stage requested that the process of sale of the suit property which had begun be put on hold for 180 days as they organized their finances. This request was rejected by the respondent.

10. The applicants' seem to complain about interest charged on the overdraft account. From the respondent's replying affidavit and the supporting affidavit of the applicants, it is clear that at every stage, the applicants were informed of the interest rates applicable and the amounts outstanding. It is trite law that any dispute as to the amount of interest outstanding cannot be a ground for seeking an injunction. In the case of **Morris & Co. Limited Vs Kenya Commercial Bank Limited & another EA 605** Justice Ringera as he then was stated as follows:-

> ***"…….and what is one to make of the fact that the exact amount is in dispute and the interest component thereof is said to be usurious or unconscionable. It is just a tiny nipple in the pond. The law is well settled that a dispute as to the amount due cannot be a ground for an injunction to restrain a mortgagee from exercising its statutory power of sale".***

11. The applicants' claim that the respondent has breached the duplum rule has no basis and cannot be a

ground for grant of injunction. When the applicants were seeking for the sale process to be put on hold for 180 days, the interest component thereof was clearly indicated to them. I do not therefore see what prima facie case the applicants have. Even on consideration of the second principle in the ***Giella*** case, the applicants can be compensated in case it turns out that they were overcharged on interest. Once they offered the suit property as security, they were aware of the consequences in case of default. They cannot therefore argue that the property is matrimonial property which should not be sold. See the case of **Andrew Muriuki wanjohi Vs Equity Building Society Ltd & 2 others (2006) eKLR.**

12. Having evaluated the materials before me and the applicant's case, I do not find that the applicants have demonstrated that they have a prima facie case with probability of success to warrant issuance of injunction. I proceed to dismiss the notice of motion dated 15th June 2017 with costs to the respondent.

It is so ordered.

Dated, Signed and delivered at Nairobi on this 6th day of February, 2018.

E.O.OBAGA

JUDGE

In the presence of :

Mr Ngira for applicant

M/s Kituru for Mr Nyamodi for Respondent

Court Assistant : Kajuju

E.O.OBAGA

JUDGE