



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO 2 OF 2018

WESTEND HOTEL LIMITED.....PLAINTIFF

=VERSUS=

BANK OF INDIA LIMITED.....DEFENDANT

RULING

1. Through a notice of motion dated 5/1/2018 the plaintiff, Westend Hotel Limited, seeks an interim injunctive order restraining the defendant, Bank of India Limited, against advertising for sale and or selling Land Reference Number 1870/111/499, pending the hearing and determination of this suit. The application is premised on the ground that the respondent seeks to exercise the chargee's statutory power of sale without complying with the mandatory provisions of the Land Act, namely: (i) Section 90(1) which requires the chargee to inform the chargor through a written notice indicating the amount required to be paid to rectify any default; and (ii) Section 96(1) which provides for a 90 days' notice:
2. The application was supported by an affidavit sworn on 5/1/2018 by Piyush Ratilal Shah in which he deposed that the suit property was charged to the respondent to secure various banking facilities extended to the applicant by the respondent. He further deposed that on 30/1/2017, the respondent did a review of the terms and conditions of the loans and proposed a new repayment schedule providing for a 72 months loan repayment period for the granted facilities, giving the applicant up to December 2022 to repay the facilities.
3. The deponent further stated that due to bad business environment which existed in the Country arising from the general elections and the repeat presidential election, the applicant was not able to honour the monthly repayment schedule. He added that on 1/12/2017, the respondent, through M/s Mahinda & Maina Company Advocates wrote to the applicant demanding a sum of United States Dollars (USD) 2,468,550.66 within 40 days. He contended that the figure of United States Dollars (USD) 2,468,550.66 relates to the whole loan amount which was not yet due at the time the respondent made the demand. He further deposed that the applicant had not been served with a notice in the prescribed form as required by Section 90(1) of the Land Act.
4. Mr Shah further deposed that what was due to the respondent was the cumulative monthly amount plus interest as at the date of default and not a recall of the whole amount. He contended that the respondent was acting contrary to the provisions of Section 90(1) and Section 96(1) in recalling the entire loan amount. He stated that the applicant had not been given a chance to regularize the loan account as required under Section 90(1) and Section 96(1) of the Land Act. He urged the court to protect the applicant by stopping the sale pending the hearing and determination of the suit herein.
5. The respondent opposed the application through a replying affidavit sworn on 18/1/2018 by Pramod Kumar Agrawal. He deposed that between 2013 and 2015, the respondent granted the applicant facilities amounting to USD 1,800,000 secured by a debenture and a first charge against the suit property. In 2015 the respondent advanced the applicant a further facility of USD 900,000 secured by a supplementary Debenture and a further charge, both dated 1/4/2015. Mr Agrawal added that the above facilities were reviewed at the request of the applicant who proposed a repayment schedule for the two facilities, allowing the applicant to repay the facilities in a door to door repayment period of 120 months.
6. The deponent further deposed that the applicant's account became non-performing in 2017, necessitating the respondent to issue the applicant with a notice categorizing the account as non-performing. Due to the applicant's inaction, the respondent through its advocates, issued and served a notice under Section 90(3) of the Land Act, advising the applicant the nature of their default and the respondent's intention to exercise the statutory power of sale. Receipt of the said notice was duly acknowledged. In response, the applicant pleaded for a further period of six (6) months within which to dispose one of its properties and clear the loan. Owing to the applicant's failure to adhere to the statutory notice, the respondent through its advocates issued a notice under Section 96(1) and (2) of the Land Act indicating its intention to sell the property after the lapse of 40 days.
7. The deponent added that the outstanding balance in the account as at 30/6/2017 together with interest were clearly set out in the statutory notice. He contended that all statutory notices were issued. He further deposed that both the first legal charge and the further charge provided

that all money, obligations and liabilities secured by the charges shall immediately become due and payable by the applicant to the respondent if the applicant defaulted or failed to comply with any term or condition or failed to discharge any of its obligations. He urged the court to dismiss the application.

8. In submissions, Mr Masese, counsel for the applicant argued that the notice issued by the respondent failed to comply with Section 90 of the Land Act because: (i) it failed to specify the amount to be paid to rectify the default; (ii) it demanded the entire loan amount to be paid within 30 days yet the Act provides for a period of 90 days and (iii) it demanded interest at 14% contrary to the 8% agreed on in the charge instrument. He added that there was an agreed repayment schedule which provided that the loan amount of USD 2.4 Million was to be repaid over a period of 72 months effective 2014. He contended that the notice issued contravened the agreed repayment schedule.

9. Counsel submitted further that the 2nd notice issued on 23/8/2017 similarly contravened the law in that it failed to specify the sum payable to rectify the default. He argued that the notices issued by the respondent were illegal and did not crystallize the power of sale. He added that the balance of convenience tilted towards preserving the *status quo*.

10. In response, Mr Kagiri, counsel for the respondent, submitted that the applicant had not disputed the amount owed. He added that the sum owed remained outstanding. Counsel further submitted that the statutory notices exhibited clearly specified the amount demanded. He further submitted that the amount lent was USD 2,700,000 and the amount outstanding was USD 2,468,550.

11. Counsel submitted further that an injunction is an equitable remedy granted to a party who comes to equity with clear hands. He argued that the applicant had ignored the need to service the loan and now seeks to use the courts to hold the defendant hostage.

12. Mr Kagiri further argued that an injunction based on alleged irregularity of a notice would subsist only as long as the Bank has not issued a proper notice. Lastly, he argued that the applicant is a belligerent defaulter who is not keen to repay the loan. He urged the court to dismiss the application.

13. In a rejoinder, Mr Masese submitted that the parties in the present suit entered into an agreement on how the loan amount was to be repaid. That agreement varied the terms in the charge and provided for 72 monthly instalments effective January 2017.

14. I have considered the tenor and import of the application, the rival affidavits and the rival submissions. I have also considered the law on interim injunctive relief. The applicant was required to demonstrate that it has a *prima facie* case with a probability of success and that if the injunctive order is not granted it would suffer irreparable damage that cannot be adequately indemnified through an award of damages. Were the court to be in doubt, the application is to be determined on a balance of convenience.

15. At this stage, what is required of the court is to examine the materials placed before it and establish whether they disclose a *prima facie* case with a probability of success. The court is not required to delve deep into the merits of the parties' respective cases or make any definitive or conclusive pronouncement on any of the emergent issues.

16. The application under consideration was triggered by statutory notices issued by the respondent under Sections 90 and 96 of the Land Act. The applicant contends that the said notices contravene the mandatory requirements of the law. The respondent contends that the notices complied with the law in its entirety. Secondly, the applicant contends that the loan repayment schedule was reviewed. The respondent concurs but adds that the applicant did not comply with the reviewed schedule.

17. Three key questions fall for determination in this application. The first question is whether there is evidence of probable default by the applicant in terms of the reviewed loan repayment schedule. The second question is whether there is evidence of probable violation of the requirements of Section 90 of the Land Act. The last question is whether there is evidence of probable violation of Section 96 of the Land Act. I will deal with the three questions in the order in which they are framed.

18. There is common ground that through two separate agreements both dated 30/1/2017, the repayment schedules for the two loans were reviewed. The parties agreed that the sum of USD 1,586,587.87 which was due, payable and outstanding out of the first loan of USD 1,800,000 was to be repaid in 72 varying monthly instalments. The monthly instalments for each calendar year were spelt out in the agreement. Similarly, the parties agreed that the sum due, payable and outstanding out of the second loan of USD 900,000 was USD 846,230.33 and the said sum was to be repaid in 72 monthly repayments of varying amounts.

19. Between 17 January 2017 and December 2017, the applicant was required to make a monthly repayment of USD 18,000 making a total of USD 216,000 for the 12 months. The agreed monthly repayment for 2018 for the first loan was USD 19,500 making a total of USD 234,000.

20. With regard to the second loan, the agreed monthly repayment for January 2017 to December 2017 was USD 9,500 making a total of USD 114,000 for the year 2017. The monthly repayment for 2018 was USD 10,500 making a total of USD 126,000 for the year 2018.

21. Paragraph 2 of each of the said variation agreements provided as follows:

“Subject only to the modifications aforesaid, all powers, provisions, covenants, agreements, declarations, terms and conditions contained in the principal agreements, and the security created thereunder shall remain in full force and effect”

22. From the materials presented to the court, there is no evidence at this point that the applicant complied with the terms of the variation agreements in relation to the repayment of the two loans. There is therefore a probability that the applicant breached the terms of the two charges as varied through the two subsequent agreements in that he defaulted to service the two loans as agreed in the variation agreements.

23. The second question is whether there is evidence of probable violation of the requirements of Section 90 of the Land Act. Section 90 of the land Act provides as follows:

90. Remedies of a chargee

(1) If a chargor is in default of any obligation, fails to pay interest or any other periodic payment or any part thereof due under any charge or in the performance or observation of any covenant, express or implied, in any charge, and continues to be in default for one month, the chargee may serve on the chargor a notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be.

(2) The notice required by subsection (1) shall adequately inform the recipient of the following matters—

(a) the nature and extent of the default by the chargor;

(b) if the default consists of the non-payment of any money due under the charge, the amount that must be paid to rectify the default and the time, being not less than three months, by the end of which the payment in default must have been completed;

(c) if the default consists of the failure to perform or observe any covenant, express or implied, in the charge, the thing the chargor must do or desist from doing so as to rectify the default and the time, being not less than two months, by the end of which the default must have been rectified;

(d) the consequence that if the default is not rectified within the time specified in the notice, the chargee will proceed to exercise any of the remedies referred to in this section in accordance with the procedures provided for in this sub-part; and

(e) the right of the chargor in respect of certain remedies to apply to the court for relief against those remedies.

(3) If the chargor does not comply within ninety days after the date of service of the notice under, subsection (1), the chargee may

(a) sue the chargor for any money due and owing under the charge;

(b) appoint a receiver of the income of the charged land;

(c) lease the charged land, or if the charge is of a lease, sublease the land;

(d) enter into possession of the charged land; or

(e) sell the charged land;

(4) If the charge is a charge of land held for customary land, or community land shall be valid only if the charge is done with concurrence of members of the family or community the chargee may—

(a) appoint a receiver of the income of the charged land;

(b) apply to the court for an order to—

(i) lease the charged land or if the charge is of a lease, sublease the land or enter into possession of the charged land;

(ii) sell the charged land to any person or group of persons referred to in the law relating to community land.

(5) The Cabinet Secretary shall, in consultation with the Commission, prescribe the form and content of a notice to be served under this section.

24. The applicant contended that the notice served by the respondent was non-compliant because: (i) it failed to specify the amount to be paid to rectify the default; (ii) it demanded the entire loan amount to be paid within 30 days yet the Act provides for a period of 90 days; and (iii) it demanded interest at 14% contrary to the 8% agreed in the charge instrument. I have carefully examined annexure “PKA5A” which is the statutory notice issued by the respondent to the applicant herein. It reads thus:

Your Ref TBA

The Directors,

Westland Hotel Limited

P.O. Box 11309-00400,

NAIROBI.

Dear Sirs

RE NOTICE TO EXERCISE STATUTORY POWER OF Sale

Chargor: Westend Hotel Limited

Property: LR 1870/111/499

We refer to the matter above in which act we for the Bank of India (Our client) who have instructed us to address you as we do hereunder.

Our instructions are that our client sanctioned and granted banking facilities to you for the sum of United States Dollars Two Million Seven Hundred Thousand (USD, 2,700,000.00) plus costs and interest and subject to the terms and conditions as provided in inter alia the facility letter dated 30th January, 2017 full particulars whereof are within your knowledge.

The banking facility was granted and secured by inter alia Debenture dated 31st May 2013, a supplementary Debenture dated 1st April 2015 (hereinafter called "the Debentures"), a first legal charge dated 31st May, 2013 and a further charge dated 1st April, 2015 (hereinafter called "the charges") over property known as LR No 1870/111/499 registered in the name of the Charge (hereinafter called "the Charged Property").

We are further instructed that you have since defaulted in meeting you obligations as per the terms of the facility letter, the Debentures, the charges and all such other arrangements between yourself and our client and have further failed, refused and/or ignored to honour your obligations and settle the outstanding balance as per the terms of the sanction despite numerous demands and reminders from our client. We further note that our client sent a default notice by their letter dated 27th July, 2017 informing you that your account was non-performing and calling upon you to make payment of the amount overdue in order to regularize your account with interest thereon within thirty (30) days of the said letter, which demands and letters have elicited no response from you.

Take notice that despite demands to you to make payment or to remedy the default, the outstanding balance in the account as at 30.6.2017 remains as follows:

1	Account type	Account Number	Outstanding (united States Dollars)	Rate of Interest
2	Term Loan-1	0026027000004 302	1,609,875.68	6M LIBOR +6.64178 = Minimum 8.00% per Annum + penal interest of 2%.
3	Term Loan -II	0026027000015 316	858,674.98	6M LIBOR +6.64178 = Minimum 8.00% per Annum + penal interest of 2%.
	Total	US\$	2,468,550.66	

You are further advised that the overdraft balance in your account continues to accrue interest as from 01.06.2017 which interest was last applied on 31.05.2017 at the rate of 6M Libor + 6.64178 = 8.00% (Minimum) + Penal interest of 2% per annum or such other rate(s) as may be amended/chargeable from time to time on the outstanding amount until payment in full.

In light of the above we are instructed to notify you that as per the terms of the facility letter and the charges, your facility has been recalled and our Client has ceased forthwith having any further obligations to you in respect of the Banking facility. Accordingly, we are by this letter instructed to DEMAND that you remedy the default by making payment of United States Dollars Two Million Four Hundred and Sixty eight Thousand, Five Hundred and Fifty Sixty Six cents (US\$2,468,550.66) being the outstanding amount plus interest and costs within NINETY (90) DAYS from the date of service and delivery of this notice upon you which for the avoidance of doubt shall be deemed to be four (4) days from the date of posting.

TAKE NOTICE that if the aforesaid outstanding amount will not be paid to our Client within the stipulated period aforementioned, our client shall proceed to exercise its Statutory powers conferred by the Charges and as provided in Section 90(3) of the Land Act 2012 in order to recover the outstanding amount then due and owing to our Client, together with interest, cost and all attendant charges therein IT BEING UNDERSTOOD that our Client may exercise any of the following options.

- 1. Sue you and the Guarantors**
- 2. Appoint receiver of the income of the Charged Property**
- 3. Lease the Charged Property**
- 4. Enter into possession of the Charged Property; or**
- 5. Sell the Charged Property.**

TAKE FURTHER NOTICE that any proposal made or part payment made subsequent to this letter shall be accepted by our Client without prejudice to the rights available to our client, including but not limited to the right to continue demanding from you the outstanding amounts and the rights to exercise all the above legal remedies available to them in law and as conferred by the Charge.

Yours faithfully

Signed

For: Wangai Maina

MAHIDA & MAINA COMPANY ADVOCATES

CC

The Chief Manager

Bank of India

Industrial Area Branch

Sameer Business Park,

Bloc D1, Ground Floor,

P.O. Box 18415-00500

NAIROBI.

Guarantors

1. Mr. Piyush Ratilal Shah

M/s Westend Hotel Limited

PO Box 11309-00400

NAIROBI.

[Email: greatlakes@angelcourt.co.ke](mailto:greatlakes@angelcourt.co.ke)

2. Mr Dipak Ratila Shah

M/s Westend Hotel Limited

PO Box 11309-00400

NAIROBI.

Email:dipaksha5@gmail.com

25. I have quoted the entire notice because the question under consideration revolves around the content of the notice.

26. Without saying much at this point, paragraph 2 of the notice indicates that the amount loaned to the applicant was USD 2,700,000. Paragraph 5 indicates that the total amount payable as at 30/6/2017 was USD 2,468,550.66. Paragraph 6 indicates that the rate of interest charged was 8.00%. Paragraph 7 of the notice informed the applicant that it was required to pay the amount within 90 days.

27. Under Clauses 7 and 8 of the charge dated 31/5/2013, the respondent was entitled to serve notice under Section 90 of the Land Act demanding payment of the money secured by the charge and not merely the arrears. Similarly, under Clause 9 of the further charge, all moneys secured by the further charge became due and payable upon default by the applicant. The totality of the foregoing is that, the allegations that the respondent violated the requirements of Section 90 of the Land Act are not supported by the evidence before court. The materials presented to the court at this point do not disclose any probable violation of Section 90 of the Act.

28. The last question is whether there is a *prima facie* evidence of probable violation of Section 96 of the Land Act. Section 96 requires the chargee to give a second notice, this time a forty days' notice. I have looked at the applicant's Annexure **PR 53**. It is a notice dated 1/12/2017 and served by the respondent to the applicant. Paragraph 5 of the notice stated thus:

Take Notice that despite demands to you to make payment or to remedy the default, the outstanding balance in the account as at 30.6.2017 remains as follows:

1	Account type	Account Number	Outstanding (united Dollars)	States	Rate of Interest
2	Term Loan-1	002602700004302	1,609,875.68		6M LIBOR +6.64178 = Minimum 8.00% per Annum + penal interest of 2%.
3	Term Loan -II	0026027000015316	858,674.98		6M LIBOR +6.64178 = Minimum 8.00% per Annum + penal interest of 2%.
	Total	US\$	2,468,550.66		

You are further advised that the overdraft balance in your account continues to accrue interest as from 01.06.2017 which interest was last applied on 31.05.2017 at the rate of 6M Libor + 6.64178 = 8.00% (minimum) + penal interest of 2% per annum or such other rate(s) as may be amended/chargeable from time to time on the outstanding amount until payment in full.

29. The respondent contended that the notice dated 1/12/2017 was a proper notice under Section 96 of the Land Act. I have reproduced paragraph 5 of the notice. I am in agreement with the respondent that the 40 days' notice contemplated under Section 90 of the Land was duly served.

30. In light of the foregoing, it is apparent from the materials presented to the court at this stage that the allegations made by the applicant are not backed by evidence. The evidence before court at this point does not disclose the alleged breaches.

Disposal Orders

31. The upshot of the foregoing is that the plaintiff has not established a *prima facie* case with a probability of success. The net result is that the Notice of Motion dated 5/1/2018 fails. The respondent shall have costs of the application

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 27TH DAY OF SEPTEMBER 2018.

B M EBOSO

JUDGE

In the presence of:-

Mr. Masese Advocate for the plaintiff/applicant

Mr. Kagiri Advocate for the defendant/respondent

June Nafula - Court Clerk