REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO. 228 OF 2015

KENYA FARMERS ASSOCIATION LTD…….....….PLAINTIFF

VERSUS

BARLCLAYS BANK OF KENYA LTD.…....….1ST DEFENDANT

JOSEH M. GOKONYO T/A GARAM INVESTMENTS ...2ND DEFENDANT

RULING

(Applicant having charged suit land to respondent to secure the sum of Kshs.77 million; respondent now claiming over Kshs.2 Billion and moving to advertise suit property for sale; applicant seeking injunction; applicant contending that the debt now claimed is illegal; applicant challenging the charges and statutory notice; not clear how the debt has ballooned from Kshs.77 million to Kshs.2 Billion; no proof that statutory notice was sent to the correct address; prima facie case established; order of injunction issued).

1.The application before me is for an order of injunction, seeking to bar the 1st defendant/respondent from offering for sale the land parcel Nakuru Municipality Block 9/33 (hereinafter "the suit property") in exercise of its statutory power of sale as chargee until this case is heard and determined. What prompted the application is that the 1st respondent, instructed the 2nd respondent, a firm of auctioneers, to sell the suit land and the 2nd respondent scheduled a sale for 13 August 2015. The plaintiff/applicant then filed this suit on 6 August 2015 and together with the suit, this application for injunction. The reasons why the applicant wants the respondents stopped from selling the suit property are contained in the plaint, in the motion and the several affidavits in support of the same.

2. In the plaint, the applicant has pleaded that it was previously known as Kenya Grain Growers Cooperative Union Limited (KGGCU) and that by a charge dated 17 January 1996 and registered on 2 Febuary 1996, KGGCU charged the suit property alongside two other properties being LR No. Nakuru Municipality Block 6/69 and 70 to the 1st respondent to secure a loan and guarantee of Kshs. 77,200,000/=. It is pleaded that the charge is fatally defective, unlawful, contra-statute, invalid, and null and void ab initio because it does not meet the conditions set out by the Registered Land Act (repealed), the Land Registration Act, 2012 and the Land Act, 2012 in terms of its contents, its execution and verification. It is contended that the said charge is hence of no legal effect, and does not confer any statutory power of sale upon the 1st respondent. It is pleaded that on diverse dates between the year 2012 and 2014, following negotiations between the applicant and the 1st respondent, the 1st respondent consented to the sale by private treaty of the other two properties charged so as to repay the loan. It is averred that the two properties were sold and the applicant paid to the 1st respondent the sum of Kshs. 272,400,000/= in settlement of the loan. It is pleaded that this amount was in excess of the loan amount

properly due to the 1st respondent and that the applicant does not now owe any money to the 1st respondent. It is stated that despite this, the 1st respondent on 26 May 2015 wrote to the applicant claiming an alleged loan balance of Kshs. 2,203,291,403.50/= accruing interest at 22.5% per annum, and threatened to sell the suit property to recover the said monies. It is pleaded that this claimed sum of money is absurd, extremely extortionist, totally illegal, and unconscionable. It is stated that previously the 1st respondent had written to the applicant on 6 September 2013, indicating that the outstanding loan amount then was Kshs. 362,500,000/= but that the same would gradually escalate up to a maximum of Kshs. 502,500,000/= if the same was not paid up by 28 February 2014. It is averred that the applicant declined to accept and confirm the terms of this letter because the figures were disputed. It is pleaded that it is incomprehensible how the figure purportedly claimed by the 1st respondent rose from Kshs. 362,500,000/= in 2013 to over Kshs. 2.2 Billion in 2015. It is averred that the discrepancies point at the defendant's inconsistency and bad faith in the matter. It is pleaded that the 1st respondent has been paid far in excess of the maximum Kshs. 144.4 Million that would be lawfully recoverable by the 1st respondent under Section 44A of the Banking Act.

3. The applicant has also pleaded that prior to the advertisement of the suit property by the 2nd respondent, it had not been issued with a statutory notice under Section 74 of the Registered Land Act or a Notice under Section 90 of the Land Act or a Notice to sell under Section 96(2) of the Land Act or a Notification of Sale under the Auctioneers Rules. It is further pleaded that the property is a leasehold from the Government yet no notice to sell has been served upon the lessor as required by Section 96(3) of the Land Act and neither has any notice been served upon the applicant's tenants or employees on the suit property. It is also stated that the 1st respondent has not undertaken a valuation of the suit premises as required by Section 97 of the Land Act, 2012.

4. In its plaint, the applicant has asked for the following orders (slightly paraphrased):-

> *(i) An order of temporary injunction (at the interlocutory stage) and of permanent injunction and perpetual injunction, restraining the 1st and 2nd defendants jointly and severally from selling the suit property.*
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> *(ii) A declaration that the charge dated 17 January 1996 and registered on 2 February 1996 over the suit property is fatally defective, bad in law, invalid, null and void, and of no legal effect whatsoever and the same cannot give rise to a chargee's statutory power of sale over the suit property.*
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> *(iii) A declaration that the plaintiff has fully paid and settled the 1st defendant's loan debt secured by the aforesaid charge and that the plaintiff does not owe any more money to the 1st defendant and an order to compel the 1st defendant to issue the plaintiff with a clearance certificate to that effect.*
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> *(iv) An order compelling the 1st defendant to discharge the charge over the suit property and in default the Deputy Registrar of this court to sign all the necessary discharge documents.*
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> *(v) A declaration that the 1st defendant's claim to an alleged loan balance of Kshs. 2,203,291,403.50/= and further interest thereon at the rate o 21% per annum or any other interest rate is illegal, exorbitant, extortionist, unconscionable, and is not lawfully due or recoverable from the plaintiff.*
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> *(vi) An order compelling the 1st defendant to recalculate and to furnish the plaintiff and the court with a complete, accurate, and up to date account of the plaintiff's lawful loan debt herein (already repaid) calculated having regard to Section 44A of the Banking Act.*
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> *(vii) A refund of all and any excess money paid by the plaintiff to the 1st defendant bank, or otherwise recovered by the 1st defendant on the plaintiff's loan account herein, and interest thereon at the 1st defendant's own lending rate of 21.5% per annum.*

(viii) General, aggravated and exemplary damages.

(ix) Costs of this suit and interest thereon at court rates.

(x) Any other or further relief as the court may deem fit to grant.

5. The supporting affidavit to the application for injunction is sworn by Mr. Tom Ndiwa, the General Manager and Company Secretary of the Plaintiff company. He has repeated more or less what is pleaded in the plaint and has annexed a copy of the letter of offer for the loan amount and the charge. He has deposed that the loan facility of Kshs. 77,200,000/= became non-performing from the onset and not a single repayment installment was made. He has averred that the amount of Kshs. 272,400,000/= paid to the 1st respondent after the sale by private treaty of the two other properties charged, was well in excess of the loan amount properly due to the 1st respondent under Section 44 of the Banking Act and that the applicant does not owe any money to the 1st respondent. It is repeated that the maximum amount that the 1st respondent can lawfully recover is Kshs. 144 Million and that none of the notices that are required to be issued have ever been issued to the applicant.

6. The 1st respondent has opposed the application for injunction by filing a replying affidavit sworn by Mr. Kenneth Kiurah, its head of corporate recoveries. It is deposed that the 1st respondent's power of sale arose well before the Land Act, 2012, came into force and that all requisite notices were issued. He has annexed various notices including one dated 3 October 2007, giving the applicant 3 months to settle the sum of Kshs. 502,911,742.23/= which was accruing interest at the rate of 4% above the Bank's base rate then at 13.75% per annum. Another is a 45 days notice issued by the 2nd respondent dated 28 April 2008 and a Notification of Sale for a public auction scheduled for 12 January 2011. There is another 45 day notice dated 29 October 2010 issued by the 2nd respondent. It is further averred that the 1st respondent has caused the suit property to be valued and a valuation report is annexed. It is deposed that :-

(a) The applicant was in default of repaying the loan for a very long time.

(b) The 1st respondent has extended indulgence to the applicant on several occasions and even suspended auctions of the suit property to accommodate the applicant.

(c) On the 26th of January 2009 the applicant admitted that it owed the 1st respondent a sum of Kshs. 582,205,277/= as at June 2008 with interest accruing at 24% per annum.

(d) Parties entered into negotiations to settle the matter amicably, whereof it was agreed that a sum of Kshs. 362,500,000/= would be accepted by the 1st respondent, in full and final settlement of the debt owed to it by the applicant, but on condition that the sum was paid by 31 December 2012. In default, the sum acceptable to the 1st respondent would escalate as set out in the letter of 13 September 2013.

(e) Even though the applicant did not sign the aforesaid letter of 13 September 2013, it has acted in accordance with it, by seeking indulgence in respect of its terms and even procuring part payment.

(f) The applicant has even committed to pay the 1st respondent proceeds of sale of another property to fulfill its obligations in respect of the aforesaid terms.

7. Some letters dated 28 October 2014, 4 August 2014, 23 July 2014, 26 May 2015, are annexed. It is argued that the applicant has misapprehended the in duplum rule and that the applicant is merely making excuses to run away from an amount which it had admitted that it owed and agreed to repay.

8. A supplementary affidavit sworn by Mr. Symon Cherogony the Managing Director of the applicant was filed by the applicant on 22 January 2016. It is denied that the notices displayed by the 1st respondent were ever served. It is stated that one of the notices bears an address which is not the applicant's address. It is averred that the Land Act, 2012, applies even to charges executed before the enactment of the said statute. It is also denied that any valuation of the premises has been done as claimed by the 1st

respondent; that the applicant has never admitted owing the sum of Kshs. 362,500,000/=; that the figures were proposed by the 1st respondent and rejected by the applicant as they had no legal basis; that the letters displayed are marked "without prejudice" and were never intended to have any binding effect. Mr. Cherogony has admitted that there were negotiations but has averred that full payment was subsequently made after the sale of the other properties owned by the applicant. It is repeated that the law that governs the matter is Section 44 of the Banking Act, and not even the parties can vary what the law prescribes. It is also deposed that from the bank statements annexed, the 1st respondent has not only received the sum of Kshs. 272,400,000/= but has also recovered a sum of Kshs. 29,747,036.00/= from rent due to the applicant; that the bank has therefore recovered the sum of Kshs. 302,147,036.00/= which is almost 400% of the principal debt yet the bank still wants a further Kshs. 2.2 Billion on the same loan. It is reiterated that the applicant does not owe the 1st respondent any money and that it is actually the bank which owes the applicant over Kshs. 158 Million. It is further stated that the claim that the charge is null and void has not been controverted by the respondents.

9. Both Mrs. Magana and Mr. Kimani for the applicant and 1st respondent respectively, filed written submissions which I have considered. Mrs. Magana, inter alia submitted that the suit is not defended as no defence has been filed by the respondents and that the matters pleaded in the plaint are therefore not denied. She has pointed out that a defence is required to be filed within 14 days of entering appearance. She submitted that out of the sum of Kshs. 77.2 Million advanced, the applicant has paid Kshs. 302 Million and there is no basis for the demand of over 3.2 Billion by the 1st respondent. She submitted that the 1st respondent does not even appear sure of what it is still claiming from the applicant. She further submitted that without prejudice correspondence is not admissible under Section 23 (1) of the Evidence Act. She submitted that the Bank's attempt to sell the suit property is time barred by virtue of Section 19 (1) (2) and (4) of the Limitation of Actions Act. She submitted that the Charge instrument does not have a repayment date and therefore the date of repayment should be after a demand under Section 65 (2) of the Registered Land Act, which she submitted has never been issued. She also submitted that the 1st respondent is guilty of laches. She submitted that the Charge does not conform to Section 80(3) of the Land Act, 2012; that it is not properly attested by the applicant with a seal; that there is no verification of execution; that there is no special acknowledgment of understanding of Section 74 of the Registered Land Act by the chargor; that the signatures of the persons executing the charge were not verified by the Registrar as required by Section 110 (1) of the Registered Land Act; that there is no certificate of verification by an advocate; that no statutory notice was issued, but even if such were issued, fresh ones needed to be issued under the Land Act, 2012; that the alleged notices were not properly addressed; that a fresh notice to sell needed to be made under Section 90 (2) (d) of the Land Act, 2012; that the applicant has fully settled all monies due and deserves a discharge; that the maximum recoverable under Section 44A is Kshs. 154.2 Million. She submitted that the applicant thus deserves the remedy of injunction.

10. Mr. Kimani on his part submitted inter alia that it is not denied that the sum of Kshs. 77,200,000/= was advanced; that the money was secured by a charge over the suit premises; that the applicant has admitted defaulting from the onset; that the power of sale thus arose; that a statutory notice dated 3 October 2007 was issued demanding the sum of Kshs. 502,911,742.23/= as at 27 August 2007;that the rights arose before the Land Act, 2012 came into force and thus the Land Act, 2012 is not applicable; that the in duplum rule came into force on 1 May 2007 and before that, there was no cap on the interest accruing on the principal sum; that before the in duplum rule came into effect, the loan balance due from the applicant was Kshs. 475,822,630.55/= as shown in the statement of accounts; that the applicant on 29 January 2009 admitted owing the 1st respondent the sum of Kshs. 582,205,227.00/= as at June 2008; that the applicant further wrote another letter on 23 July 2014; that the correspondences annexed show various meetings between the parties which culminated into an agreement to pay the sum of Kshs. 362,500,000/= by 31 December 2012; that the applicant paid some money pursuant to the said agreement but defaulted on the balance; that despite the claims by the applicant that there was no valuation, the same was done and he referred me to the valuation report annexed.

11. Both counsels relied on various authorities which I have considered.

12. What is before me is an application for injunction and I stand guided by the principles laid down in the case of ***Giella vs Cassman Brown (1973) EA 358***. In the said case, it was held that to succeed in an

application for injunction, the applicant needs to demonstrate a prima facie case with a probability of success and also show that he/she stands to suffer irreparable loss if the injunction is not granted. If the court is in doubt, it will decide the application on a balance of convenience.

13. There are various grounds advanced by the applicant which I will categorize into four as follows :-

(i) Whether the charge instrument is valid or invalid.

(ii) Whether the applicant has paid in full its debt to the 1st respondent.

(iii) Whether the 1st respondent sent the required notices before proceeding to advertise the property for sale.

(iv) Whether the 1st respondent is time barred from claiming any money from the applicant.

14. On the first issue, it is argued that the charge instrument is invalid. Mrs. Magana referred me to some provisions of the Land Act,2012 specifically Section 80 and stated that they were not complied with in the preparation of the charge and thus the charge is invalid. I see no place for the application of the Land Act, 2012 in so far as the form of the charge is concerned, for the simple reason that the 1st respondent could not be expected to conform to some requirements in a law that was not there at that time. The charge was apparently executed on 19 December 1995 and at that time, the Land Act, 2012 was not even contemplated. The same was enacted in the year 2012, and it is futile to argue that the instrument of the charge herein does not conform to a law that was non existent at the time. The applicable law as to the form of the charge is the Registered Land Act, which was then in force, and which was repealed in the year 2012 by the Land Registration Act, Act No. 3 of 2012, which commenced on 2 May 2012.

15. There is argument that the charge is not properly attested. Section 110 of the Registered Land Act required attestation of signatures. But the attestation is not only by the Land Registrar, as Mrs. Magana attempted to argue. I am not however too sure that the charge was properly attested. It is not very clear from the copies annexed, as to who exactly attested the charge instruments and whether the person falls into the category of officers who may attest signatures. Maybe the same will come out clearly when the original is availed and I do not want to exhaustively pronounce myself on that point at this stage without the benefit of the original document. I can however say that the applicant has raised doubt as to whether the charge instrument was properly attested and I think there is an issue to be tried as to whether the charge instrument is valid for want of proper attestation.

16. Apart from that, I have actually not seen anything else that is wrong with the charge. There is argument that there is no acknowledgement that the chargor understands the statutory power of sale as required by Section 65 of the Registered Land Act, but I have seen an acknowledgment signed by a Director and Company Secretary of the applicant. In all respects, they are the officers expected to bind the applicant, which is a corporate body. A corporate body, not being a natural person, inevitably has to act through the agency of an individual or individuals. I wonder how the applicant expected itself to make an acknowledgment as it is not a natural person. How would it have held a pen to sign the acknowledgment ? It is not claimed here that the two persons who executed the charge were not its duly authorized officers at the time, and I see no issue in this argument.

17. The second issue is whether the applicant owes any money to the 1st respondent. My answer to this, is that I am not certain whether the applicant has paid all money, but neither can I state that what the bank claims is legal, and this requires an interrogation at a full hearing of the matter. The loan advanced was of Kshs. 77,200,000/=. I have tried to go through the statements of accounts annexed by the 1st respondent and I think the same need explanation as to how the amount escalated to the astronomical sum of Kshs. 2, 203,291,403.50/=, now being claimed as at 26 May 2015, despite some quite significant payments made by the applicant. I think after a proper interrogation, arguments can be made as to how the in duplum rule will apply to the situation herein, but there is so much doubt as to what is properly owed by the applicant, and whether the applicant has made full payment, and it would be unfair, in the special circumstances of this case, to have the suit property sold, for it could very well be found that there is no money owing by

the applicant to the 1st respondent. That will be settled after a full hearing on merits but in my view the applicant has made out a case that there is a legitimate question to be tried whether or not it has fully paid its loan to the 1st respondent.

18. Although it is oft argued that an injunction ought not to issue merely because there is doubt as to what is owed, I think where it is not clear whether all the money has been paid or not, an injunction ought to issue because it could very well be that no money is owed by the chargor. I think the principle that an injunction ought not to issue where there is doubt as to the money owed, may hold where there is absolutely no question that money is owed and default is obvious, only that there is a disagreement as to how much is owed, but not where there is doubt as to whether any money is owing at all, which is a matter that must be interrogated and a proper finding made; for if it is found that there was actually no money owing, then there would be no basis for a chargor to lose his property for he would then be losing it for a non-existent debt which would be absolutely unfair.

19. The third issue is whether the requisite statutory notices were issued. The applicant has argued that a demand notice needed to be made, and thereafter a statutory notice before the power of sale could arise. There are also arguments that certain notices needed to be issued as required by the Land Act, 2012. I think I need not go too far on these arguments for I have doubts as to whether a proper statutory notice was issued to be applicant. There is actually a notice issued on 3 October 2007, which would pass for a good statutory notice under Section 74 of the Registered Land Act (then being in operation), but I have no proof that the said notice was ever served upon the applicant either in their office or by registered post. The address noted therein is P.O Box 7236-20100, which the applicant states is not its address and there could be a good argument on this as the charge instrument bears the address P.O Box 35 Nakuru. The letterhead of the applicant, in one of the letters annexed by the 1st respondent, bears the address P.O Box 35 -20100 Nakuru. All other correspondences annexed by the applicant, save for the statutory notice, are addressed to P.O Box 35-20100 Nakuru. I really do not know where the address P.O Box 7236-20100 came from, and why the 1st respondent chose to use it to send the statutory notice. Even if this address was the correct address, I have no proof, by way of a Certificate of postage, that this statutory notice was actually dispatched to the address cited. The applicant has thus demonstrated that prima facie, no statutory notice was issued to it by the 1st respondent and the 1st respondent will need to prove at the hearing of the suit, that the purported statutory notice dated 3 October 2007 is a good notice that was properly served. It is trite law that the power of sale by chargee, cannot arise until a statutory notice is served upon the chargor.

20. I really do not see the point of addressing whether or not the debt herein is time barred, or indeed any other issues raised by the parties, for I am already persuaded that the applicant has made out a prima facie case with a probability of success, as it could be that no proper statutory notice was served and there is also a question to be tried as to whether the applicant owes any money to the 1st respondent.

21. It is from my above analysis that I issue an order of injunction, stopping the respondents from proceeding to offer the suit property for sale, until this suit is heard and determined.

22. The applicant shall also have the costs of this application.

23. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 27th day of September 2017.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

In Presence of:-

Mrs. Gatu Magana for the applicant

Mr. Andama holding brief for Mr. Kimani instructed by M/s Walker Kontos & Company Advocates for the respondents .

Court Assistant: Toroitich.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU