REPULIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

LAND CASE NO. 239 OF 2016

PAMAY TRADING AND GENERAL SUPPLIERS....1ST PLAINTIFF/APPLICANT

PATRICK KYALO NZUKI.....2ND PLAINTIFF/APPLICANT

VERSUS

EQUITY BANK (KENYA LIMITED.....DEFENDANT/RESPONDENT

RULING

INTRODUCTION

1. Before me is a Notice of Motion Application dated 15th September 2016 seeking the following Orders: -

1. Spent

2. Spent

3. THAT pending the hearing and determination of this application inter-partes, an order for discovery be made directed at the Defendant to produce all the security documents relating to the credit facility granted to the 1st Plaintiff secured by the property known as Title Number Kilifi/Mtwapa/927.

4. THAT pending the hearing of this suit, an injunction do issue restraining the Defendant, by itself, servants, auctioneers and specifically Trevo Auctioneers, agents, or advocates or any of them or otherwise from advertising or offering for sale, or selling, or purporting to sell, or in any other way alienating or dealing with the proprietary interests in the suit property known as Title Number Kilifi/Mtwapa/927.

5. THAT an order be made appointing an independent Commissioner for purpose of investigating, ascertaining and reporting to Court:

(a) The rate of interest applied by the Defendant on the credit facility from time to time from the time of disbursement to the 14th day of July 2016 when Trevo Auctioneers issued an undated notification of sale pursuant to Rule 15(d) of the Auctioneers Rules.

(b) The Market value of the suit property known as Title Number Kilifi/Mtwapa/927.

6. That the Court be pleased to make any other order fit in the circumstances of this case.

7. That costs be provided for.

The Plaintiff's Case

2. The Application is supported by the annexed affidavit of Patrick Kyalo Nzuki, the 2nd Plaintiff herein sworn on 15th September 2016. The application is premised on a number of grounds as indicated on the body thereof which inter alia, are that:-

(i) The 2nd Plaintiff is the registered proprietor of the suit property located in Kilifi. The said property is very valuable and as at 3/3/2014, its value stood at Kshs 6,000,000/= At present its value exceeds Kshs 16,000,000/=

(ii) Sometimes in the year 2014, the Defendant agreed to advance a credit facility of Kshs 2,000,000/= to the 1st Plaintiff, Pamay Trading and General Suppliers as working capital. The said sum was repayable within a period of 36 months at the rate of Kshs 74,328/= per month;

(iii) The credit facility was conditional upon the 2nd Plaintiff agreeing to execute and register a First Legal Charge over the suit property in favour of the Defendant;

(iv) The 1st Plaintiff has since been making payments to the Defendant towards settlement of the credit facility effective 15th May 2014;

(v) As at 28/1/2016, the 1st Plaintiff had paid Kshs 1,044,624.36/= in repayment of the principal amount and interests. The Defendant has however demanded the immediate payment of Kshs 1,555,660.34/= claiming it is the debt due and still owing;

(vi) On 14/7/2016, the Defendant sent Ms Trevo Auctioneers to the Plaintiff's premises with a Notification of Sale of the suit property together with the Auctioneer's 45 day statutory notice of redemption;

(vii) The Plaintiffs have previously not received any demand for unpaid monies and/or any statutory notices as required under Sections 90(2) and 96(2) of the Land Act, 2012;

(viii) On 5/9/2016, the Defendant advertised the suit property for sale in alleged exercise of its statutory power of sale;

(ix)The intended sale is meant to recover the sum of Kshs 1,566,660.34/= which amount is far less than the value of the suit property whose forced sale value currently stands at Kshs 4,500,000/=;

(x) The amount claimed by the Defendant is grossly overstated and inaccurate as the Defendant has been unilaterally varying the interest rates applicable contrary to Section 84 of the Land Act, 2012. The Defendant has been charging interest on interest and on the amounts due hence clogging the equitable right of redemption;

(xi) In any event, the intended sale is also premature as the Defendant has not undertaken a forced sale valuation of the suit property contrary to Section 97(2) of the Land Act, 2012 which requires a valuation of the property before exercising the right to sell. The said failure to conduct a valuation of the suit property is calculated at selling the same at a gross under value;

(xii) The Plaintiffs stand to suffer irreparably should the illegal, unlawful and procedural sale be allowed to proceed since the suit property is the 2nd Plaintiff's matrimonial property; and

(xiii) It is therefore just and necessary to grant the orders sought otherwise this suit shall be rendered nugatory.

The Defendant's Case

3. The Application is however opposed. In a Replying Affidavit sworn by the Defendant Equity Bank's Mtwapa Branch Credit Manager one David Kirigia on 3rd February 2017, the Defendant denies virtually all the averments made by the Plaintiffs. The Defendant states that contrary to what the 2nd Plaintiff has stated, it is only in the first month of the repayment period, that is May 2014, that the Plaintiff made a complete payment. Thereafter the Plaintiffs fell behind in repayments by making inconsistent, insufficient and irregular payments throughout and thus breaching an express condition of the Loan Agreement between the Parties herein. A copy of the Plaintiff's Loan Account for the period 31st January 2013 to 28th September 2016 is annexed to the affidavit in support of this contention.

4. It is the Defendant's case that the Plaintiffs had no intention whatsoever to service the loan facility as they went into arrears almost immediately after acquiring the facility and 2nd Plaintiff has thereafter made flimsy excuses at every turn for his inability to honour his contractual obligations ranging from alleged harsh economic times to failure to sell products.

5. The Defendant further avers that all requisite demand letters were prepared and sent to the Plaintiff's last known forwarding address by registered post following his default and the same were correctly addressed. In a last ditch effort to reach the Plaintiff after he failed to respond to communication issued by the Defendant, copies of the said letter were emailed to him at his known email address on 9th August 2014.

6. It is further the Defendant's case that they instructed Messrs Trevo Enterprises Auctioneers to attach for sale the subject property after the Plaintiffs failed to honour the claim pursuant to the various notices issued to them. On receipt of the Proclamation of Attachment from the Auctioneers, the 2nd Plaintiffs wrote an undated letter received by the Defendant on 18/7/16 claiming that he was facing financial constraints in servicing his loan and requested for indulgence from the defendant by way of extending the loan repayment period.

7. Ultimately, the Defendants aver that the Plaintiffs are underserving of the orders sought as they have not come to the court with clean hands and have failed to prove their case to the required standards.

8. I have considered the Plaintiffs' application and the lengthy affidavit in reply. I have equally considered the detailed submissions and authorities placed before me by the Learned Advocates representing the Plaintiffs and the Defendant respectively.

Analysis of the Evidence

9. As I understood it, the background of this matter is that sometimes in March 2014, the 2nd Plaintiff together with his wife, one Mary Moli Mbai both trading as Pamay Trading and General Suppliers, the 1st Plaintiff herein applied for and were granted a loan facility by the Defendant in the sum of Kshs 2,000,000/= to be utilized by the 1st Plaintiff as working capital. Both sides thereafter executed a Letter of Offer prepared by the Defendant which letter contained the terms and conditions of the loan advanced. The 2nd Plaintiff who is the registered proprietor of Land parcel No Kilifi/Mtwapa/927(the suit property) pledged the suit property as security for the loan advanced and consequently a charge was created and registered against the title to the Suit property.

10. Pursuant to Clause 3 of the Letter of Offer, the Plaintiffs were to repay the loan in equal monthly instalments of Kshs 74,328/= comprising of both the principal sum advanced and interest. The loan was to be repaid in full within 36 months from the date of the draw down.

11. According to the Plaintiff, they immediately embarked on repaying the loan and as at 28th January 2016, they had paid a total of Kshs 1,044,624.36/= to the Defendant and were therefore taken aback when the Defendant demanded that they pay immediately a sum of Kshs 1,566,660.34/=.

12. On their part however, the Defendants contend that the Plaintiffs almost immediately fell into arrears after acquiring the loan as they started making incomplete and inconsistent payments contrary to the express terms of the Letter of Offer and thus breaching a fundamental term of the loan agreement. According to the Defendant, this default prompted them to issue various notices to the Plaintiff on diverse dates demanding payment of the outstanding amount. When the Plaintiffs failed to make good the outstanding sum, the Defendants instructed Ms Trevo Auctioneers to attach the suit property for sale to recover the debt due.

13. The Plaintiffs dispute the amount demanded and deny having been served with the requisite statutory notices before the Auctioneers were instructed to attach and sell the suit property. They have therefore filed this suit seeking an interlocutory injunction to restrain the Defendant Bank on the basis that the intended sale is unlawful and in breach of the mandatory procedural law as laid out in the Land Act, 2012.

14. In my view, the following issues arise for determination:-

1. *Whether the Attachment of the suit property for sale was lawful and/or in compliance with the mandatory provisions of the law;*

2. Whether the Applicants have satisfied the conditions for the grant of an interlocutory injunction; and

3. Whether the Plaintiffs are entitled to an order for Discovery and Commission.

1. <u>Whether the Attachment of the suit property for sale was lawful and in compliance with the Mandatory Provisions of the Law.</u>

15. It is not in doubt that the Plaintiff executed security documents with the Defendant to secure the repayment of the loan facility, that is the Letter of Offer dated 3rd March 2014 and a Charge on the suit property dated 9th April 2014. It is also not in doubt from the material placed before me that the Plaintiffs were experiencing some difficulties in servicing the loan.

16. Paragraph 14 of the Letter of Offer dated 3rd March 2014(annexed to the Defendant's Replying Affidavit and marked "DK1") executed between the Plaintiffs and the Defendant states as follows:-

"14. Default

(a) The following events will constitute default and cause any amount outstanding under the proposed facility to become immediately due and repayable and any commitments hereunder cancelled:-

(i) The failure of the Borrower to observe or perform any other obligations under this Letter and/or the security documents.

(ii) ……

(iii) The Borrower admits in writing its inability to pay or shall become unable to pay its debts generally as they fall due, or become bankrupt or insolvent, or file any petition or action or relief under any bankruptcy, re –organisation, (or) insolvency law.

(iv) ……..

(v) ……

(vi) ….....

(vii) Any of the Borrowers indebtedness is not paid on its due date or becomes due prior to its stated maturity or any guarantee given by the Borrower is not honoured when due or called upon.

(vii) ….

If any of the above events occurs then as and at any time thereafter the Lender may by written notice to the Borrower terminate its obligations under this Letter and/or demand immediate repayment of the amount outstanding under the proposed facility together with accrued interest and all other amounts due and the Borrower will comply with such demand forthwith.

17. From the Plaintiff's Loan Account Statement annexed to the Defendant's Replying Affidavit (marked "DK5"), the Defendant puts the outstanding sum due from the Plaintiff as at September 2016 at Kshs 1,696,807.64/=. The Defendants contend that they gave notice of the default of this amount and demanded payment of the same as required by the law but the Plaintiffs deny receipt of any such notice.

18. Section 90 of the Land Act 2012 lays down the requirements of a valid Statutory Notice as hereunder:-

"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 in 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) ……

(d) The consequence that if the default is not rectified within the time specified in the notice, the Charge 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 two months 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 charges

(b) ….

(c) …

(d) ,,,

(e) Sell the charged land.

19. The Plaintiffs submit that the Applicants and the said Mary Moli Mbai never received any demand or valid notice from the defendant indicating that it intended to exercise its power of sale as provided under Section 90 of the Land Act as outlined hereinabove. In the first instance, the Plaintiffs aver that their Postal Address to which the notices ought to have been sent is 1183-80100 Mombasa and not 1183-80109 Mtwapa to which the Defendant sent the notices. Secondly, the Plaintiff's contend that the Defendant ought only to have demanded "the amount necessary to rectify the default" and not the entire sum secured by the Charge as was done in this case.

20. I have looked at the Letter of Offer annexed to the Defendant's Replying Affidavit and marked "D K 1". The last portion of Page 6 thereof which is executed by the 2nd Plaintiff and the said Mary Moli Mbai in the presence of Nyameta Cleophas Bichanga Advocate reads as follows:-

"I confirm that I have read, understood, and accepted the offer contained in this letter subject to the above terms and conditions.

Patrick Kyalo Nzuki & Mary Moli Mbali T/A Pamay trading and General Suppliers

P.O. Box 1183-80109

MTWAPA

21. Explaining the origin of this address at paragraph 7 of the Replying Affidavit, the Defendant avers as follows:-

"7. That in response to Paragraph 7 of the Supporting Affidavit, on 20th

February 2014, the Plaintiff personally filled in a Loan Application Form

to which he clearly stated that his postal address is P.O. Box 1183-80109

Mtwapa and consequently the Defendant reasonably relied on this

representation to be of the Plaintiff's Postal address. Annexed herewith

and marked as "D K 4" is a copy of the said Loan Application Form dated

24th February, 2014.

22. I have looked at the annexed Loan Application Form filled in by hand and it is indeed true that the address given therein is the one of Mtwapa and not Mombasa. The 2nd Plaintiff has not denied that he filled in the form and provided the Bank with the said Postal Address and the Plaintiffs protestation to that effect therefore amounts to nothing but a mere denial. In my considered view, it was incumbent upon the Plaintiffs at the time of filling in the application form to confirm the correctness thereof otherwise they are barred by the doctrine of estoppel from denying the address that they themselves provided to the Bank.

23. Section 120 of the Evidence Act gives effect to the doctrine of estoppel and stipulates as follows:-

"120. General Estoppel

When one person has, by his declaration, act or omission, intentionally caused or permitted

another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceedings between himself and such person or his representative, to deny the truth of that thing."

24. Accordingly, the Plaintiff cannot now be allowed to assert that they never received the Statutory Notices as sent by the Defendant. The Defendant has indeed attached the Certificate of Postage (marked DK6 to the Replying Affidavit) and I am accordingly satisfied that the Statutory Notices were served as contemplated under Sections 90 and 96 of the Land Act, 2012.

25. On the contention that the notice ought only to have demanded the amount that was due and necessary to rectify the default, I am unable to see how a demand for the total sum due to the Bank would prejudice the Plaintiffs. Indeed a look at the Demand Notice dated 30th July 2015 attached to the Defendant's Replying Affidavit (annexed 'DK6') clearly shows that the Defendant Bank gave a breakdown of the aggregate sum demanded at Paragraphs 3 and 4 thereof as follows:-

"*3. That you have failed to repay the money advanced to you in*

accordance with the terms, express or implied, in the said Charge

and that by reason of your failure to honour your obligation to the

Bank, we now DEMAND from you the payment of Kshs 373,669.60/=

being the sum in arrears as at the date of this letter , that you are

required to pay in order to regularize your account.

4. *Please note that your total liability of Kshs 1,850,985.59/= continue*

to Accrue penal interest at the rate of 6% per annum, over and above

the prevailing normal interest rate……..."

26. A close scrutiny of the statutory notice issued accordingly confirms that it complied with all the requirements of Section 90 of the Land Act. The Plaintiffs were thereby properly informed of the nature and extent of their default, there was a demand for payment of the outstanding amount due to regularize the account and the duration of three months was given as the period within which the payments in default must be made. The letter also as required informed the Plaintiff of the consequences of the default if the same were not rectified within the stipulated time.

27. Accordingly, I find and hold that the attachment of the suit property for sale was lawful and in compliance with the provisions of the law.

2. **Whether the Applicants have satisfied the conditions for the grant of an Interlocutory injunction.**

28. The conditions for the grant of interlocutory injunctions were stated in the celebrated case of ***Giella – vs- Cassman Brown and Co Ltd(1973) EA*** 358 as follows:-

"……First an applicant must show a prima facie case with a probability of success. Secondly an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience."

29. From the foregoing it behoves the Court to first and foremost establish whether or not the Applicants have established a prima facie case with a probability of success. In ***Mrao Ltd –vs- First American Bank***

of Kenya & 2 Others (2003) KLR 125, a prima facie case in a civil case was described as follows:-

> *: …..a genuine and arguable case…., a case which on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."*

30. The main basis upon which the Plaintiffs pray for an injunction is the fact that the 2nd Plaintiff is the registered Proprietor of the suit property which property the Defendant seeks to sell without having issued the mandatory notices in compliance with the law. It is accordingly their submission that the failure to comply with statutory provisions gives rise to a prima facie case with a serious chance of success.

31. As it were however and arising from my findings hereinabove the Defendant herein has demonstrated that all statutory provisions were complied with. In addition it is clear from annexure "DK 11" of the Replying Affidavit that contrary to the assertions by the Plaintiffs, the Defendants in adherence to the procedural and substantive provisions carried out a valuation of the suit property through a firm of Valuers. The Valuers Report dated 22nd August 2016 incudes a forced Sale Value and an Open Market Value of the suit property. While the Plaintiffs contend that the suit property was in March 2014 valued at Kshs 6,000,000/= and that its present value now exceeds Kshs 16,000,000/= nothing was placed before me to support such a contention and/or to discredit the findings of Messrs Hallmark Valuers Ltd whose findings put the current Market Value of the property at Kshs 6,000,000/= and the Forced Sale Value at Kshs 4,500,000/=

32. Again while the Plaintiff contends that the suit property is 'matrimonial' and its sale would cause irreparable loss and damage, it is clear from the valuation report that the amount of loss likely to be suffered can be pre-estimated and is not irreparable as claimed. At any rate as was held in ***Nahashon K Mbatia –vs- Housing Finance Company Ltd (2006) e KLR:-***

> *"…..having charged the property, the Plaintiff converted it to a Commercial Commodity with monetary value that can be easily ascertained. Its loss can always be made good by an appropriate award of monetary compensation*."

33. Arising from the foregoing, I must find and I do hold that the Plaintiffs have failed to satisfy this Court that they have a case with a reasonable chance of success.

3. **Whether the Plaintiffs are Entitled to an Order for Discovery and Commission.**

34. The Plaintiffs have at Prayers 3 and 5 of this application sought orders to enforce discovery and for an independent commission to be appointed to investigate and ascertain the rate of interest charged by the Plaintiff and the propriety thereof, as well as to ascertain the current Market Value of the suit property.

35. Discovery by its very nature is part of the civil litigation procedures. Indeed the Rules Committee in its wisdom amended the Civil Procedure Rules 2010 to provide for Discovery. Under Order 11 Rule 2 thereof, Parties to litigation are as a matter of procedure required to undertake pre-trial directions and conferences and to fill relevant questionnaires within 10 days of the close of pleadings. In this instance, this application was filed with the Plaint and the pleadings were certainly yet to close. I therefore find the request for discovery premature.

36. On the request for an independent Commissioner to ascertain the amount of interest charged, I did not find anything in the Plaintiffs claim in support of the contention that the interests charged by the Defendant were inaccurate and/or exaggerated. The same can still be ascertained at the trial. In any event, I think it is now widely accepted that a Court of law ought not to grant an injunction restraining a Chargee from exercising its statutory power of sale solely on the ground that there is a dispute on the amount of interest payable.

37. In ***Benjamin Kaburi Kamuruci vs Stanbic Bank Ltd(2014) eKLR, Gikonyo J*** stated and I concur that:-

"As a general rule, disputes on interest rates or amount payable cannot be a basis for a grant of injunction unless they are tinctured with illegality or the amount claimed is preposterous, excessive or unconscionable on the face of the Charge. Or it is a bargain so ridiculous on the face of the Charge that no person would offer another. The terms above do not fall in that category. If the Plaintiff considered the interest to be illegal or uncontractual, he should have taken appropriate legal steps to have the interest declared as such immediately it was charged on his account"

38. The long and short of this is that I do not find any merit in the application dated 15th September 2016. The same is hereby dismissed with costs to the Defendant/Respondent.

Dated, signed and delivered at Malindi this 19th day of September, 2017.

J.O. OLOLA

JUDGE