IN THE COURT OF APPEAL

AT NYERI

SITTING IN NAKURU

(CORAM: G.B.M. KARIUKI, SICHALE, & KANTAI, JJ.A.)

CIVIL APPEAL NO. 2 OF 2017

BETWEEN

EQUIP AGENCIES LIMITED.....……..…APPELLANT

AND

I & M BANK LIMITED..... ……..…..... RESPONDENT

(An appeal from the Ruling and Order of the High Court of Kenyaat Naivasha (Meoli, J.) dated 9th December, 2016

in

H. C. C. C. No. 9 of 2016)

****

JUDGMENT OF THE COURT

The appellant, **Equip Agencies Limited**, filed suit against the respondent, **I & M Bank Limited**, at the High Court of Kenya, Nakuru, being HCCC No. 348 of 2016. That suit was transferred to the High Court of Kenya, Naivasha, upon a High Court Registry being established there, and became HCCC No. 9 of 2016. The appeal arises from a ruling of **C. W. Meoli, J.** who heard a motion for injunction by the appellant against the respondent. By the ruling delivered on 9th December, 2016 the learned Judge dismissed the appellant's application having found the same not to be merited. This appeal is therefore against orders in an interlocutory application. The suit has not been heard on the merits and we shall set out in this judgment only those parts of the matter before the learned Judge that will assist us to determine this appeal.

By a charge dated 22nd April, 2013 the appellant, as chargor and its related companies – Unicon Limited and Intertractor Company Limited (these related companies are referred to in the charge as "borrower") and the respondent contracted for advance of money by the respondent to the appellant and borrower. The initial sum referred to as "Maximum Principal Amount" was stated as Kshs 324,000,000/- repayable as stated in the charge with interest again stated in the charge. Title Number **Gilgil Township Block 2/2010** was offered by the appellant to the respondent as security for the loan and a charge was duly registered.

In a plaint filed in the said court, the appellant stated *inter alia* that it had borrowed the said sum as a term loan for the purpose of financing purchase of the said parcel of land which it offered as security; that the charge was not registered on time as required by certain provisions of the Companies Act and thus the charge was invalid; that the respondent did not seek further or supplemental charges and that the parcel of land remained the sole security for the sum advanced of Kshs 324,000,000/-; that the respondent had unlawfully tacked further unsecured debt and that the respondent had in any event repaid the said loan. Further, that the respondent had issued to the appellant an invalid statutory notice to sell the charge properties, invalid because the respondent demanded a sum in excess of the sum of Kshs 324,000,000/-; that it was wrong for the respondent to report the appellant's indebtedness to the Credit Reference Bureau; that the parcel of land was unique due to its peculiar location and occupation by the appellant and its tenants. For all these reasons, reliefs were sought including a permanent injunction to prevent the respondent from selling or transferring the charged property and various declarations were also sought. Contemporaneous with the suit was a Notice of Motion brought under various provisions of law where various substantive orders of injunction to prevent interfering, selling or transferring the said parcel of land pending hearing and determination of the suit. The grounds set out in the motion and in a supporting affidavit of **Divtyesh Patel Indulbhai,** a director of the appellant, were more or less what we have already stated.

The respondent's Relationship Manager, Corporate Division, **Mr. Gilbert Banda,** in a replying affidavit stated amongst other things that the appellant and the related companies had executed various letters of offer accepting terms and conditions in the same, that the appellant, the related companies and the respondent had executed a facility letter where the loan had been restructured; that the appellant had admitted owing various loans by letters to the respondent; that the appellant had executed an omnibus counter guarantee where it irrevocably undertook to unconditionally on demand indemnify the respondent against all claims, losses, damages, action and costs, charges and expenses that may be incurred by the respondent in respect of various financial, performance and other guarantees or bonds whether already issued or issued in future.

At paragraph 8 of Mr. Banda's affidavit, it is stated:-

> ***"8. I wish to respond to paragraphs 13 to 18 of the Supporting Affidavit by Divyesh Indubhai Patel where he has raised various unfounded allegations. The Legal Charges were duly registered at the land's office. I am advised by Allen Waiyaki Gichuhi, which advice I verily believe to be true, that:***
>
> ***(a) The plaintiff, in its dual capacity as Borrower and Guarantor, executed all the Letters of Offer accepting the additional facilities and are contractually bound by the terms and conditions wherein, the charge properties remained the securities in place.***
>
> ***(b) The charge was duly registered and complied with the Land Act. At Clause 18.1 the plaintiff agreed to be bound by all the terms in the charge in accordance with the Law of Contract Act – see page 50 of the plaintiff's affidavit.***
>
> ***(c) The plaintiff agreed to the bank's right to combine or consolidate any of the Mortgagor's (plaintiff's) and/or the three companies then existing accounts – Clause 2.3 of the Charge dated 22nd April 2013 – see page 30 of the Plaintiff's Affidavit.***
>
> ***(d) The bank duly registered the rights of tacking and consolidation on 6th May 2013 – see page 3 of the Plaintiff's exhibit.***
>
> ***(e) The plaintiff agreed to the Bank's reservation of its legal right to consolidate the charge securities and require full repayment of all monies owed by the three companies before any property could be redeemed – Clause 8.2 of the Charge dated 22nd April 2013 – see page 41 of the Plaintiff's Affidavit."***

Mr. Banda denied that the loans advanced had been repaid stating, to the contrary, that the appellant had

by various letters admitted the debts requesting for rescheduling and/or restructuring of the same and that it was default in paying or servicing the debts that had led to the respondent seeking to exercise statutory power of sale to recover the monies advanced.

Various documents were placed before the learned Judge by both parties including the charge, title to the parcel of land, letters exchanged by the parties and documents restructuring the loans. These are the materials that the learned Judge considered and found that the respondent was entitled to restructure the various loans and exercise a statutory power of sale if the loans were not serviced or fell into arrears. Those findings led to this appeal.

There are twelve (12) grounds set out in the memorandum of appeal drawn by the appellant's advocates. In essence the appellant faults the learned Judge for not finding that the appellant had established a *prima facie* case to be entitled to an injunction. The appellant also faults the learned Judge for finding that the charge was tacked with other debts; for not finding that statutory notice served was either invalid or that the power had not arisen and for not upholding a doctrine *"lis pendens"*.

Both parties filed written submissions and when the appeal came up for hearing before us on 22nd June 2017, the learned counsel appeared to highlight the same. **Mr. Njenga Muraya**, learned counsel for the appellant submitted that the Land Act 2012 had a specific procedure on how to tack loans and that failure to abide that procedure invalidated a charge. Learned counsel also submitted that the charge was invalid because, according to counsel, it was not registered within the time envisaged in law.

Mr. Allen Gichuhi, learned counsel for the respondent, in opposing the appeal took us through correspondence and affidavits on record where, according to counsel, the appellant had admitted the debts and requested time to enable it (the appellant) collect a debt owed to it by the Government of Kenya to enable it settle loans owed to the respondent. Learned counsel submitted that the appeal was unmerited as the appellant had requested the respondent to restructure loans, a request that had been granted, but that the appellant had not serviced the loans since restructure. Mr. Gichuhi, in further submissions, stated that the charge had been registered on time as required in law and that the charge provided for tacking and consolidation of loans. On the doctrine of *lis pendens*, it was learned counsel's view that an equitable remedy like that one could not override a statutory provision. He asked us to dismiss the appeal.

We have considered the record of appeal, submissions made, both written and oral, and the authorities cited and have come to the following view of this appeal.

It is common ground that the appellant at its request, was advanced a loan by the respondent for a certain term as agreed in a letter of offer later reduced into a charge where land was offered as security for the loan. In the plaint filed at the High Court and in affidavits filed in support of an application for injunction, the appellant averred that it had borrowed a sum of Kshs 324,000,000/- and had fully repaid the same with interest and that the respondent was not entitled to exercise a statutory power of sale.

The learned Judge examined the material placed before her and found as fact that the appellant had applied for several other facilities from the respondent which had been granted and that the appellant indeed had various accounts with the respondent and not the one account for Kshs 324,000,000/- as stated in the plaint. The learned Judge established as a central issue for her determination whether the respondent was entitled to consolidate the several accounts held by the appellant and treat the charged parcel of land as a continuing security for all outstanding facilities giving the respondent a right to issue the impugned statutory notice.

The learned Judge found that the charge document executed by the parties and registered as required allowed for tacking and that the Land Act also allowed tacking of debts.

We have perused the charge.

Clause 2.3 and 2.4 of the charge provides that:

"2.3 Each of the Chargor and the Borrower hereby agrees that the Chargee may at any time without notice notwithstanding any settlement of account of other matter whatsoever combine or consolidate all or any of the Chargor's and/or Borrowers then existing accounts including accounts in their respective names or jointly with others (whether current deposit loan or of any other nature whatsoever whether subject to notice or not and whether in Kenya Shillings or in any other currency) wheresoever situate and set-off or transfer any sum standing to the credit of any one or more such accounts in or towards satisfaction of any obligations and liabilities of each of the Chargor and the Borrower to the Chargee whether such obligations or liabilities be present future actual contingent primary collateral several or joint. Where such combination set-off or transfer requires the conversion of one currency into another such conversion shall be calculated at the then prevailing buying rate of exchange of the Chargee or such other bank in Kenya nominated by the Chargee (as conclusively determined by the Chargee) for purchasing the currency for which each of the Chargor and the Borrower is liable with the existing currency.

2. The Chargee is hereby irrevocably authorized by the Chargor in the Chargor's name and at the Chargor's expense to perform such acts and sign such documents as may be required to give effect to any set-off or transfer pursuant to Clause 2.3. The foregoing provisions of this clause 2.4 shall be in addition to and without prejudice to such rights of set-off combination consolidation lien and other rights whatsoever conferred on the Chargee by law."

At Clause 8.4 and 8.5 of the Charge, it is provided that:

"8.4 The Chargee shall be entitled to make further advances to the Chargor and/or Borrower provided that the aggregate principal amount advanced to the Chargor and/or Borrower secured by this Charge shall not exceed the Maximum Principal Amount.

8.5. The Chargee's right of tacking (Section 82 of the Land Act) and consolidation (Section 83 of the Land Act) shall be noted on the register and further the restrictions on the Chargor referred to in Section 87 of the Land Act shall also be noted on the register."

We have perused Certificate of Lease of the charged title and note that rights under Sections 82 and 83 (of the Land Act) are reserved in the encumbrances section of the title.

We had earlier in this judgment reproduced paragraph 8 of Mr. Banda's affidavit where it was stated, *inter alia*, that the appellant and borrower had freely executed letters of offer accepting all additional facilities and also agreeing to a combination and consolidation of accounts. These issues were also confirmed in letters by the appellant to the respondent dated 18th May, 2015, 16th July, 2015 and 3rd September, 2015.

In a letter dated 17th August, 2015 the respondent informed the appellant that the appellant was in arrears for sums stated in that letter and that the law required the respondent to report the issue to a Credit Reference Bureau. In answer to that letter the appellant wrote on 3rd September, 2015 to the respondent stating, inter alia:

"....The reason for interruption in regularizing our account was due to postponement and delay in Government payments combined with working capital constraints to accomplish the imminent LPO.."

This letter went on to request that some interest and penalty interest be waived and that the loans be restructured and:

"....As an alternative, we requested to convert Kshs 500 million Overdraft into a term loan against the five properties valued at Kshs 2,790,000,000/- which you hold as adequate collateral with you....."

These letters were not brought to the attention of the Judge who initially handled the matter and issued an *ex-parte* order of injunction. They were placed on record by the respondent. The action of withholding information from the court which is in its possession would usually dis-entitle a party from protection sought in *ex-parte* proceedings. Let us not speak more on that today seeing that the suit has not been heard and is pending hearing. The learned Judge who heard the motion *inter partes* found that both the charge and the Land Act allowed for tacking and consolidation of loans and that the respondent was entitled to demand the whole balance then outstanding in its books. The learned Judge found that the appellant had not made a *prima facie* case and was not entitled to an injunction pending the hearing of the suit. The learned Judge also found that the doctrine of *lis pendens* being an equitable remedy could not affect statutory rights exercised under the Land Act on the charge created under that Act. We agree with all these findings.

The Charge, as we have shown, allowed for tacking and consolidation of debts as did the Land Act. The appellant, after taking the first loan, applied for many more facilities which were granted. It would appear that the appellant did not service the loans as required and, upon requesting for restructure of the same, did not service more loans.

The appellant was not entitled to protection of an interim order of injunction and the learned Judge was right to so hold. This appeal has no merit and we dismiss it with costs to the respondent.

Dated and delivered at Nakuru this 27th day of September, 2017.

G. B. M. KARIUKI SC

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JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original

DEPUTY REGISTRAR