



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 476 OF 2013

SILVERGATE ACADEMY LIMITED.....PLAINTIFF

-VERSUS-

NATIONAL BANK OF KENYA LIMITED.....DEFENDANT

RACHUONYO & RACHUONYO ADVOCATES.....THIRD PARTY

RULING

INTRODUCTION

1. The Application before the Court is the Plaintiff's Notice of Motion dated **8th May 2014** and filed on **9th May 2014**. It is expressed to be brought under the provisions of **Sections 1A, 1B, 1C, 3A and 63 (c) & (e)** of the **Civil Procedure Act** as well as **Order 40 rules 1 (a), 2(1), 3, Order 8 Rule 3 and Order 51 Rule 1** of the **Civil Procedure Rules**. The Application sought for the following orders:-
 1. *Spent*
 2. *Spent*
 3. *This Honourable Court be pleased to issue an order of interim injunction restraining the Defendant either by itself or through its agent M/s Garam Investments Auctioneers or their employees, servants or any person acting under their authority from exercising the Defendant's Statutory power of sale or selling, disposing, and/or advertising, soliciting, offering or in any way negotiating or inviting any person or groups of person from bidding, buying or selling either by way of public auction or private treaty of al that property Title No. Nairobi Block NO. 127/752 or at all or from taking possession, alienating, attaching or in any manner interfering with the Plaintiff/Applicant's ownership, title, interests and/or exclusive, use, development and enjoyment of the subject property pending the hearing and determination of this suit.*
 4. *This Honourable Court be pleased to grant the Plaintiff leave to amend its Plaintiff dated 28th December 2012 in terms of the draft Amended Plaintiff annexed hereto.*
 5. *The costs of this application be provided for.*

THE PLAINTIFF'S CASE

2. The application is based on the grounds set out therein and is supported by the Affidavit of **Cecilia Wambui Kimani**, the Managing Director of the Plaintiff and sworn on **8th May 2014**. The application is further supported by her Supplementary affidavit sworn on **10th June 2014** and a Further Supplementary affidavit sworn on **22nd January 2015**.
3. The Plaintiff filed the current application on grounds that the Defendant through its auctioneers was about to advertise the intended sale of the suit property which was scheduled for auction on 22nd May 2014. It is averred by the Plaintiff that the Defendant had purported to consolidate and recall the entire loan advanced to them and demanded that the same be paid at once and in full, failure to which they would sell the suit property in exercise of their statutory power of sale. Thereafter, the Plaintiff and the Defendant entered into negotiations to restructure the loan repayment in terms and conditions that had been mutually agreed between them. It is however the Plaintiff's contention that despite the fact that they complied with the restructuring conditions, the Defendant reneged on its undertaking and proceeded to instruct its auctioneers to advertise and sell the suit property by way of public auction if the Plaintiff failed to pay the full consolidated loan.
4. It is the Plaintiff's case that the Defendant has so far been repaying the loan and hence it is not true that they have failed to or are unable to repay the loan as alleged by the Defendant. The Plaintiff also contends that the Defendant has refused to render proper and accurate accounts in order to conceal the true amount they have so far paid.
5. It is further the Plaintiff's case that the Defendant has grossly undervalued the suit property together with all the developments and fixtures, thereby making the intended sale irregular and unlawful.
6. The Plaintiff's contention is that they have invested in and developed the suit property which now operates a school and that the Defendant's actions if not stopped shall cause irreparable loss and damage not only to the Plaintiff but also to the students and teachers of the school.
7. The brief facts leading to the current application are that the Defendant sold to the Plaintiff the suit property at a consideration of Kshs. 27,000,000/= which amount was to be partly financed by the Defendant through a loan to be secured by the said property. The parties executed a Legal Charge dated 02/06/2005 wherein the Defendant advanced the Plaintiff Kshs. 24,300,000/= as part payment of the purchase price of the suit property.
8. It was an express term of the Agreement for Sale that the Defendant was to pay all the outstanding land rent and land rates before the property was transferred to the Plaintiff. Thereafter the land rates were to be apportioned between the Plaintiff and the Defendant once the Plaintiff took possession of the property. *See a copy of the agreement marked "CWK-2" annexed to the application.*
9. It is the Plaintiff's case that the Defendant misrepresented to them that it had paid Kshs. 941,600/= as outstanding land rates on the suit property as at the year 2004 and purportedly obtained a Land Rents Clearance Certificate from the City Council of Nairobi. However, it turned out that the said Land Rates Clearance Certificate was obtained unlawfully and by means of fraud. The Plaintiff contends that the outstanding land rates were not paid at all and the purported cheque of Kshs. 941,600/= was utilised for payment of other properties other than the suit property. The Plaintiff avers that when they informed the Defendant of the unpaid land rates, the Defendant took no action and instead demanded that the said land rates be paid by the Plaintiff.
10. It is therefore the Plaintiff's case that as a result of the Defendant's misrepresentation, breach of contract and refusal to settle the unpaid land rates, the City council of Nairobi issued a Notice to sell the suit property if the outstanding land rates were not settled. It is the Plaintiff's position that in the circumstances, they were forced to pay the outstanding land rates so as to avert the imminent sale of the suit property. To facilitate the payment, the Plaintiff took a loan of Kshs. 3,898,802/= from the Defendant by way of an overdraft.
11. It is the Plaintiff's contention that they suffered financial setback due to the Defendant's failure to pay the outstanding rates. Further, the Plaintiff contends that as a result of the malpractices that occurred at the material time of the transaction, the title documents of the suit property could not be verified by the land registry until sometimes in 2013 which according to the Plaintiff occasioned them loss of business and damage.
12. Subsequent to the foregoing, it seems that the Plaintiff and Defendant have been involved in a back and forth situation as regards the repayment of the loan advanced to the Plaintiff. The

Plaintiff is adamant that they have been repaying the loan which fact the Defendant denies vehemently and as a result the Defendant are ready and willing to exercise their statutory power of sale by selling the suit property.

13. It is the foregoing circumstances that have led to the current application.

THE DEFENDANT'S CASE

14. The Defendant opposed the application through its grounds of opposition dated 21st May 2014 and the Replying affidavit of Damaris Gitonga sworn on 23rd May 2014 and filed on the same day. There is also a Supplementary affidavit sworn by Raphael Orimba and filed on 3rd February 2015 in support of the Defendant's case.

15. The Defendant averred that they lent the Plaintiff a total sum of **Kshs.39,123,152.30/=** which has been elaborately explained at paragraphs 5 to 11 of the Defendant's Replying affidavit. It is their case that despite agreeing with the Plaintiff on the mode, schedule and amount payable per month, the Plaintiff has to date not observed the repayment schedule as agreed. The Defendant's position is that the Plaintiff is in arrears as shown in the table at paragraph 13 of its Replying affidavit.

16. Therefore, the Defendant denies that the Plaintiff has "faithfully" and or consistently repaid the loan amounts it advanced to the Plaintiff by way of the various charges executed between the parties. In support of this contention, the Defendant referred to two different letters where the Plaintiff had requested them to extend the mortgage repayment period by five years and to be given more time as their businesses were experiencing constraints. The Defendant also referred to numerous correspondences between the Plaintiff and itself, discussing the Plaintiff's default of the repayments as scheduled. It is the Defendant's case that he Plaintiff would when advised to make good of the default propose to settle the arrears in vain. *See the bundle marked "D.G -v" attached to the Defendant's Replying affidavit.*

17. It is in light of the foregoing that the Defendant issued a demand notice dated 8th March 2013 to the Plaintiff for the due payment of the money owing in regard to the charge instruments executed over the suit property. The Defendant avers that the notice issued to the Plaintiff called for the Plaintiff to make good its default in repayment of the loan within three months. However, as is contended by the Defendant, the Plaintiff only complained about the Notice by filing an application on 31st July 2013.

18. It is the Defendant's case that it rightly acted within its legal and contractual mandate by issuing the (statutory) notices to the Plaintiff and contrary to the allegations of the Plaintiff at paragraph 22, there was no iota of malice nor secrecy.

19. In reply to paragraph 23 of the Plaintiff's supporting affidavit, it is the Defendant's position that the allegations therein are misleading as the Plaintiff did request them to amalgamate all the outstanding loans. *See the Plaintiff's letters dated 13th December 2013 and 7th April 2014 annexed and marked as CWK 17 and CWK 21 respectively.* It is further the defendant's position that it has always supplied the Plaintiff with account statements to its current account whereas the statements to its mortgage account have always been supplied on request.

20. It is the Defendant's case that payment or non-payment of the outstanding Land Rates and in fact the issues as brought out in the Plaint dated 28th December 2012 do not exempt the Plaintiff from meeting its contractual obligations with the Bank.

21. On the issue of land rates, the Defendant's position is as follows:-

- A. The subject property had no register both at the Lands office and at the City Council of Nairobi.
- B. The letter of allotment reference number 126027 of Block 127/752 issued to the original owner indicated that the property had attracted a "Contribution in Lien of Rates" in the sum of Kshs. 941,600/= payable to the Commissioner of Lands.
- C. The "Contribution in Lien of Rates" as at the time of the first registration of the suit property was **Kshs. 941,600/=** and payable to the Commissioner of Lands.
- D. The Defendant dully forwarded a cheque number 009879 and dated 25th February 2004 for Kshs. 941,600/= in favour of the Commissioner of Lands to its Advocates M/s Rachuonyo & Rachuonyo Advocates for onward transmission for purposes of facilitating the registration.
- E. The title document of the subject suit was thereafter issued on or about the 8th April 2004 in the

- name of the original owner – Cyperr Enterprises Limited.
- F. The Banks' advocates applied for a Rates Clearance Certificate sometime in July 2004 from the Nairobi City Council but was issued with a rates Demand Note for Kshs.675,600/= which was contested by the defendant's Advocates on the basis that the property was only registered in the year 2004 and therefore the property before registration was not rate-able.
 - G. After protracted consultations with the Nairobi City Council, the error was corrected and the Council issued revised demand notes totaling Kshs. 257,284/= being rates commencing the year of registration 2004 up until the year 2006.
 - H. The Defendant paid the revised rates through cheque number 012925 which was forwarded to the advocates on or about the 23rd February 2006 and a receipt thereof issued by the Council.
 - I. A Rates Clearance Certificate dated 28th February 2006 was thereafter issued to the Defendant's Advocates.
 - J. The Transfer and securities documents were dully registered sometime in the year 2006.
 - K. However the Defendant's Advocates on following up on the payment of Kshs. 941,600/= made to the Commissioner of Lands for '*Contribution in Lieu of Rates* it was discovered that the cheque number 009879 was fraudulently misapplied by officers/employees at the Ministry of Lands offices at Ardhi House.
 - L. The proceeds of the said cheque had been fraudulently misapplied to transactions the Defendant and their Advocates were strangers to.

22. In light of the above, it is the Defendant's case that it is a stranger to the allegations of fraud on its part and that there is no breach of contract on its part as alleged or at all.
23. It is also the Defendant's case that the subject matter in the Plaintiff's suit herein is the payment and or non-payment of land rates, and therefore the exercise of statutory power of sale by the bank cannot be an issue for this Court to determine in the present pleadings.

ANALYSIS

24. The application was prosecuted by way of written submissions. The Plaintiff filed its submissions on 9th February 2015 while the Defendant filed theirs on 10th February 2015. I have considered the application, the affidavits in support and opposition to the application as well as the submissions by Counsel. Having done so, I take the following view of the matter.
25. I will begin with the issue of amendment of the Plaintiff as it appears that the injunction orders herein are based on the proposed amended Plaintiff. The current Application sought to amend the Plaintiff dated 28/12/2012 in terms of the draft Amended Plaintiff dated 08/05/2015 annexed to the subject Application. The said application is not opposed. It is however, the Defendant's case that Plaintiff is guilty of laches in that it seeks to amend the Plaintiff a whole year and a half since the inception of this suit. The general rule is that the Court has wide and unfettered discretion to allow amendments of pleadings. There is no indication that the Plaintiff as amended will cause any prejudice to the Defendant that cannot be compensated by way of costs. It is obvious that the injunctive orders sought for herein are based on the amended Plaintiff and therefore the amendment of the same has to be dispensed with. Therefore, the prayer (3) seeking for leave to amend the Plaintiff is hereby allowed.
26. I now turn to the substantive issue of injunction. It is not in dispute that the Plaintiff was granted several loan facilities by the Defendant. The Plaintiff has admitted as much. Further, the Plaintiff does not dispute that there is an outstanding loan. Their position is that they have been making payments towards the respective loans but that the Defendant has been secretive in operating the accounts and has been applying undisclosed interest rates. It is also the Plaintiff's case that all loans had different repayment terms and interest rates.
27. To this end, I take note of the Plaintiff's further Supplementary affidavit filed in Court on **23rd January 2015** in which the Plaintiff demonstrated that they had been making periodic payments to offset the loan by attaching several cheques amounting to Kshs. 7,405,483.50. The Defendant acknowledged the said payments. However, it is the Defendant's contention that the Plaintiff's Mortgage account and other loan accounts are still outstanding and that the Plaintiff is indebted to them in the sum of Kshs. 35,241,401.45/=. *See the statements of account attached to the Defendant's Supplementary Replying affidavit and marked as RO 2 a-d.* It is therefore the

- Defendant's case that despite the Plaintiff's remittances of the loan proceeds, the amount being paid is so small that the accounts are still in arrears. Therefore where does that leave the Plaintiff? The only conclusion is that the Plaintiff is indebted to the Defendant and therefore the Defendant is entitled to exercise its Statutory Power of sale at any time. So what issues have the Plaintiff raised to dispute the Defendant's right of Statutory Power of sale?
28. The Plaintiff's case as I understand it is that the Defendant has refused to consolidate the loans and restructure the loan repayment period to the detriment of the Plaintiff. It is further the Plaintiff's case that subsequently the Defendant consolidated all the loan facilities and demanded that the Plaintiff pay the outstanding amount at once which according to the Plaintiff was malicious. The position on consolidation is that the Defendant had the power to consolidate the Plaintiff's accounts at any time and without notice towards the satisfaction of any outstanding loans. *See clause 2.5 of the Letter of Offer dated 16/9/2011.* There are other various letters of offer that the Plaintiff signed which permitted the Defendant to consolidate the loans. It is also clear from the pleadings on record that the Plaintiff had on various occasions requested the Defendant to consolidate and restructure the loans. Therefore, the Plaintiff cannot be heard to dispute the Defendant's power to consolidate.
29. The Plaintiff also alleges that the Defendant has also been unilaterally charging illegal and exorbitant interest rates without following due process of law and without notice to them. On the Defendant's part, it is their contention that the Plaintiff did not raise the issue of the rates during the pendency of the relationship and only brought it up once they were in arrears. I have perused the various letters of offer issued for the various loan facilities advanced to the Plaintiff. The interest rates that were agreed between the Plaintiff and the Defendant are clearly stated therein. The clauses dealing with interest also state that the Defendant reserved the right to vary and change the interest rate without notice to the Plaintiff. Therefore the Plaintiff cannot be heard to contest the variation of the interest rates yet it appended its signature to the various letters of offer providing for the variation of interest rates. It is trite law that the Court is there to enforce contracts between the parties and not to rewrite the same. Besides, Section 84 (1) of the Land Act, which the Plaintiff relies on in submitting that the Plaintiff ought to have notified them of the variation is not couched in mandatory terms. The said section provides as follows:-

“Where it is contractually agreed upon that the rate of interest is variable, the rate of interest payable under the charge may be reduced or increased by a written notice served on the charger by the charge...”

30. In addition, the Demand Notices dated 11/10/2012 and 10/12/2012 issued by the Defendant showed that the interest rates that were being charged are 29% and 25% for the current account and the term loans respectively. It therefore cannot be said that the Defendant did not disclose the interest rates.
31. It is also the Plaintiff's case that their financial difficulty was caused by the refusal of the Defendant to pay the outstanding land rates of Kshs. 3,898,802/=. It is not in dispute that the Defendant being the vendor of the property was to pay for the land rates and obtain a valid Land Rates Clearance Certificate prior to the transfer of the suit property as provided for in the Sale Agreement dated **21/09/2004** executed between the parties. However, it turned out that the cheque issued by the Defendant to the City Council of Nairobi to pay the said land rates was used to pay land rates for other parcels of land and not for the suit property herein. As a result the Plaintiff paid the sum of Kshs. 3,898,802/= in settlement of the outstanding land rates. It is their submission that the Defendant's refusal to indemnify them for the amount of rates paid on its behalf was dishonest, oppressive, and unlawful and a blatant breach of the terms of the Sale Agreement. The Plaintiff further submitted that they are entitled to recover the said amount from the Defendant Bank.
32. It is not in dispute that the Defendant had an obligation to ensure that the land rates were paid. It is however the Defendant's case that on following up on the payment of Kshs. 941,600/= made to the Commissioner of Lands for 'Contribution in Lieu of Rates' it was discovered that the cheque number 009879 was fraudulently misapplied by officers. Having discovered so, it is not clear what action the Defendant took to rectify the same. Whatever the circumstances, the payment of land

- rates lay squarely with the Defendant and it was unfair for them to let the Plaintiff bear the burden yet the Plaintiff was not party to the fraud or knew nothing about it. It was upon the Defendant to diligently follow up with the City Council of Nairobi and rectify the matter, but they did not. It is therefore this Court's view that in demanding the outstanding loan, the Defendant is not entitled to demand the amount of Kshs. 3,898,802/= paid by the Plaintiff as land rates as the same is contested. However, this simply amounts to a dispute as to accounts and it is trite law that a dispute as to accounts cannot bar a Chargee from exercising its statutory power of sale.
33. On the issue of the valuation report, it is the Plaintiff's case that no valuation was done and no valuation report prepared by the Defendant as required by the law. The Plaintiff attached a valuation report as at 2nd May 2014 indicating that the suit property was valued at Kshs. 185,000,000/=. According to the Plaintiff the Defendant had grossly undervalued the property at Kshs 136,000,000/=. The Plaintiff did not refer the Court to the documents indicating that the Defendant had valued or undervalued the property at the said figure. It however referred the Court to an advertisement by the Auctioneers indicating that the property was to be sold for 245 million on 27th May 2014. This figure is higher than that provided for in the Plaintiff's valuation report. I therefore doubt that the Plaintiff's claim for undervaluation is valid. In any case, the Defendant has not yet sold the property and there is still the opportunity to do a valuation of the property. I will therefore not belabour on the issue other than to confirm that the Defendant owes a duty of care to the chargor to obtain the best price reasonably attainable at the time of sale as provided for under Section 97(1) of the Land Act, 2012.
34. On account of the above observations, I find that the Plaintiff has not established a *prima facie* case with a probability of success. To that extent, the Plaintiff has failed to satisfy the 1st condition laid in **GIELLA v. CASSMAN BROWN & CO. LTD. [1973] E.A. 358** for the grant of an interlocutory injunction.
35. On the second condition as stated in the above case, the Plaintiff should show that they will suffer irreparable injury if an injunction is not granted. The Plaintiff has submitted that the Defendant intends to sell the property unlawfully and in a capricious and oppressive manner. It is the Plaintiff's case that the Defendant intends to sell the suit property on account of a speculative and grossly undervalued price and in that case, they shall suffer irreparable damage. As already established in the foregoing paragraphs, there is no proof that the intended sale of the suit property is illegal and the issue of valuation has also been addressed.
36. If I was in doubt, the balance of convenience would tilt in favour of not granting the injunction since it is not in dispute that the Plaintiff is indebted to the Defendant and the said loan continues to attract interest.

DISPOSITION

37. In the circumstances foregoing, the upshot of this court's ruling is that the Plaintiff's Notice of Motion dated 8th May 2014 and filed on 9th May 2014 is dismissed with the following orders:-
- a. ***Leave is hereby granted to the Plaintiff to amend its Plaint as proposed.***
 - b. ***The Defendant is at liberty to exercise its statutory power of sale subject to a proper valuation of the suit property as envisaged under Section 97 (2) of the Land Act, 2012.***
 - c. ***Costs of the application shall be paid by the Plaintiff.***

Orders accordingly.

READ, DELIVERED AND DATED AT NAIROBI THIS 15TH DAY OF MAY 2015

E. K. O. OGOLA

JUDGE

PRESENT:

Mr. Muga for the Plaintiff

Mr. Mwaniki holding brief for Mbugua for the Defendant

No appearance for the Third Party

Teresia – Court Clerk