REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL CASE NO.151 OF 2012

JASHVANTSING L. SOLANKI.....PLAINTIFF

VERSUS

DIAMOND TRUST BANK (K) LTD.....DEFENDANT

R U L I N G

1. This ruling follows the filing of submissions by both sides on the Notice of Motion filed by the plaintiff – **JASHVANTSINH LAXMANSINH SOLANKI T/A NAND ENTERPRISES** – against the defendants – **DIAMOND TRUST BANK KENYA LIMITED.** The submissions were filed in lieu of hearing. The plaintiff's submissions were filed on 24/7/2013 while the defendant's submissions were filed on 28/7/2013.

2. The Notice of Motion is brought under Order 40 rule 1 of Civil Procedure Rules, Sections 1B, 3A and 63(e) of Civil Procedure Act (Cap 21) and all other enabling provisions of law. It is, at this stage, essentially seeking a restraining order against the defendant. The relevant prayer is to the effect that pending hearing and determination of the suit filed, an injunctive relief be granted restraining the defendant, whether acting by itself, its agents, employees, or any other person from selling, offering for sale or disposing off of the plaintiff's property viz **KISUMU/MUNICIPALITY BLOCK 5/68,** whether by public auction or private treaty, or from interfering in any way with the plaintiff's peaceful use and occupation of the said property. Provision for costs of the application is also asked for.

3. The grounds advanced in support of the application stipulate, inter alia, that the plaintiff's property aforementioned (which is hereafter the suit property) is charged to the defendant as security for payment of certain monies advanced to the plaintiff by the defendant. The defendant alleges default in repayment of the monies as agreed and intends to sell the suit property. The plaintiff alleges he has not defaulted in payment and accuses the defendant of charging interests at exaggerated rates. The plaintiff further states that the defendant has not given the requisite demands and notices and has not also undertaken a current valuation of the suit property.

4. The Supporting affidavit sworn by the plaintiff generally alludes to the supporting grounds advanced but its more clear on specifics. The plaintiff deponed to being advanced two term loans of 7,500,000/= and 15,000,000/= and an overdraft of 500,000/= by the defendant. He offered the suit property as security and the rate of interest was allegedly to be 24% per annum. Repayment then started but the defendant started varying interest rates, sometimes reaching 34% per annum. This frustrated the plaintiff's repayment efforts and he faced challenges keeping

up with the repayment schedule. In the meantime, the defendant started talking of arrears in payment and thereafter purported to start the process of selling the suit property. This is a move the plaintiff terms illegal, oppressive and unconscionable.

5. The defendant filed a replying affidavit, which is largely a blow-by-blow response to the plaintiff's averments in the grounds advanced and the supporting affidavit. The amounts advanced and the terms of payment are stated. And it is averred that default on repayment would attract 10% percentage points over and above the applicable lending rate, which the plaintiff himself stated to be 24% in his supporting affidavit.

6. The plaintiff then defaulted in payment and the defendant made repeated demands for payment but no payment was forthcoming and this necessitated an issue of written demand from defendant's advocates. But the default continued and the defendant decided to exercise its power of sale.

7. The demand letter from the advocate was availed as "**EH4",** statutory Notice as **"EH5"**, and Redemption Notice after auctioneers were instructed as **"EH6"**. And service of Redemption Notice was shown as **"EH7".** The other relevant notices were sent by registered post to plaintiff's address No.3368-40100, Kisumu.

8. The default however persisted and the defendant availed **"EH8"** which are plaintiff's bank account statements showing a Contrary position to the plaintiff's averments that payment is upto date.

9. The variation in interest is explained as the applicable base rate at 24% plus the 10% agreed upon by the parties in case of default. The defendant further deponed that a dispute as to accounts whether arising from computation of interest or otherwise cannot form the basis of granting injunction to restrain sale. The same position applies where allegations of undervaluation of the charged property are made.

10. The plaintiff is accused of failing to disclose his default and the various steps the defendant has taken to realize its security. His actions are said to be unconscionable and undeserving of the equitable relief sought.

11. The plaintiff's submissions state, inter alia, that the plaintiff has complied with the conditions for granting a restraining order as spelt out in the decided case of **GIELLA VS CASSMAN BROWN (1973) EA 358.** A primafacie case is said to be established on the basis that the defendant is charging non-contractual interest rates and that the requisite Notice was not served prior to the threatened exercise of the power of sale.

12. Irreparable loss is alleged on the basis of undervaluation of the property. The plaintiff's position is that the value of the property has appreciated over time but the defendant would wish to proceed on the basis of the valuation done earlier. The loss that may result will obviously be borne by the plaintiff.

13. The balance of convenience is also said to tilt in the plaintiff's favour. It is said that the plaintiff may not get a similar property elsewhere if the suit property is sold. The loan is stated again not to be in arrears and the defendant is said to suffer no prejudice or inconvenience if the prayers sought are granted.

14. The defendant's submissions summarized the plaintiff's grievances as follows:-

- the plaintiffs charged property stands to be sold in unlawful circumstances.
- No statutory Notice was served.
- The plaintiffs stands to suffer irreparable loss if the suit property is sold.
- The interest rates were unilaterally varied.

15. The defendant then poses the question whether the plaintiff is entitled to injunction. Thereafter the answers to the question are suggested. Pointing that a primafacie case is one in which the applicant has a right which has apparently been violated by the opposite party, the plaintiff was said not to meet this threshold. The account was said to be in arrears. The plaintiff is faulted for selectively availing the bank statement for his current accounts which shows a credit balance leaving out other bank statements showing the arrears he owes. The defendant availed the other statements as **"EH8"** and "**EH9"** showing the arrears and showing further that the plaintiff's payment have been sporadic and intermittent rather than regular and predictable as was agreed.

16. The defendant then posited that where default is shown, there exists no basis for granting injunctive relief unless the money owing is paid in Court.

17. Concerning interest rates, the defendant intimated that the charge document was clear, interest was to be charged at the Bank's Base Lending rates plus 1% p.a. The defendant was also given a right in the same document to vary interest rate without prior notification. And the defendant was further given the right to charge an additional 10% in interest rates in case of default by the plaintiff.

18. The defendant then pointed to annexture **"EH4"** which is a demand letter, **"EH5"** which is a statutory Notice and **"EH6"** together with **"EH7"** which show service of the notices to the plaintiff.

19. All this was a rebuttal to the plaintiff's assertion that he was not given or served with the requisite notices.

20. On irreparable loss alleged as likely to be suffered by the plaintiff, the defendant observed that it is trite that once a property is given to a bank as security, the same becomes a commodity that can be sold. This is because it is usually charged for a specific sum of money and as the value is ascertainable, any loss is remediable by an award of damages. And this position has a statutory backing under S.99(4) of Land Act, 2012, which is to the effect that a person aggrieved by unauthorized or irregular power of sale has recourse to a claim for damages against the person exercising that power. The plaintiff herein, it was submitted, can be compensated in damages. The defendant was also said to be capable of paying damages.

21. The balance of convenience was said to favour the defendant. The sum owing runs to the tune of 15,000,000/= and the figure continues to accrue interests. It is feared the security may ultimately not be adequate to cover accrued sums and the defendant is the one therefore likely to suffer loss.
22. The various arguments of the defendants were backed up with various decided authorities. **MRAO LTD VS FIRST AMERICAN BANK OF KENYA LTD & 2 OTHERS (2003) KLR 125** defined what a primafacie case is and outlined circumstances in which a chargee can be restrained from exercising the power of sale. In simple terms, a primafacie case consists in establishing a right violated by the chargee. It does not consist in establishing an arguable case. And concerning the exercise of the power of sale, it came out clearly that the chargee will not be

restrained because the amount due is in dispute or because the chargor has started a redemption action. Such restraining order will also not issue because the chargor objects to the manner in which the sale is arranged. The chargor's only salvation lies in payment of the sum due in Court or showing well that the claim is excessive.

23. This position was said to be entrenched in law and was adopted in **JOHN P.O MUTERE & ANOR VS KENYA COMMERCIAL BANK: HCC NO.3125/95 and HOUSING FINANCE COMPANY OF KENYA VS NGEGE KITSON MONDO (2006) eKLR.**

24. The same position emerges in **FRANCIS J.K. ICHATHA VS HOUSING FINANCE COMPANY OF KENYA LIMITED: HCC NO.414/2004** which was quoted with approval in **DANIEL KAMAU MUGAMBI VS HOUSING FINANCE COMPANY OF KENYA LIMITED (2006) eKLR.**

25. As to the variation in interests, **FINA BANK LIMITED VS RONAK LIMITED (2001) 1 EA 54 (CAK)** was availed to show that where the charge instrument gives absolute discretion to the chargee to vary interests that arrangement cannot be impeached or altered by the Court because the exact rate or rates have not been specified.

26. **CHRISTOPHER MUGWIMA MUROKI VS HOUSING FINANCE COMPANY OF KENYA LIMITED & ANOR (2006) Eklr** was availed to show the correct approach where allegations of non service are made. The plaintiff has the burden to show that such service was not done. In particular, where service is sent through registered post, the plaintiff has a duty to show it was not received by him.

27. As regards irreparable loss, **ANDREW MURIUKI VS EQUITY BUILDING SOCIETY (2006) eKLR** was said to demonstrate that where the plaintiff offers property as security, he is conscious of the fact that failure to meet his obligations could lead to sale of the property. Should it later become necessary to sell the property the plaintiff cannot be heard to complain that the loss cannot be compensated in damages. By offering the property as security, the plaintiff is in effect equating the same to a commodity for sale in case of default.

28. This same position emerged clearly in the decided case of **ANDREW OUKO VS KENYA COMMERCIAL BANK & 3 others (2005) eKLR** and emerges also in statute law at Section 99(4) of the Land Act 2012 which empowers the owner of any property unlawfully or irregularly sold to claim for damages.

29. When the plaintiff obtained exparte orders he is said to have failed to disclose many things including the fact that he was in arrears and had actually been served with the requisite statutory notice.

30. I have endeavoured to read and consider the material laid before me by both sides. It seems to me that the defendant captures well the grievances of the plaintiff when it terms them as hinging on allegations of non-service of the requisite notices, unilateral variation of interest rates and lack of upto date valuation of the suit property.

31. Then the plaintiff was said to have established a primafacie case, may suffer irreparable loss if injunction is not granted, and that the balance of convenience tilts in his favour when all is considered.

32. The defendant raised the issue of defendants conduct given the various non-disclosures that the

defendant failed to make to the court bearing in mind that what he is seeking are equitable orders.

33. I would need to address all these issues before making my decision.

34. On the issue of non-service, the plaintiff first alleged that no notice was issued to him as Section 90 of the Land Act requires. Then the plaintiff changed position when the replying affidavit annexed the demand notice. This time round, the demand notice was faulted for not giving the two months required. It was stated to have only given 14 days. I have looked at the demand notice. It is dated 15/2/2012 and is marked as annexture **"EH4".** It is true it gives the plaintiff 14 days within which to pay the arrears. But one has to look at the plaintiff's application as filed. The allegation was that no such demand was ever served. The allegation that fewer days than anticipated by law were given in the demand notice only arose after the demand notice was availed as an annexture thereby disproving the allegation of the plaintiff that no such notice was ever served. When the plaintiff said he was not served with a demand notice, he was telling a lie.

35. But the plaintiff's position on service is not confined only to demand notice. He alleged that he was not served with the other notices as well. This comes out quite clearly on the face of the certificate of urgency accompanying the application. Infact it is largely because of that the plaintiff was issued with restraining orders Exparte in the first instance. But it turns out after reading the replying affidavit that the plaintiff was served with the other notices as well. The plaintiff's postal address as appearing in various documents is **P O Box 3368-40100, KISUMU**. The statutory Notice of sale is annexture **"EH5"** in the replying affidavit and it was sent to plaintiff's postal address by registered post. The redemption notice is annexture **"EH6"** and again it was duly served. When the plaintiff therefore says he was not served with the requisite notices, he is again telling a lie. The truth is that all the requisite notices were served, the shortcomings that may be found in any or all of them notwithstanding.

36. The other issue is that of variation of interest. The charging of the plaintiff's property came into effect before the coming into force of the Land Act, 2012. The plaintiff's position is that he should have been given a Notice before variation of interests by the defendant. Such Notice only came into requirement after the Land Act was enacted and operationalized. It was not a requirement before. A look at clause 2(b) of the charge instrument shows that the defendant could vary the interests rates with or without giving notice to the plaintiff.

The charge is clear that failure to give such notice does not affect the obligations of the chargor. When the plaintiff appended his signature to that document, that is what he bound himself to. He cannot now be heard to turn around and complain about variation. It is also useful to note that another line of attack concerning interest is that it rose to 34%. However, the defendant was able to show that the letter of offer clearly stipulated as such. The plaintiff was therefore also being dishonest by alleging that there was no basis of charging interest at 34%.

37. In the case of **LIMPOPO SNACKS VS KENYA COMMERCIAL FINANCE CO. LTD (2001) eKLR (HCC NO.1209/01, MILIMANI COMMERCIAL COURTS, NAIROBI)** the facts were generally in resemblance to the facts herein. In that case, the plaintiff had created the impression that the interest charged was 32% instead of the agreed 24%. Like in this case too, there was a variation of interests in favour of the lending institution. The restraining order sought in that suit was refused.

38. The plaintiff also complained about under valuation. The allegation was that the property has

appreciated in value since the last valuation and therefore a second valuation is required before sale is conducted. The defendant responded by pointing out the law. It is clear, the defendant pointed out, that under S.97(1) of the Land Act, 2012, the defendant must obtain the best price for the property and has also to ensure valuation for forced sale is undertaken. And the plaintiff is protected by S.97(3) of the same statute as the defendant is obliged to try and sell at not less than 75% of the market price. If all this is not done the plaintiff can bring a claim for damages. In face of all this, the plaintiff's argument looses weight. There is no manifest intention on the part of the defendant to violate the law and should that happen, the plaintiff is entitled to damages.

39. I would need to comment on the plaintiff's conduct. So far, it is clear that the plaintiff is guilty of material non-disclosure and outright lies. Sample this: The plaintiff alleged he is upto date in payment. To prove this, he availed a bank statement for his current account showing a credit balance. But the plaintiff was given 3 financial facilities. The defendant was able to avail other bank statements which clearly show the plaintiff in arrears and showing also less than satisfactory mode of payment on his part. What the plaintiff is seeking are equitable remedies. Good faith and honesty are required for the one seeking the remedies. This is what **RINGERA J.** was emphasizing in the decided case of **MOSES NGENYE KAHINDO VS AGRICULTURAL FINANCE CORPORATION HCCC NO.1044/2001, NAIROBI** when he said:

“And of course it requires no stressing that as an injunction is a discretionary equitable remedy, if the applicant's conduct in relation to the subject matter of the suit is shown not to meet the approve of a court of equity, the relief may not be granted however meritorious the case may otherwise have been”.

40. And has the plaintiff established a primafacie case" The plaintiff advanced the position that there is a primafacie case established because of the way the interest rates have been varied and that the requisite notices have not been given. The Court has already taken a position on these issues. It had already observed that the requisite notices were served and the interest rates were not varied in a non-contractual way. The plaintiff was also clearly demonstrated to have fallen into arrears. He purported to show a bank statement to demonstrate he was not in arrears but the defendant effectively countered this showing clearly the arrears and irregularities in the manner of payment. It is well shown therefore that no primafacie case is made out.
41. And is there a likelihood of suffering irreparable loss" The plaintiff's position is that the suit property may be sold at an under-value. Such sale would not capture the current value of the suit property, the plaintiff said. The defendant was apt and prompt on this. It pointed out that S.99(4) of the Land Act, 2012, clearly entitles the plaintiff to claim damages in cause of unauthorized or irregular sale. And the decided case of **ANDREW MURIUKI V. EQUITY BUILDING SOCIETY & ANOR (2006) eKLR** sums up the position well by observing:

“Whenever the applicant offered the suit property as security, he was fully conscious of the fact that, if the borrower did not meet his obligations, the property could be sold off. Therefore, in the event that it later became necessary for the suit property to be sold off by the chargee, the chargor could not be heard to complain that his loss was incapable of being compensated in damages.....”.

In light of this, the plaintiff fails to persuade that the issue of damages should incline the court in his favour.

42. There is the balance of convenience as the last point. The plaintiff said that land is a unique and scarce resource. It was posited that even if the plaintiff property is sold or the plaintiff is even

paid damages, he may not get similar property.

The defendant said what the plaintiff owes is about 15,000,000/= and interests continue to accrue. It may reach a point where the security offered may not be an adequate security for the amounts owing.

I agree with the defendant. The defendant rather than the plaintiff would make great loss if the value of the security offered is outstripped by the accrued and owing amounts. The plaintiff can have recourse to claim for damages against the defendant but what would the defendant do against a plaintiff who is already unable to pay the amount owing"

43. Consideration of all the foregoing leads to the conclusion that the plaintiff's application should not be allowed. The application is therefore dismissed with costs.

A.K. KANIARU – JUDGE

10/12/2013

10/12/2013

A.K. Kaniaru – Judge

Dianga – C/C

No party – Present

Olel for Plaintiff/Applicant

Kuria absent for defendant/Respondent

COURT: Ruling on application for orders dated read and delivered in open COURT.

Right of Appeal – 30 days.

A.K. KANIARU – JUDGE

10/12/2013

AK/vaa