REPUBLIC OF KENYA

IN THE HIGH COURT

AT KAPSABET

FORMERLY ELDORET HCC NO. E003 OF 2020

CIVIL SUIT NO. E002 OF 2021

BETHWEL KIMUTAI.....PLAINTIFF/APPLICANT

-VERSUS-

EQUITY BANK (K) LTD.....1ST DEFENDANT/RESPONDENT

ANTIQUE AUCTIONS AGENCIES.....2ND DEFENDANT/RESPONDENT

Coram: Hon. Justice R. Nyakundi

Kalya & CO. Advocates for the respondents

M/S Lutta Antonina & CO. Advocates for the plaintiff

R U L I N G

What is before the court is an application which is expressed to be brought under Article 40 of the Constitution of Kenya 2010, Sections 90,92(2) and 103 of the Land Act No. 6 of 2012, Rule 15(d) of the Auctioneers' Rules, Sections 1A, 1B and 3A of the Civil Procedure Rules. The Applicant seeks a temporary injunction restraining the defendants from dealing in and disposing of the suit land known as TITLE NO. CHEPSIRO/KIBUSWA BLOCK 1/KELCHINET/223 and TITLE NO. NANDI/KAMOBO/1122 and a statement of accounts by the 1st respondent of the correct statements for collection account no. 090024903575 for the period between the charges to date reflecting the amount paid so far by the plaintiff.

The applicant approached the 1st respondent in 2015 for a banking facility of kshs. 10,850,000/- and entered into a loan agreement which the plaintiff offered TITLE NO. NANDI/KAMOBO/1122 as security. The applicant approached the respondent for another banking facility for kshs. 30,100,000/- and offered TITLE NO. CHEPSIRO/KIBUSWA BLOCK 1/KELCHINET/223 as security which culminated in a second loan agreement dated 8th July 2015. Both charges on the properties were dated 31st march 2014 and 8th July 2016 and were duly registered. The 1st respondent disbursed kshs. 10,850,000/- and kshs 28,000,000/- to the applicant. The 1st respondent consolidated the securities and accounts of the applicant which had an outstanding amount total amount of kshs. 45,820,529.12/-.

The applicant filed the present application challenging statutory power of sale on the grounds that the 1st respondent did not issue the following notices;

90 days statutory notice under section 90 of the Land Act 2012

40 days statutory notice under section 96(2) of the Land Act 2012

45days redemption notice under rule 159d) of the Auctioneers rules.

The applicant did not file any submissions in the matter. The 1st respondent filed a replying affidavit and submissions in opposition to the matter. It contends that the applicant received the funds.

Upon perusing the pleadings and submissions filed by the parties I have identified the following issues for determination;

a) Whether the Application has met the threshold for an injunction

WHETHER THE APPLICATION HAS MET THE THRESHOLD FOR A TEMPORARY INJUNCTION

The threshold for granting of a temporary injunction was set out in **Giella v Cassman Brown Co. Ltd 1973 E.A. 358** where the court held;

> **"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 harm which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on a balance of convenience."**

WHETHER THE APPLICANT HAS A PRIMA FACIE CASE

In order to determine whether there exists a prima facie case the court has to determine whether the statutory power of sale was exercised in accordance with the law. The following sections of the law clearly set out the process of statutory power of sale;

Section 90(1) of the Land act provides: -

> **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 or in the performance or observation of any covenant, express or implied, in any charge, and continues to be in default for one month, the charge 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.**

Section 96(1) of the Land Act 2012, states as follows: -

> **(1) Where a charger is in default of the obligations under a charge and remains in default at the expiry of the time provided for the rectification of that default in the notice served on the chargee under section 90(1), a charger may exercise the power to sell the charged land.**

Section 96(2) of the Land Act provides that:

> **(2) Before exercising the power to sell the charged land, the chargee shall serve on the chargor a notice to sell in the prescribed form and shall not proceed to complete any contract for the sale of the charged land until at least forty days have elapsed from the date of the service of that notice to sell.**

Section 56(2) of the Land Registration Act provides: -

> **A date for the repayment of the money secured by a charge may be specified in the charge instrument, and if no such date is specified or repayment is not demanded by the charge on the date specified, the money shall be deemed to be repayable three months after the service of a demand, written, by the chargee.**

Rule 15(d) of the Auctioneer Rules provides: -

> **Upon receipt of a court warrant or letter of instruction the auctioneer shall in the case of immovable property, give in writing to the owner of the property a notice of not less than forty-five days within which the owner may redeem the property by payment of the amount set forth in the court warrant or letter of instruction.**

It is not disputed that the applicant was the beneficiary of the loan facilities from the 1st respondent. The applicants' contention is that he was not served with the statutory notices by the 1st respondent Annexures SC14, SC15 and SC16 are to the replying affidavit of the 1st respondent are notices under sections 90 and 96 of the Land Act.

Clause 42 of the charge dated 8th July 2016 and the charge dated 31st March 2014 provides that a notice authorized by law shall be deemed to have been properly served when sent to the chargor's last known registered address. Annexures SC20(a-f) are copies of certificates of postage for the notices that were sent to the applicant. Annexures SC 20(c-f) contain the certificates of postage evidencing the postage of the statutory notices to the applicant under section 90 of the Land Act.

In **Nest Manor Residence & Suites Ltd & another v African Banking Corporation Ltd & another [2021] eKLR** the court held as follows at paragraph 106;

> **It follows therefore that since the respondents have shown evidence that they effected proper service upon the applicants, the burden now shifted to the applicants to show that they did not receive the said notices. It is clear vide the letters of offer and the charge instruments that the 1st respondent's obligation was to send any notices to the postal address given by the applicants in the said letters of offer and charge instruments and in the manner provided therein. The applicants cannot now turn and claim that the postal address used by the respondents is incorrect for the 1st applicant.**

The Applicant has not proven that they did not receive the said notices.

Section 97(2) of the Land Act provides;

> **A chargee shall, before exercising the right of sale, ensure that a forced sale valuation is undertaken by a valuer.**

Annexures SC21a and b, SC22 and 23a are letters instructing valuers to conduct a forced valuation in accordance with section 97(2) of the Land Act.

In accordance with Rule 15(d) Annexures SC24a-e are evidence that the respondents complied with the same. They contain the letter of instructions to the auctioneers, the notification of sale dated 10th August 2020, 45 days' redemption notice dated 10th August 2020 and certificates of postage.

In the case of **HCCC No. 115 of 2012 Abdulkadir atex Commercial Supplies Limited and Another Vs Euro Bank Limited (In Liquidation) Musinga** J held that: -

> **"It is not disputed that the borrower is in arrears of its loan repayment to the 1st respondent. The court has established that an appropriate statutory notice was served upon the applicant….in the circumstances, the applicant has not made out a prima facie case with a likelihood of success."**

The agreed date for repayment of the loan is duly provided in the loan agreement. Evidently the applicant defaulted in its payments on the terms and conditions of the loan and upon this default in the repayment of the debt the respondent decided to exercise its power of sale. From the affidavit evidence the applicant does not deny that he is in default of his obligations under the mortgage contract, save that he contends that the respondent's power of sale did not arise at the time it is sought to exercise it. It is the applicant's averments that the power of sale was completely done in bad faith. I bear in mind that it is not within the court's jurisdiction to try and resolve the issues at hand on the merits for these are matters for the main trial. It is also so clear from the law that grant of an injunction is a matter of discretion which depends on all the facts of the case. There are no fixed rules as to when an injunction should or should not be granted. The arguments by the applicant were countered by the respondent bank on the contractual history which gave rise to the loan amount being advanced to the applicant. The critical question to ask myself is whether the claim which has already been filed would be rendered nugatory in the event of orders of injunction being denied. I do not perceive this to be the outcome in the particular circumstances of the cause of action before me. The domain of interlocutory applications is somewhat that grant or denial of the orders should not ruffle the law. The court in **Downsview Nominees Ltd v First City Corporation [1993] AC 295** had this to say **"Several centuries ago equity evolved principles for the enforcement of mortgages and the protection of borrowers. The most basic principles were, first, that a mortgage is security for the repayment of a debt and, secondly, that a security for repayment of a debt is only a mortgage. From these principles flowed two rules, first, that powers conferred on a mortgagee must be exercised in good faith for the purpose of obtaining repayment and secondly that, subject to the first rule, powers conferred on a mortgagee may be exercised although the consequences may be disadvantageous to the borrower. These principles and rules apply also to a receiver and manager appointed by the mortgagee." [my emphasis] "If a mortgagee exercises his power of sale in good faith for the purpose of protecting his security, he is not liable to the mortgagor even though he might have obtained a higher price and even though the terms might be regarded as disadvantageous to the mortgagor**.

In conclusion, the respondent urged this court to dismiss the application with costs for lack of merit. What I hear the respondent telling the court is that the applicant has not met the yardstick for grant of an injunction pending trial of the suit. In light of the guidance and material provided by both parties in exercising discretion I tend to agree that the fulcrum on the scale of justice does tilt more in favour of the respondent.

What is the position of this court? It is in consonant with the principles by **Fisher and Lightwood's Law of Mortgage "The mortgagee will not be restrained from exercising his power of sale because the mortgagor has commenced a redemption action or because he objects to the arrangement for sale or because the amount due is in dispute. But he will be restrained, if before there is a contract for sale or the mortgaged property the mortgagor pays into court, the amount claimed to be due, that is the amount the mortgagee swears to be due to him for principal, interest and costs."**

From the submissions of counsel for the applicant, the upshot of this argument is that the guiding statutory provisions on the power of sale exercisable by the respondents had not ripened. The foregoing point is fundamental in terms of the legal principles which go to the root of restraining the respondents from proceeding further to redeem the loan by way of a public auction. However by dint of the discourse elsewhere in this ruling the issuance of notice presumably was a valid process. The anxiety in the circumstance of the matter before this court is the likelihood of the applicant being deprived of his proprietary rights to the parcel of land. The court decision in **American Cyanamid – v- Ethicon (1975) 1 ALL ER 504** "**As to that, the governing principle is that the court should first consider whether if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage. If, on the other hand, damages would not - 18 - provide an adequate remedy for the plaintiff in the event of his succeeding at the trial, the court should then consider whether, on the contrary hypothesis that the defendant were to succeed at the trial in establishing his right to do that which was sought to be enjoined, he would be adequately compensated under the plaintiff's undertaking as to damages for the loss he would have sustained by being prevented from doing so between the time of the application and the time of the trial. If damages in the measure recoverable under such an undertaking would be an adequate remedy and the plaintiff would be in a financial position to pay them, there would be no reason for this ground to refuse an interlocutory injunction. It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or to both, that the question of balance of convenience arises. It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them."**

In the same vein arguments have been advanced suggesting that the applicant will suffer irreparable harm and prejudice if the sale is allowed

to proceed. Moving the question of damages as a determinant to grant or decline an injunction the position of counsel fails to meet the threshold test as expounded in the **American Cyanamid** case supra. As strenuously as it was articulated by the applicant this court finds that damages would be an adequate remedy for the claim filed against the respondents in absence of fraud on their part. Therefore the validity of the instrument which created the loan agreement is not in dispute. This court has alluded to the integrity of the statutory power of sale. From the affidavit evidence the applicant does not fall within the ambit of a prima facie case or chances of suffering irreparable harm in which damages would not be an adequate remedy.

BALANCE OF CONVENIENCE

In the case of **Thathy vs Middle East Bank (K) Ltd (2002) 1 KLR 595** the court expressed itself as follows: -

> **"As regards the balance of convenience, I think the same tilts in favour of refusing the injunction. The plaintiff is not repaying his mortgage debt. From the statement of account, a lot of what is outstanding is interest. That interest continues to accumulate. At the present tempo the charge debt will be more than the value of the security quite soon. The Bank would lose because its security will in effect be no security at all if on sale it cannot realize the debt. And the plaintiff will lose because if the property is ultimately sold, he will not benefit from his investment. A sale of the security now appears to me to be in the best interest of both parties."**

The 1st respondent will be greatly inconvenienced if the debt is not settled. I find that the balance of convenience lies in not granting the injunction.

The applicant has only settled kshs. 110,000/- of the entire sum that is due. He settled the same only after the statutory power of sale had been issued and contrary to the loan agreement terms. The applicant has come to equity with unclean hands and therefore does not deserve the discretion of the court.

Further, I find that the prayer for rendering for accounts is unmerited. Annexure SC11 provides a statement for the loan accounts and the applicant has not disputed the contents therein.

The application for an interlocutory injunction is accordingly refused with costs. The costs can either be agreed upon or taxed by the Deputy Registrar. Leave to apply in any event.

DATED, SIGNED AND DELIVERED VIA EMAIL AT ELDORET THIS 28TH DAY OF FEBRUARY, 2022

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R. NYAKUNDI

JUDGE