Sigilai & another v Stanbic Bank (K) Limited & another (Civil Case E753 of 2021) [2022] KEHC 132 (KLR) (Commercial and Tax) (23 February 2022) (Ruling)

Neutral citation: [2022] KEHC 132 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL CASE E753 OF 2021

DAS MAJANJA, J

FEBRUARY 23, 2022

BETWEEN

EVANS KIPKEMBOI SIGILAI ..... 1ST PLAINTIFF

JANE CHELAGAT SIGILAI ..... 2ND PLAINTIFF

AND

STANBIC BANK (K) LIMITED ..... 1ST DEFENDANT

STEPHEN KARANJA T/A DALALI TRADERS AUCTIONEERS .... 2ND DEFENDANT

RULING

1. The Plaintiffs are the owners of Maisonette No. 7 situated on LR No. 3734/1032 Oryx Villas Estate in Lavington Estate, Nairobi ("the Suit property"). They have moved the court by the Notice of Motion dated 16th August 2021 made, inter alia, under Order 40 rules 1 and 4 of the Civil Procedure Rules seeking an injunction restraining the 1st Defendant ("the Bank") and the 2nd Defendant ("the Auctioneer") from selling the Suit property in exercise of its statutory power of sale pending the hearing and determination of the suit. The application is supported by the 1st Plaintiff's undated affidavit and his supplementary affidavit sworn on 10th September 2021. The Defendants oppose the application through the affidavit of Kenneth Mawira, the Bank's Legal Officer, sworn on 25th August 2021. The application was canvassed by way of written submissions.

2. The facts giving rise to the application and the suit are common ground. The Plaintiffs as registered proprietors of the Suit property applied for and were advanced KES. 8,500,000.00 by the Bank secured by a Charge dated 16th December 2008. The Plaintiffs later requested for and were advanced a further

facility KES. 21,600,000.00 by the Bank under the Letter of Offer dated 12th August 2014 secured by a Further Charge dated 10th October 2014.

3. According the Bank, the Plaintiffs defaulted in their obligations causing it to commence the process of exercising its statutory power of sale. This process precipitated the filing of this suit.

4. The gravamen of the Plaintiffs' case as set out in the Plaint dated 16th August 2021 and its deposition is that Bank breached the Letter of Offer dated 12th August 2021 by converting the loan facility from KES to USD without advising them at the time of drawdown with the effect that the applicable exchange rate has never been communicated to them.

5. The Plaintiffs complain about the interest rate applied on the loan. They argue that the interest rate applicable is 9.25% as provided in the Letter of Offer and which never changed and if it did, then it is illegal for failure to notify the Plaintiffs. The Plaintiffs claim that when the 1st Plaintiff's employment with Lady Lori (K) Limited, where he was being paid in USD, was terminated, he requested for conversion of the facility from USD to KES on several occasions but this request was unreasonably denied.

6. The 1st Plaintiff depones that he has continued to service the facility and has so far paid USD. 539,582.55 (approx. KES. 59,354,080.00) against a loan of KES. 21,600,000.00 within a period of 6 years which is in contravention of the in duplum rule. He states that throughout this period the Bank has never served him with any demand letter, correspondence, default notice nor any correspondence regarding the facility or forex rates including the three-month notice and 40-day notice of intention to sell the suit property under section 90(1) and 96(2) respectively of the *Land Act*, 2012.

7. The 1st Plaintiff further states that it was not until 24th June 2021 when the Auctioneer served upon him the 45-day redemption notice indicating that the Plaintiffs owed USD 263,399.85 (approx. 28,973,983.00) and that in order to forestall the sale, he managed to deposit USD 13,505.45 with the Bank but it was still intent on proceeding with the sale. The Plaintiffs argue that by advertising the suit property for sale on 4th August 2021, the Auctioneer was in breach on Rule 15(d) of the Auctioneers Rules, 1997 which requires advertisement to be made not before the lapse of the 45-day redemption notice which notice was dated 24th June 2021 and delivered to the Plaintiffs on 25th June 2021.

8. The Plaintiffs also complain that there is no evidence that the suit property has been valued by a Licenced Valuer to inform the values indicated on the Notification of Sale in breach of section 97(2) of the *Land Act*. They point out that the suit property will likely be sold without a valuation report and at an undervalue.

9. The Plaintiffs submit that if the suit property is sold by the Bank, they will suffer irreparable damage as it is their matrimonial home and conversely the Bank will be unjustly enriched.

10. The Defendants oppose the application. The Bank states that the loan amount was USD 260,931.52 as per the terms of the Letter of Offer dated 12th August 2014 and the Plaintiff were required to remit USD 2,764,46 monthly. It further states that the Plaintiffs defaulted in making repayments in 2016 consequently, it issued a 30-day notice on 10th May 2016. As the default was not rectified, the Bank also issued a 90-day notice under section 90(3) of the *Land Act* on 18th April 2017. Once the said notice lapsed, the Bank issued the 40-day notice to sell under section 96(2) of the *Land Act* on 18th July 2019. The Bank contends that since the Plaintiffs did not comply with the notices, which were sent by email and registered post, its statutory power of sale has now arisen and it is entitled to sell the Suit property. In exercise of its statutory power of sale, the Bank undertook a valuation of the Suit property in accordance with section 97 of the *Land Act* which was done by Acumen Valuers Limited

and a report submitted on 8th January 2021. Thereafter, the Auctioneer was to issue a Redemption notice which lapsed without the Plaintiffs regularizing the account.

11. The Bank further contends that the under the Letter of Offer dated 12th August 2014, the loan amount would be converted to USD while the Clause 30 of the Charge gives the Bank the mandate to convert the rate of currency as it deem fit. It adds that the Plaintiffs have not shown that they requested or inquired about the rate of exchange. It adds that contrary to what the Plaintiffs states, they have only paid USD 204,521.54 and not USD 539,582.21 as shown in the certified statement of account. Further that the Plaintiffs are indebted to the Bank to the tune of USD 257,781.66 which amount includes the outstanding sum and arrears of USD 19,161.25 which continues to accrue interest at 18.75% per annum.

12. In total, the Defendants contend that the Plaintiffs have not made out a case to warrant the grant of an injunction.

Analysis and Determination

13. The main issue for determination is whether the court should grant an injunction restraining the Bank from exercising its statutory power of sale. It is common ground and the parties have cited authorities to confirm that the parameters for the grant of such an order are grounded on the principles established in *Giella v Cassman Brown [1973] EA 358*. In order to succeed, an applicant must demonstrate that it has a prima facie case with a probability of success, demonstrate irreparable injury which cannot be compensated by an award of damages if a temporary injunction is not granted, and if the court is in doubt, show that the balance of convenience is in its favour.

14. In *Nguruman Limited v Jane Bonde Nielsen and 2 Others NRB CA Civil Appeal No. 77 of 2012 [2014] eKLR* the Court of Appeal reiterated the three conditions to be fulfilled before an interim injunction is granted as set out in Giella v Cassman Brown (Supra) and further clarified that they are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. This means that if an applicant does not establish a prima facie case then irreparable injury and balance of convenience do not require consideration. On the other hand, if a prima facie case is established, then the court will consider the other conditions.

15. In *Mrao Ltd v First American Bank of Kenya Limited and 2 Others MSA CA Civil Appeal No. 39 of 2002 [2003] eKLR*, the Court of Appeal explained that a prima facie case is, "a case in 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 to call for an explanation or rebuttal from the latter." Since the Plaintiff seek to restrain the Bank from exercising its statutory power of sale, they must show that the Bank is violating their right in the suit property. Further, the prima facie case is grounded on the facts which the Plaintiffs set out to prove in the Plaint.

16. A reading of the Plaint and consideration of the arguments shows that the Plaintiffs raise two main issues. First, whether facility advanced to the Plaintiff was in USD and whether the Plaintiffs were informed of the changes in exchange rates and arising therefrom, whether the Plaintiffs are indebted to the Bank. This issue is connected to whether the Bank's statutory power of sale has arisen and whether it was properly exercised.

17. On the first issue regarding the currency denomination of the facility, the Letter of Offer dated 12th August 2014 shows that the total loan advanced was KES 26,600,000.00 or its equivalent in USD. It further provided as follows:

    1. The loan amount will be converted to USD (USD) at the prevailing FOREX rates at the time of drawdown;

    2. The interest rate applicable on the booked USD home loan facility will be Prime (currently 7.25%) + 2% and

    3. The FOREX rate applicable at the conversion of the Kenya Shilling to the USD and the number of USD arising from the conversion will be advised via a letter at the time of drawdown.

18. In addition, the Further Charge dated 10th October 2014 provides in the recital that it secured, ''the principal sum of Kenya Shillings Thirteen Million, One Hundred Thousand Only (Kshs. 13,100,000.00/=) (hereinafter called "the Prescribed Minimum Debt'') or the equivalent therein whatever currency denominated and interest cost expenses and charges hereinafter set out.''

19. It is therefore clear that the Bank was permitted under the both instruments to charge the facility in USD and the facility would be converted to USD at the time of drawdown. Thus the loan was from the time of drawdown a USD loan. This fact is admitted by the 1st Plaintiff who stated that between 2014 and 2016 while he was working at Lady Lori (K) Limited, he was being paid in USD and was in fact servicing the facility in USD. While the Plaintiffs complain that they were never informed of the exchange rate in accordance with the Letter of Offer in 2014, they continued to service the loan in USD until the 1st Plaintiff lost his employment when they state they requested a change in currency.

20. From the totality of the evidence, I agree with the Bank that there is no evidence that the Plaintiffs requested for or demanded that they be furnished with the applicable exchange rate. On the other hand, the statement shows that the particulars of payment and indebtedness. I assume that these statements were furnished from time to time to the Plaintiffs whereupon they could raise any queries including the rate of exchange.

21. On the issue of interest, the Plaintiffs complain that they were never advised of the change in interest rates throughout the pendency of the facility. The Letter of Offer and the Charge both envisage that the interest rate were variable and pursuant to section 84(1) of the *Land Act*, any variation in interest is required to be notified by a 30-day notice. This provision is reiterated in Clause 1 on the covenant of interest which provides that, "it is agreed that the Bank shall pursuant to Section 84(1) of the *Land Act* give the Chargors a Thirty (30) day Notice of the variation in the interest rate.'' It goes on to provide that, ''nor shall any failure by the Bank to advise the Chargors as aforesaid prejudice in any way howsoever the recovery by the Bank of the interest charged subsequent to any such charge.'' Although the issue was raised by the Plaintiffs, the Bank did not show that it complied with these provisions.

22. Finally, the Plaintiffs complain that the tenure and period instalments were not indicated in both the Letter of Offer and Further Charge leaving the Plaintiffs at the mercy of the Bank. From the documents annexed to the depositions, I do not see the term and periodic installments to be paid but I do not agree that the facility did not have a tenure and conditions of installments because on what terms were the Plaintiffs servicing the loan particularly between 2014 and 2016 when the parties had no issues. Nothing would have been easier than for the Plaintiffs to inform the Bank that the terms of repayment were not clear.

23. I take the following view of the first issue. First, it is clear that from the Letter of Offer dated 12th August 2021, the facility was denominated in USD. Second, although there is no notice of advance notice of the interest variation, this issue would not, in accordance with the Further Charge, invalidate the charge or prejudice the right of the Bank to exercise it power of sale. Third, all the issues of the exchange rate and interest would only affect the amount due to the Bank.

24. In this case though, the Plaintiffs admit indebtedness and this is evident by the Statement of Account produced by the Bank which runs from the date of drawdown, 24th October 2014 when USD 248,275.86 was disbursed to 14th August 2021 which shows USD 251,660.00 outstanding. The statement of account produced by the Bank is covered by section 176 of the *Evidence Act* (Chapter 80 of the Laws of Kenya) which creates a presumption in favour of the Bank as follows:

> 176. A copy of any entry in a banker's book shall in all legal proceedings be received as prima facie evidence of such entry, and of the matters, transactions and accounts therein recorded.

The Plaintiffs have not produced any evidence to show that any amount they paid is not reflected in the statement of account so produced in order to dislodge the presumption in favour of the Bank or at least cast doubt on the amount the Bank claims. I therefore reject, the Plaintiffs argument that the in duplum rule, which the Plaintiffs have not particularized or shown how it has been violated, applies to this case.

25. I hold that the issues raised by the Plaintiffs in respect of the first issue I have framed only go to the extent of indebtedness and since the Plaintiffs are indebted to the Bank, the court cannot for grant an interlocutory injunction where the result of the argument is about the level of indebtedness. In this respect, the Plaintiffs have not established a prima facie case with a probability of success.

26. Since the Plaintiffs are indebted to the Bank, the next question for resolution is whether the Bank has satisfied the procedure necessary for it to exercise its statutory power of sale. In this respect, the burden is on the Bank to show that it has issued and served all the statutory notices. In *Nyagilo Ochieng & Another v Fanuel Ochieng & 2 Others [1995-1998] 2 EA 260*, the Court of Appeal held that the burden to show that the statutory notice has been served does not in any way rest on the chargor. Once the chargor alleges non receipt of the statutory notice, it is for the chargee to prove that such notice was in fact served.

27. The Bank exhibited a 90-day statutory notice dated 18th April 2021 under section 90 of the *Land Act*. It has also issued the notice to sell under section 96 of the *Land Act* supported by evidence that it was forwarded by registered post. This evidence is not controverted. Lastly, the Plaintiffs admit receipt of the redemption notice from the Auctioneer. However, I have scrutinized the evidence and despite the fact that the 90-day statutory notice dated 18th April 2017 was issued by the Bank, there is no evidence that it was actually sent or received by the Plaintiffs. The Bank has not exhibited any Certificate of Posting or proof of receipt by email hence I find and hold that the notice was not served and I would restrain the Bank from proceeding with the sale. Although there is proof that the subsequent notices were served, the fact that the initial 90-day notice was not served invalidated the entire process.

28. However, for completeness, I shall deal with the issue of valuation of the Suit property. Under section 97 of the *Land Act* the Bank, as chargee, has a duty of care towards a chargor, failing which it would be liable for breach of duty of care. The section provides as follows:

> 97(1) A chargee who exercises a power to sell the charged land, including the exercise of the power to sell in pursuance of an order of a court, owes a duty of care to the chargor, any

guarantor of the whole or any part of the sums advanced to the chargor, any chargee under a subsequent charge or under a lien to obtain the best price reasonably obtainable at the time of sale.

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

29. Under section 97 of the *Land Act*, 2012 the chargee has a duty of care to the chargor to obtain the best price reasonably obtainable at the time of sale and in that regard, it is required to ensure a forced sale valuation is obtained. Under Rule 11(b)(x) of the Auctioneers Rules, a professional valuation of the reserve price must be carried out not more than 12 months prior to the proposed sale. The collective effect of these provisions is that the Bank is required to obtain a forced sale value of the property within the year of the intended sale.

30. The Plaintiffs aver that it is likely that the Bank shall likely be sold without a valuation report and a lower value considering the valuation carried out by Clayton Valuers in 2014 returned a value of KES. 40,000,000.00 and KES. 30,000,000.00 as the open market value and forced sale value respectively. The Bank countered by producing a valuation report 17th December 2020 by Acumen Valuers Limited assessing the open market value at KES. 42,000,000.00 and the forced sale value at KES. 31, 000,000.00. Based on these figures, I cannot say Bank proposes to sell the Suit property at an undervalue hence the Plaintiffs' fears are unfounded.

31. Since the Plaintiffs are indebted to the Bank and the only issue I find that they have established a prima facie case with a probability of success on is the service of the 90-day statutory notice under section 90(1) of the *Land Act*, the Plaintiffs covenant to discharge the debt secured by the charge still stands. In the circumstances, the issue of an injunction pending the hearing and determination of the suit would not be in the interests of justice as the debt would continue to escalate and eat in the value of the security. I am therefore inclined to grant an injunction on terms as was approved by the Court of Appeal in *National Bank of Kenya v Shimmers Plaza Limited NRB CA Civil Appeal No. 26 of 2009 [2009] eKLR* where it observed as follows:

> An injunction is an equitable and discretionary remedy. The duration of an order of injunction is at the sole discretion of the trial Judge and depends on the circumstances of each case. In this case, the duration of the injunction until the determination of the suit frustrated the statutory right of the bank to realize the security upon giving a notice which complies with the law. We venture to say that where the court is inclined to grant an interlocutory order restraining a mortgagee from exercising its statutory power of sale solely on the ground that the mortgagee has not issued a valid notice, then in our view, the order of injunction should be limited in duration until such time as the mortgagee shall give a fresh statutory notice in compliance with the law.

32. I shall therefore grant an injunction but only limited to the period necessary for the Bank to comply with the law by issuing and sending to the Plaintiffs a statutory notice under section 90(1) of the *Land Act* and then proceed with all the other steps.

Disposition

33. I allow the Notice of Motion dated 16th August 2021 on the following terms:

> a. The 1st Defendant be and are hereby restrained from exercising its statutory power of sale in respect of the property known as Maisonette No. 7 on LR NO. 3734/1045, Oryx Villas

Estate in Lavington Estate, Nairobi County unless it issues a fresh statutory notice under section 90 of the *Land Act*, 2012.

b. The Defendants shall bear the costs of the application.

DATED AND DELIVERED AT NAIROBI THIS DAY 23RD OF FEBRUARY 2022.

D. S. MAJANJA

JUDGE

Court of Assistant: Mr M. Onyango

Ms Gazemba instructed by Gazemba, Wekesa and Company Advocates for the Plaintiff.

Mr Anyona instructed by Muma and Kanjama Advocates for the Defendants.