Villa Care Limited & another v Stanbic Limited (Commercial Case E265 of 2022) [2022] KEHC 10032 (KLR) (Commercial and Tax) (25 July 2022) (Ruling)

Neutral citation: [2022] KEHC 10032 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

COMMERCIAL AND TAX

COMMERCIAL CASE E265 OF 2022

DAS MAJANJA, J

JULY 25, 2022

BETWEEN

VILLA CARE LIMITED .... 1ST PLAINTIFF

AFRILAND LIMITED .... 2ND PLAINTIFF

AND

STANBIC LIMITED .... DEFENDANT

RULING

1. The 1st Plaintiff is a registered estate agent in the house management business while the 2nd Plaintiff is the registered proprietor of Apartment Number A7, third floor in Block A erected on Land Reference Number 4857/121(I.R. 166442/1) within Brooklyn Springs Apartments, Kileleshwa area of Nairobi County ("the suit property"). It is not in dispute that the Defendant ("the Bank") advanced the 1st Plaintiff facilities amounting to KES. 20,000,000.00 secured by, inter alia, a Charge dated September 12, 2014 over the suit property.

2. The 1st Plaintiff admits that it defaulted in servicing the facility due to the difficult economic environment brought about the Covid-19 pandemic. Following the default, the Bank commenced the process of exercising its statutory power of sale by selling the suit property by public auction. It is this action that has precipitated the filing of this suit together with an application for injunction dated July 14, 2022 seeking to restrain the Bank from selling the suit property. The application is brought, inter alia, under Order 40 rule 1 and 2 of the *Civil Procedure Rules*.

3. The application is supported by the affidavit and supplementary affidavit of the 1st Plaintiff's director, Daniel Ojijo Agili, sworn on July 14, 2022 and July 21, 2022 respectively. It is opposed by the Bank, through the replying affidavit of its officer, Diana Karambu, sworn on July 20, 2022. At the hearing of the application counsel for both parties made brief submissions in support of their respective positions.

4. The Plaintiffs' case is set out in the Plaint dated July 14, 2022 and the depositions in support of their application. They do not dispute that the Bank served on 2nd Plaintiff a statutory notice issued by the Bank under section 90 of the *Land Act*, 2012. The Plaintiffs' complaint is that it approached the Bank in May 2022 in order to resolve the debt and it was agreed that the 1st Plaintiff would be paying KES. 500,000.00 monthly in order to clear the arrears. Thereafter it paid KES. 500,000.00 on May 16, 2022 and KES. 600,000.00 on 24th June 2022. It states that it is committed to paying the agreed minimum monthly amount until business improves. The Plaintiffs were therefore surprised when they were served with a 45-day redemption notice on May 24, 2022 scheduling the auction of the suit property for July 26, 2022.

5. The Plaintiffs have challenged the Bank's intended exercise of its statutory power of sale on several grounds. They state that the Bank has not valued the suit property as required by section 97 of the *Land Act*. They complain that the Bank is obstructing the right to discharge the suit property under section 85 and 86 of the *Land Act* by loading the loan statement with illegal and unconscionable charges that keep the account permanently in arrears despite the monthly payments. It adds that the intended exercise of the power of sale disregards the effort by the Plaintiffs to service the facility from KES. 20,000,000.00 to the current outstanding balance of KES 3,577,827.00 due and owing as at July 1, 2022, the hard economic times notwithstanding.

6. The Plaintiffs seek an order that this court exercise its discretion under section 104(2)(a) and (b) and of the *Land Act* to either cancel, vary suspend or postpone exercise of the Bank's statutory power of sale and or in the alternative extend time for compliance with the statutory notice under section 96 of the *Land Act* by an extra 12 months and or re-open the charge under section 105 of the *Land Act* to enable the Plaintiffs pay off the facility by paying the Bank revised monthly installments of KES. 500,000.00 on or before end of every month.

7. The conditions for the grant of an interlocutory injunction such as one sought by the Company were settled in *Giella v Cassman Brown* [1973] EA 385 where the court held that in order to succeed in obtaining an interlocutory injunction, the applicant must demonstrate that it has a prima facie case with a probability of success, that it will suffer irreparable loss which cannot be compensated by an award of damages if the injunction is not granted and if the court is in doubt regarding the nature of injury, determine the matter on a balance of convenience. In *Nguruman Limited v Jane Bonde Nielsen & 2 others* NRB CA Civil Appeal No. 77 of 2012 [2014] eKLR, the Court of Appeal reiterated those conditions and added that they are to be considered as separate, distinct and logical hurdles a plaintiff is expected to surmount sequentially.

8. In *Mrao Ltd v First American Bank of Kenya Limited & 2 others* [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." It also observed in the *Nguruman Case (Supra)* that in reaching the decision whether the application has established a prima facie case, the court need not hold a mini trial and ought not examine the merits of the case closely. It must, however, be satisfied that on the face of it, the person applying for an injunction has a right, which has been or is threatened with violation as the parties will have an opportunity to prove their respective positions at the trial. The prima facie case is in relation what is pleaded in the plaint. In this case, the Company must show, on a prima facie, basis that its right is threatened to the extent that it is entitled to an injunction.

9. In this case the Plaintiffs admit that 1st Plaintiff has defaulted in making payments under the facility. They do not dispute indebtedness. The Plaintiffs' claim that the Bank has loaded the loan account with

illegal and unconscionable charges. From the pleadings, the Plaintiffs have not provided particulars to support this allegation. Further, I find this attempt feeble as the issue was not raised previously when the Plaintiffs attempted to negotiate a settlement of the arrears with the Bank.

10. The question then is whether the statutory power of sale has accrued. The Plaintiffs' admit that the Bank served on it the notice dated 7th October 2021 under section 90 of the *Land Act*. As regards that second 40-day notice to sell issued under section 96 of the *Land Act*, the Plaintiff states that the notice dated January 21, 2022 was not sent to the Principal Debtor, that is the 1st Plaintiff, and even so it was not sent to the 2nd Plaintiff's proper address.

11. The Bank bears the burden of showing that it sent the statutory notice to the chargor (see *Nyagilo Ochieng & another v Fanuel Ochieng & 2 others* [1995-1998] 2 EA 260). I have looked at the notice dated January 21, 2022, it is addressed to the 2nd Plaintiff and copied to the 1st Plaintiff. The notice was sent to both parties by registered post as shown by the certificate of postage. The 2nd Plaintiff states that the postal address box number 66330-00800 Nairobi does not belong to it. Notwithstanding that the Plaintiffs complain that the notice was sent to the wrong address, the notice was also addressed to the correct address not only shown in the charge document but also the lease executed by the 2nd Plaintiff. In the circumstances, I am satisfied the 40-day notice to sell was sent to and received by the Plaintiffs.

12. Under section 97 of the *Land Act*, 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 Bank has produced a valuation report prepared by Hallmark Valuers Co. Limited dated March 22, 2022 indicating KES. 18,000.000.00 as the market value and KES. 13,500,000.00 as the forced sale value. The valuation report relied on by the Bank was prepared within time prescribed. While the Plaintiffs contest the valuation, inter alia, on the grounds that the valuer never visited the suit property, they have not shown the valuation is doubtful or wrong by producing cogent evidence to rebut the valuation (*Palmy Company Limited v Consolidated Bank of Kenya Limited* Ml HCCC No. 527 of 2013 [2014] eKLR). Further, whether the valuation is deficient or not is a question for trial. In the event it is deficient and the sale proceeds on that basis, the Plaintiffs will be compensated by damages as provided for under section 99(4) of the *Land Act*.

13. Having considered the grounds set out in the Plaint and depositions, I find and hold that the Plaintiff has not made out a prima facie case with a probability of success to warrant the grant of an interlocutory injunction restraining the Bank from exercising its statutory power of sale.

14. From the arguments on record, the thrust of the Plaintiffs' case is that they seek the court's assistance to be able to pay the outstanding debt by manageable instalments. The 2nd Plaintiff urges that the suit property is the matrimonial property of its director, Daniel Ojijo Agili, and is thus deserving of the protection in section 104 and 105 of the *Land Act*. They cite *Michael Rono Kimutai & 2 others v Consolidated Bank of Kenya Ltd* Eld E & L 265 of 2013 [2013] eKLR where the court observed that the provisions of sections 105 and 106 gives the court power to reopen a charge, of whatever amount, so long as that charge is secured on a matrimonial home.

15. Sections 104 and 105 of the *Land Act* must not be read in isolation. The starting point is section 103 of the *Land Act* under which a chargor may apply to the court for relief against the chargee exercising its remedies under section 85 thereof. The purport of section 85 is to allow the chargor pay off the secured debt before the time agreed and therefore redeem the property. Under those provisions, the chargor is permitted to apply to the court for relief if the chargee impedes the chargor for paying off

the debt. Section 104 of the *Land Act* then goes on to provide the factors which the court will take into consideration when granting relief under section 103. It provides as follows:

104. Power of the court in respect of remedies and reliefs.

(1) In considering whether to grant relief as applied for, a court—

(a) shall, have regard to whether the remedy which the chargee proposes to exercise is reasonably necessary to prevent any or any further reduction in the value of the charged land or to reverse any such reduction as has already occurred if the charged land consists of agricultural land or commercial premises, and the remedy proposed is to appoint a receiver, or to take possession of or lease the land or a part thereof;

(b) shall, where the charged land consists of or includes, a dwelling- house, and the remedy proposed is to appoint a receiver, or take possession or lease the dwelling house or a part of it, have regard to the effect that the appointment of a receiver or the taking of possession or leasing the whole or a part of the dwelling house would have on the occupation of the dwelling house by the chargor and dependants and if the effect would be to impose undue disturbance on those owners, whether it is satisfied that—

(i) the chargee has made all reasonable efforts, including the use of other available remedies available, to induce the chargor to comply with the obligations under the charge; and

(ii) the chargor has persistently been in default of the obligations under the charge; and

(iii) if the sale is of land held for a customary land, the chargee has had regard to the age, means, and circumstance including the health and number of dependants of the chargor, and in particular whether—

(aa) the chargor will be rendered landless or homeless;

(bb) the chargor will have any alternative means of providing for the chargor and dependants;

(iv) it is necessary to sell the charged land in order to enable the chargee to recover the money owing under the charge;

(v) in all the circumstances, it is reasonable to approve, or as the case may be, to make the order to sell the charged land.

(2) A court may refuse to authorise an order or may grant any relief against the operation of a remedy that the circumstances of the case require and without limiting the generality of those powers, may—

(a) cancel, vary, suspend or postpone the order for any period which the court thinks reasonable;

(b) extend the period of time for compliance by the chargor with a notice served under section 90;

(c) substitute a different remedy or the one applied for or proposed by the chargee or a different time for taking or desisting form taking any action specified by the lessor in a notice served under section 90;

(d) authorise or approve the remedy applied for or proposed by the chargee, notwithstanding that some procedural errors took place during the making of any notices served in connection with that remedy if the court is satisfied that—

(i) the chargor or other person applying for relief was made fully aware of the action required to be taken under or in connection with the remedy; and

(ii) no injustice will be done by authorising or approving the remedy, and may authorise or approve that remedy on any condition as to expenses, damages, compensation or any other relevant matter as the court thinks fit.

(3) If under the terms of a charge, the chargor is entitled or is to be permitted to pay the principal sum secured by the charge by installments or otherwise to defer payment of it in whole or in part but provision is also made in the charge instrument or any collateral agreement for earlier payment of the whole sum in the event of any default by the chargor or of a demand by the chargee or otherwise, then for purposes of this section the court may treat as due under the charge in respect of the principal sum secured and of interest on it only the amounts that the chargor would have expected to be required to pay if there had been no such provision for earlier payment.

(4) A court must refuse to authorise or approve a remedy if it appears to the court that—

(a) the default in issue has been remedied;

(b) the threat to the security has been removed;

(c) the chargor has taken the steps that the charger was required to take by the notice served under section 90; and

(d) the chargee has taken or attempted to take some action against the chargor in contravention of section 90 (4).

16. Section 105 of the *Land Act* allows the court to re-open the charge where the property is matrimonial property.

17. The Plaintiffs therefore bear the burden of proving that their case falls within the provisions of sections 103, 104 and 105 of the *Land Act*. The 2nd Plaintiff centres its case on the fact that the suit property is matrimonial property as a basis for relief. I disagree. The suit property is owned by a limited liability company which is a separate entity from the shareholders. The shareholders of the 2nd Plaintiff are Daniel Ojijo Agili and his wife Maureen Wanjiru Wamaitha. What constitutes matrimonial property are the shares in the company and not the property of the company itself. I therefore agree with the holding in *Harroil Petroleum Holding Ltd v Consolidated Bank Ltd & another* Eld E & L No. 335 of 2013 (OS) [2013] eKLR that, ''The applicant is a corporate commercial entity. The properties herein are owned by the company and cannot therefore be said to be matrimonial property." The Plaintiffs cannot therefore benefit from the provisions it has invoked on the ground that the suit property is not matrimonial property.

18. Even assuming that the 2nd Plaintiff is entitled to relief, the 1st Plaintiff, who is the borrower, has not provided a factual or evidential basis for the court to assess its ability to repay the facility on the terms it suggests. A party who seeks the court's discretion to be allowed to pay an amount less than what it contracted must make full disclosure of its financial status to the court. It is not enough to say that due to the economic down it is unable to make payments and suggest a figure totally unrelated to its provable financial status.

19. For the reasons I have set out, I am constrained to dismiss the application dated July 14, 2022 with costs to the Defendant.

SIGNED AT NAIROBI

D. S. MAJANJA

JUDGE

DATED AND DELIVEREDMAT NAIROBI THIS 25TH DAY OF JULY 2022.

D. CHEPKWONY

JUDGE

Court of Assistant: Mr M. Onyango

Mr Simiyu instructed by Wafula Simiyu and Company Advocates for the Plaintiffs.

Ms Muhia instructed by Wamae and Allen Advocates for the Defendant.