



IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL CASE NO. E204 OF 2020

BETWEEN

ELDORET CONCRETE POLES LIMITED.....PLAINTIFF

AND

BANK OF INDIA..... 1ST DEFENDANT

GARAM INVESTMENTS AUCTIONEERS.....2ND DEFENDANT

RULING

Introduction

1. The Plaintiff (“the Company”) has approached the Court by a Plaint dated 18th June 2020 accompanied by a Notice of Motion Application of the same date made, inter alia, under **Order 40 Rule 1** of the **Civil Procedure Rules** seeking a temporary injunction restraining the Defendants from selling or otherwise dealing or interfering with its ownership of the Title LR No. 1160/413 (Original No. 1160/264/8) situated at Quarry Lane Karen within Nairobi County registered in the name of Hosea Mundui Kiplagat (“the suit property”) valued at KES 455 million as at 21st March 2020.

2. The application is supported by the undated affidavit of Hon. Hosea Mundui Kiplagat, the Company’s Chairman. It is opposed by the 1st Defendant (“the Bank”) through affidavits sworn on 9th July 2020 by Rohit Yadav, its Eldoret Branch Senior Manager and its Chief Executive, Sharda Bhushan Rai. The application was canvassed by way of written submissions.

The Plaintiff’s Case

3. In its Plaint and deposition, the Company does not dispute that the Bank advanced it KES 100,000,00.00 secured by a legal charge dated 8th July 2016 over the suit property.

4. The Company states that, “*due to the hostile and unpredictable business environment in the County, coupled with Covid-19 pandemic, (it) defaulted on scheduled repayments.*” It further admits that due to default, the amount outstanding continues to accrue interest at the rate of 4% above the Central Bank Rate (CBR) per annum which stood at KES 86,113,798.93 as at 24th September 2019.

5. The Company pleads that following threats by the Bank to exercise its statutory power of sale, its counsel and counsel for the Bank held a meeting on 27th March 2020 where it was agreed that the Company would write a letter to the Bank requesting for 90 days to enable it regularize its loan account. It accused the Bank of failing to respond to the letter and to other entreaties to resolve the matter. The Bank instead proceeded to instruct the 2nd Defendant (“the Auctioneer”) to issue a Notification of Sale dated 30th April 2020 intending to sell the suit property without prior notice.

6. The Company contends that threatened sale of the suit properties is wrongful and intended to deny the Company and the chargors of their right to redeem the suit property. It contends that the sole cause of the default is that the it failed to meet some repayments following the current global economic meltdown which has been compounded by the sudden and unexpected Covid-19 pandemic.

The Defendants’ Case

7. The Bank's position is that the Company never approached it to show good will towards repaying the loan. The Company only responded through its advocates when it issued notices of default dated 2nd September 2019 and 24th September 2019 well before the COVID-19 pandemic. Regarding the meeting referred to by the Company, the Bank states that the informal meeting was called by the Company's advocate. She suggested that the Company be given a 90-day grace period to settle the matter. This request was formalized in a letter dated 27th March 2020. The Bank however rejected the request on the ground that it has given the Company several opportunities from September 2019 to remedy the default through four notices but it failed to respond to them.

8. As the Company and the chargor failed to remedy its default, the Bank instructed its advocates to proceed with the necessary steps to sell the suit properties. It issued a 90-day notice dated 12th November 2019 under **section 90** of the **Land Act**. When the Company and the chargor failed to respond to the notices, it issued a 40-day notice dated 26th February 2020 under **section 96** of the **Land Act**.

9. The Bank contends that it is only when the Company and chargor received the notices from the Auctioneer that Mr Kiplagat visited Mr Rai. After discussions, he promised that the Company would deposit Kshs. 50,000,000.00 with the Bank within a week in order to regularize the account. In that regard, the Bank instructed the Auctioneer, who had already issued notices, to hold off any advertisement of the suit properties. The Company did not comply with the promise but instead filed the suit and application.

10. The Bank submits that it issued notices in compliance with **sections 90 and 96** of the **Land Act** and has given the Company more than sufficient time to make good the default and to exercise its right of redemption. The Bank submitted that the application cannot be granted since the Company has not established a *prima facie* warranting grant of the orders of injunction.

Analysis and Determination

11. The main issue for determination is whether the court should grant an injunction restraining the Bank from exercising its statutory power of sale. The parameters for the grant of such order are grounded on the principles established in **Giella v Cassman Brown [1973] EA 358**. The 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.

12. 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.

13. In **Mrao Ltd v First American Bank of Kenya Limited and 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." Since the Company seeks to restrain the Bank from exercising its statutory power of sale, it must show that the Bank is violating its right in the suit property.

14. It is not in dispute that the suit property is owned by Hosea Mundui Kiplagat, the chargor. The Company, which has sued the Bank, does not have any proprietary interest in the suit property. It is also trite law that a chargor is the proper party to sue the Bank as it is only a chargor who has a registered and proprietary interest in the land and who can complain that the statutory power of sale is being exercised unlawfully, wrongfully or oppressively (see **Nairobi Mamba Village v National Bank of Kenya Ltd [2002] 1 EA 197**, **Venture Capital and Credit Ltd v Consolidated Bank of Kenya Ltd CA Nai No 349 of 2003 (UR)** and **Kenya Commercial Finance Company Limited v Afraha Education Society [2001] 1 EA 86**).

15. As the Chargor has not laid any complaint regarding the exercise of the Bank's statutory power of sale. It is not a party to this suit. As the Plaintiff has does not have any proprietary interest in the suit property, it has not established a *prima facie* case with a probability of success. A further inquiry will not serve any useful purpose in light of the decision in **Nguruman Limited v Jane Bonde Nielsen and 2 Others (Supra)**.

Disposition

16. The Notice of Motion dated 18th June 2020 is now dismissed with costs to the Defendants. The interim orders in place are discharged forthwith.

DATED and DELIVERED at NAIROBI this 21st day of JANUARY 2021.

D. S. MAJANJA

JUDGE

Court of Assistant: Mr M. Onyango

Mr Apondi instructed by Muga Apondi and Associates Advocates for the Plaintiff.

Ms Koranje instructed by Mahida and Maina Company Advocates for the Defendants.