



IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL CASE NO. E202 OF 2020

BETWEEN

TIMBER TREATMENT INTERNATIONAL 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.s, ELDORET MUNICIPALITY/BLOCK9/2502, 2522, 2526, 2527 & 2528, 2519, 2520, 2516 & 2521, 2511 & 2518, 2501, ELDORET MUNICIPALITY (“the suit properties”).

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 275,610,000.00 secured by a legal charge dated 14th August, 2017 and a further charge dated 6th June 2018 over the suit properties in favour of the Bank for the purpose of purchasing a tractor, importing plant and machinery and financing capital requirements

4. The Company states that, “*due to the hostile and unpredictable business environment in the County, coupled with Covid-119 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. 185,311, 562.81 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 properties without prior notice.

6. The Company contends that the threatened sale of the suit properties is wrongful and intended to deny the Company its right to redeem the suit properties. It contends that the sole cause of the dispute between it and the Bank is that the it failed to meet some repayments following an unfavorable and harsh business environment.

The Defendants’ Case

7. The Bank's position is that the Company had never approached it to show good will towards repaying the loan. It only responded through its advocates when the Bank issued notices of default dated 2nd September 2019 and 24th September 2019 which was well before the COVID-19 pandemic. Regarding the meeting referred to by the Company, the Bank states that the meeting was informal. That at the meeting, the Company's advocate suggested that the Company be given a grace period for 90 days to settle the arrears. This was followed up by a letter dated 27th March 2020 making the request. The Bank rejected the request on the ground that it had 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 failed to remedy its default, the Bank instructed its advocates to proceed with the necessary steps for the sale of the suit properties. It issued a 90-day notice dated 12th November 2019 under **section 90** of the **Land Act**. When the Company failed to respond to the notices, it issued 40 day notices dated 26th February 2020 under **section 96** of the **Land Act**.

9. The Bank contends that it only when the Company 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 has 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 has issued notices adhering to **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 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.

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 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 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. The Company has admitted indebtedness and default to the Bank. It blames its indebtedness on the COVID -19 pandemic though the evidence is clear that the default commenced in 2019. This admission undermines the Company's case for an injunction as indebtedness is the foundation for the Bank to initiate the process of exercising its statutory power of sale by first issuing and serving on the Company a 90-day statutory notice under **section 90** of the **Land Act**. The Bank has exhibited the notice and evidence that it was served on the Company by registered post at its known address.

15. Despite being given a chance, the Company failed to settle the arrears or redeem the properties whereupon the Bank issued and served on the Company by registered post a 40-day notice to sell the suit property as a mandatory requirement under **section 96** of the **Land Act**. Once again the Company failed to avail itself of the opportunity to resolve the default. The Company did not contest the validity of these notices nor dispute the fact that it received them. It also admits that it received the Auctioneer's notice which, in fact, precipitated this suit.

16. Based on the facts pleaded by the Company, I fail to see how the Bank has violated the Company's rights as the statutory notices were issued in accordance with the law and were received by the Company. In as much as the Company has pleaded that it has been unable to repay the debt due to the harsh business environment and the COVID-19 pandemic, I am also alive to the fact that the Bank has granted the Company some accommodation but the Company has still not demonstrated how it has attempted to make any repayments. In any case, the court cannot compel the Bank to accept the Company's proposals to restructure the facilities by restraining it from exercising its legal remedies as this would amount to re-writing the parties' bargain.

17. Since the Company has admitted indebtedness and having found that the statutory notices were properly issued and served upon the Company, it follows that the Bank cannot be restrained from exercising its statutory power of sale in accordance with the law. I need not to say more as the direction the court ought to take is obvious. I find that the company has failed to establish a *prima facie* case with a probability of success. Consideration of the other grounds is unnecessary in view of the dicta in ***Nguruman Limited v Jane Bonde Nielsen and 2 Others (Supra)*** that once an applicant fails to establish a *prima facie* case with a probability of success, the inquiry comes to an end.

Disposition

18. 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.