



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CIVIL CASE NO. 3 OF 2018

SAHRA HERSI ALI.....1ST PLAINTIFF/APPLICANT

ULTRA HOLDINGS (K) LIMITED.....2ND PLAINTIFF/APPLICANT

BUNGOMA CALTEX SERVICE STATION LTD.....3RD PLAINTIFF/APPLICANT

VERSUS

DIAMOND TRUST BANK KENYA LIMITED....1ST DEFENDANT/RESPONDENT

DALAI TRADERS AUCTIONEERS.....2ND DEFENDANT/RESPONDENT

RULING

The Plaintiffs SAHRA HERSI ALI, ULTRA HOLDINGS (K) LIMITED and BUNGOMA CALTEX SERVICE STATION LTD filed this suit by plaint dated 9.5.2018 against the Respondents DIAMOND TRUST BANK KENYA LIMITED and DALAI TRADERS AUCTIONEERS seeking this judgment for a permanent injunction to issue restraining the Respondents, their workers, agents or anyone acting on their behalf from attaching, transferring, alienating, advertising, selling or in any other way interfering with the properties First Legal Continuous charges over **LR Nos. South-Teso/Osurette/1182 and 1183, LR Bungoma/Township/336 and 339** or any other property owned by the Plaintiff in relation to the above mentioned facility.

Counteprenously the Plaintiff/Applicant filed this application dated 9th May 2018 seeking the following orders:

a) That this Hon. Court be pleased to issue orders restraining the Respondents, their workers, agents or anyone acting on their behalf from attaching, transferring, alienating, advertising, selling or in any other way interfering with the properties known as TITLE NO. SOUTH-TESO/OSURETTE/1182 AND 1183 AND TITLE NO. BUNGOMA TOWN/336 &339 any other property of the Applicants pending the hearing and determination of this application.

b) That this Hon. Court be pleased to issue an order restraining the 1st Respondent from listing the Applicants with the Credit Reference Bureau pending the hearing and determination of this application.

c) That pending the hearing and determination of this Application, this Hon. Court do issue an order compelling the Respondents to furnish the Applicants with:

i. Statements of the 3rd Applicant's loan account showing the repayment schedule of the facility.

ii. Copies of the charge or further charge documents of the facilities issue to the borrower.

iii. Copies of the forced sale valuation reports for the above mentioned properties; TITLE NO. SOUTH-TESO/OSURETTE/1182 AND 1183 AND TITLE NO. BUNGOMA TOWN/336 and 339 earmarked for sale.

The grounds for the application are that the applicant obtained credit facilities from the Respondent now totaling Kshs 128,000,000 and secured the same by:

i. Fixed and floating debentures over the assets of the borrowers.

ii. First legal Continuous charges over LR Nos. South-Teso/Osurette/1182 and 1183, LR Bungoma/Township/336 and Bungoma/Township/339 all registered in the name of the 1st Applicant.

iii. Joint several and personal guarantees of the Directors of the borrowers in support of the borrowings.

iv. Deed of Rental Assignment over properties mentioned hereinabove.

v. Cross Company guarantees between the borrowers in support of the respective borrowings.

vi. Agreement establishing the consideration between the Applicant and the borrowers.

That the applicants were on 2.5.2018 served with the following documents:

a) Statutory notices from the 1st Respondent dated the 23rd day of May 2017.

b) Notifications of sale from the 1st Respondent dated the 6th day of October 2017.

c) Auctioneer's Notification of sale from the 2nd Respondent dated the 23rd of February 2018.

The Applicants avers that having been served with the above document on 2.5.2015 and the properties were scheduled for sale on 10th May 2018 only a week from the date of service, the said notices were not served within the stipulated time and therefore the scheduled sale by public auction is unlawful. The Applicants also aver that mandatory documents including the forced sale valuation has been only done to one property and the other properties do not have forced sale valuation done. The application is supported by the affidavit of Asha Hersi Moghe a director of the 1st and 2nd Respondents who reiterates the grounds for the application.

The Respondents opposed the application and filed a Replying affidavit sworn by TARMINDER UMESH the Debt Recovery officer of the 1st Respondent Diamond Trust Bank Kenya Ltd. He depones that the applicants enjoyed credit loan, and overdraft facilities at various times since 2005 and secured the same by:

a) Second further charge dated 8th May 2013 over LR No. South-Teso/Osurette/1182 and LR No. South –Teso/Osurette/1183.

b) Second Further Charge dated 8th May 2013 over Bungoma/Township/336 and Bungoma/Township/339.

c) Deed of Guarantee by 1st Plaintiff, and

d) Personal Guarantees by the directors of the 2nd and 3rd Plaintiff.

He depones that the applicants defaulted on the repayments and the Respondents issued statutory notices through their advocates dated 4.7.2017 and thereafter issued a 40 days notification of sale dated 6.10.2017 which were served on that well in advance not 2nd May 2018 as alleged by the Applicants. He depones that as at 23.1.2018 the 2nd Applicant was indebted to the bank in aggregate sum of Kshs 22,096,050.36 which amount continues to attract interest. He depones that the bank has followed all the steps required by law and that this application lacks merit and ought to be dismissed.

The Respondent also raises a Preliminary Objection to the institution of the main suit on the grounds that the suit contravenes the mandatory provisions of O.4 r. 1(3) and (4) of the Civil Procedure Rules 2010.

By consent the application was canvassed by way of written submissions. Counsel for both parties filed their respective submissions.

Mr. Ikuia instructed by Okatch & Partners for the Applicant submitted that the Respondents cannot purport to exercise its statutory right of sale without complying first which sets in motion the provisions of Section 90 of the Land Act 2012, as it is compliance to the provisions with the security realization process. He submits that the Respondents have not shown that such notice was served, if at all and when the same was done. As no evidence has been annexed to their response, he urges this court to find that no service of statutory notice was effected.

Counsel for the Applicant further submits that by the time the Respondents were advertising the property for sale the only valuation report which had been done was in respect to Bungoma Township/339 and no valuation was done in respect of other properties.

This he submits is in contravention of Section 97 of the Act which requires a forced sale evaluation to be undertaken by a valuer. Finally counsel submits that from the pleadings and submissions the Applicant has demonstrated that he deserves the orders sought.

Mr. Shah instructed by Mohamed Madhani & Co. Advocates for the Respondent filed their submissions. Counsel submitted that the applicants were served with the requisite 45 days Redemption Notice on 27.2.2018. He submits that the said was filed on 9.5.2018 by the Plaintiff, the verifying affidavit was sworn by one Asha Hersi Moghe the 2nd and 3rd Defendant director. However, no letter of authority nor any proof of authority to do so was filed together with the verifying affidavit. He submits that this was a fatal omission of O.4 r. 1, (3) and (4) and the Plaintiff suit should be struck out for breach of the rules.

On whether the Applicant is entitled to the order of Injunction counsel submits that the Applicant has not established a prima facie case, with probability of success, as the Respondent was lawfully exercising right of statutory power of sale under the contract; and that a court cannot prevent the same by injunction.

I have carefully perused the pleadings by parties and submissions by counsel. The main issue for determination in this application and in the main suit is whether the Respondents have complied with the steps necessary before exercising the statutory power of sale. That is an issue raised in this application and the claim in the main suit. Determination of such issue will require the evidence to be adduced by both parties. This is an application for interlocutory injunction. The grounds upon which an injunction can be granted was well stated in *Giella –vs- Cassman Brown*, and restated in several decisions. In ***Nguruman Limited –vs- Jan Bonde Nielsen & 2 Others (2014)eKLR*** aptly held thus

...(since the fundamentals about the implications of the interlocutory orders of injunction are settled, at least for over four decades, since Giella case (supra) they could neither be questioned nor elaborated in detailed research. Since those principles are already codified by authoritative pronouncements in the precedents they may be conveniently noted in brief as follows:

In an interlocutory injunction application, the application has to satisfy the triple requirements to:

- a) Establish his case only at a prima facie level;***
- b) Demonstrate irreparable injury if a temporary injunction is not granted; and***
- c) Ally any doubts as to (b) by showing that the balance of convenience is in his favour***

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount. See Kenya Commercial Finance Co. Ltd v Afraha Education Society (2001) Vol. EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must be satisfied that the injury the respondent will suffer, in the event that the injunction is not granted will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between.

It is where there is a doubt as to the adequacy of the respective remedies in damages available to either party or both that the question of balance of convenience would arise. The inconvenience to the applicant if interlocutory injunction is refused would be balanced and compared with that of the respondent, if it is granted.

Upon considering this application, I am satisfied that the balance of convenience tilts towards preserving the status quo pending the hearing of the main suit. I therefore allow the application for injunction to issue against the Respondents not to sell, alienate or auction the Applicant's property for 90 days pending the hearing of the main suit which must be heard and concluded within 90 days from today's date.

Dated and Delivered at **BUNGOMA** this 20th day of **January**, 2021.

S.N.RIECHI

JUDGE