



IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL CASE NO. E541 OF 2020

BETWEEN

FORTUNE CREDIT LIMITEDPLAINTIFF

AND

SIDIAN BANK LIMITED.....1ST DEFENDANT

ONESMUS MACHARIA T/A

WATTS AUCTIONEERS2ND DEFENDANT

RULING

Introduction and Background

1. The Plaintiff (“the Company”) has approached the Court by a Plaint accompanied by a Notice of Motion dated 15th December 2020 made, inter alia, under **Order 40** of the **Civil Procedure Rules** seeking an order of injunction restraining the 1st and 2nd Defendants from selling the following properties: CIS MARA/OLOLULUNGA /11917, NGONG TOWNSHIP/BLOCK 2/499 (“the suit properties”) in exercise of its statutory power of sale pending hearing of the suit.

2. The application is supported by the affidavit of Janet Namwenya Kuteli, the Chief Executive Officer of the Company, sworn on 15th October 2020. It is opposed by the Defendants through the replying affidavit of the 1st Defendant’s Legal Officer, Jackline Ndung’u, sworn on 22nd January 2021. The application was canvassed by way of written submissions supplemented by brief oral submissions by the respective counsel.

Plaintiff’s Case

3. It is common cause that in mid-2019, the 1st Defendant (“the Bank”) agreed to extend two loan facilities to the Plaintiff (“the Company”). The first facility of KES. 14,560,000.00 was secured by a First Legal Charge dated 26th September 2019 over the Company’s Property Title No. CIS MARA/OLOLULUNGA/11917 and the second facility of KES 5,400,000.00 was secured by a First Legal Charge dated 1st November, 2019 over the Company’s Property Title No. NGONG TOWNSHIP/BLOCK 2/499. In addition to the charge instruments, the Company’s Director executed a letter of guarantee and indemnity dated 25th September 2019.

4. In the Plaint, the Company admits that owing to the poor economic situation brought about by the COVID-19 pandemic, its business of providing financial solutions to small businesses and individuals was affected as its clients were unable to service existing loans. As a result, the Company was forced to close its Kitale Branch. The Company states that it was unable to repay its facility with the Bank.

5. The Company states that the Bank issued it with a notice pursuant to **section 90(1)** of the **Land Act** on or about 5th May 2020 demanding that it pays the outstanding sum of KES 2,403,257.78 within three months from the date of receipt of the said notice. Thereafter the Bank instructed the 2nd Defendant (“the Auctioneer”) to issue a 45-day notice dated 12th October 2021.

6. The Company contends that Bank assured it that the intended sale would be halted if it made reasonable proposals to resolve the debt. The Company therefore resolved and submitted a proposal to the Bank dated 14th October 2020 that the loan facility be restructured for a period

of 84 months instead of 36 and the monthly repayments be reduced to KES 400,000.00 from KES 673,879.00. The Company states that based on the proposal and representation by the Bank, it also made a payment of KES 400,000.00.

7. The Company complains that the Bank went ahead to advertise the suit properties for sale by way of public auction on 17th December 2020. That in the notification of sale, the open value of CIS MARA/LOLULUNGA/11917 is KES 26,000,000.00 which is impractical when the open market value of the property when it was last valued in April 2020 was KES 50,000,000.00. The Company therefore contends that the intended auction is null and void and should be stopped as it may suffer irreparable damage. The Company further contends that by rejecting its payment proposal, the Bank denied it an opportunity to redeem the loan.

8. The thrust of the Company's application is that the Bank has not served on it the mandatory 40-day notice to sell the suit properties under **section 96(2)** of the *Land Act*. It submits that failing to do so is an attempt to clog the Company's right to redeem the suit properties contrary to the provisions of **section 89** of the *Land Act*. The Company adds that in the Notification of Sale dated 12th October 2020, the Auctioneer gave the open market value of CISMARA/LOLULUNGA /11917 as KES 26,000,000.00 which is impracticable considering that the property has a current open market value of about KES. 50,000,000.00 therefore if the sale scheduled for 17th December 2020 were to proceed; the property would be sold at a throw away price. The Company states that the combined value of the suit properties was over KES 70,000,000.00 yet the Bank intended to sell them at a gross under value of KES 35,000, 000.00 to cover a disputed debt of KES. 20,641,377.75.

9. The Company further avers that the intended sale is illegal as the Bank never sought and/or obtained the consent of the Land Control Board coupled with the lack of a fresh valuation to ascertain the current value before sale as required by law.

10. The Company submits that it stands to suffer irreparable loss and damage should the illegal, unlawful and unprocedural sale of the suit properties proceed. It maintains that on the basis of the facts pleaded, it has established a prima facie case with a probability of success. It also submits that if the suit properties are sold, the suit would be rendered nugatory and a mere academic exercise. The Company adds that the balance of convenience tilts in favour of preservation of status quo until both parties are heard on the merits as the Bank will still be in a position to recover any outstanding amounts owing to it.

Defendant's Case

11. The Bank denies that it has denied the Company its right of redemption as it has complied with all the prerequisites for exercising its statutory power of sale by issuing and sending all the Statutory Notices to the Company and its director as guarantor.

12. The Bank stated when the Company defaulted, it initiated the recovery process by issuing a demand letter dated 20th February 2020 demanding immediate repayment of the amount in arrears of KES. 1,187,537.55 as at 20th February 2020 and a further letter dated 15th April 2020 demanding for the immediate repayment of the full and final outstanding amounts in arrears of KES. 19,868,760.78 in full as at 15th April 2020.

13. The Bank thereafter issued the statutory notice dated 5th May 2020 under **section 90** of the *Land Act*. Since no response was forthcoming from the Company, the Bank issued it a further notice dated 17th August 2020 via registered post and under **section 96(2)** of the *Land Act* to sell the suit properties after the lapse of 40 days. When the Company did not make good of the debt, the Bank instructed the Auctioneer on 8th October 2020 to sell the suit properties by public auction. On 12th October 2020, the Auctioneer proceeded to issue the mandatory 45 days' notice of sale.

14. The Bank admits that the Company approached it requesting to restructure the loan facility but it did not accede to the request. However, the Bank cancelled the auction and despite the Company undertaking and committing to repay KES 400,000.00, it failed to pay KES 400,000.00 before 30th October 2020 as it had committed in its minutes/resolution of 13th October 2020.

15. In response to the Company's allegations that the suit properties were undervalued, the Bank stated it instructed *Zenith (Management) Valuers Limited* by the letter dated 7th December 2020 to conduct a comprehensive valuation of the suit properties prior to sale. By the valuation report dated 14th December 2020, it assessed the open market value and forced sale value of CIS MARA/LOLULUNGA/11917 at KES. 10,000,000.00 and KES. 7,500,000.00 respectively. By the valuation report dated 16th December 2020, it assessed the open market and forced sale value for NGONG TOWNSHIP/BLOCK 2/499 at KES 6,000,000.00 and KES. 4,500,000.00 respectively.

16. The Bank also stated that it procured consent to charge the suit properties. In respect of CIS MARA/LOLULUNGA/11917, the Chairman of the Land Control Board at Narok issued the Letter of Consent to charge on 15th August, 2019. Similarly, the Bank applied to the National Land Commission County Coordinator at Kajiado for the consent to charge NGONG TOWNSHIP/BLOCK 2/499 and the Chief Land Adjudication Officer at Kajiado issued the Letter of Consent to charge on 29th October, 2019.

17. On the basis for the facts presented, the Bank submits that the Company has not made a prima facie case to warrant the injunction as the Company is indebted to the Bank.

Analysis and Determination

18. The issue for determination is whether the court should restrain the Bank from exercising its statutory power of sale. In deciding whether or not to issue an injunction, the court is guided by the principles settled in *Giella v Cassman Brown [1973] EA 358*. In order to succeed, the applicant must show that it has a prima facie case with a probability of success, demonstrate that it will suffer irreparable damage which cannot be compensated by an award of damages if the injunction is not granted and if the court is in doubt, show that the balance of convenience is in its favour. These principles were reiterated by the Court of Appeal in *Nguruman Limited v Jane Bonde Nielsen and 2*

Others NRB CA Civil Appeal No. 77 of 2012 [2014] eKLR. The Court further added that the three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially.

19. As to what constitutes a prima facie case, the Court of Appeal in **Mrao Ltd v First American Bank of Kenya Limited and 2 Others [2003] eKLR** explained that it 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.” A prima facie case with a probability of success proceeds from the case set out in the Plaintiff. In this case, the Company must demonstrate that it has a right to the suit properties and that this right is likely to be violated by the Bank’s intended action of exercising its statutory power of sale.

20. The Company does not deny that it is indebted to the Bank. This means that the Bank was entitled to initiate the process of realizing the suit properties by first issuing and serving the Company with a 90-day statutory notice under **section 90** of the **Land Act**. The Company admits that this was issued and served on it meaning that the Bank’s statutory power of sale had crystallized. It is at this intervening period that the Company was being given an opportunity to rectify the default by settling the arrears or redeem the facility by paying off the outstanding amount.

21. Due to the default, the Bank was entitled to issue and serve a 40-day notice to sell the suit property as a mandatory requirement under **section 96** of the **Land Act**. The Bank states that it did issue and serve the notice by registered post but the Company denies this. Since the Company denied receiving the notice, the burden is on the Bank to demonstrate that it has served the notice in the absence of an admission by the Company (see **Nyagilo Ochieng and Another v Fanuel Ochieng and 2 Others [1995-1998] 2 EA 260**). In order to discharge this burden, the Bank has produced as part of its deposition a Statutory Notice to Sell under **section 96(2)** of the **Land Act** dated 17th August 2018 addressed to, inter alia, the Company giving it 40 days from the date of service of the notice to redeem the suit properties by paying KES 20,448,951.13 failure to which the Bank would proceed to sell the suit properties. The Bank has also annexed a certificate of postage which on its face indicates that it was to the Company by registered post. Since the Company does not contend that the postal addresses were incorrect, I find that the Bank has sufficiently discharged the burden by proving that it issued and duly served the Company with the 40-day statutory notice to sell under **section 96(2)** of the **Land Act**. This ground for the application for injunction fails

22. The Company contends that the impending sale is illegal as the suit properties have been undervalued. It contends that the suit properties are valued at over KES. 70,000,000.00. 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. **Rule 11(b)(x)** of the **Auctioneers Rules** required that a professional valuation of the reserve price must be carried out not more than 12 months prior to the proposed sale. In this case, the Bank has now carried out a professional valuation of the suit property. The Company did not substantiate its position that the suit properties were undervalued or impeach the competence of the valuation reports or the valuer. In the absence of evidence to the contrary, the Company’s allegations collapses on its own weight.

23. Likewise, the suggestion that the charges over the suit property are void for want of Land Control Board consent were unsubstantiated. The Bank, though, provided affirmative evidence that it procured Land Control Board consent to charge the suit properties. I also find this allegation inconsistent with what is pleaded in the plaint as a ground for the suit.

24. The totality of the evidence is that Company admits indebtedness, it has not established how its proprietary rights have been violated by the Bank which has complied with the necessary procedures to exercise its statutory power of sale.

25. At the hearing of the application, counsel for the Company argued that since the sale was scheduled in December 2020, the Bank was required to issue another 40-day notice under the Auctioneer’s Rules. This argument is not supported by the **Land Act** or **Auctioneers Rules** or existing authority. In **George Gikubu Mbuthia v Jimba Credit and Another Civil Appeal No. 111 of 1986 [1988] eKLR**, Apaloo JA., expressed the following view:

It is plain that section 74 did not impose on the chargee, the giving of more than one notice and there is no sound policy reason why he should be obliged to give fresh notice to the chargor any time a sale was suspended to accommodate him. If such were a legal requirement, no chargee in his right mind would suspend a projected sale as a matter of favour or indulgence to a defaulting mortgagor.

26. In **Joseph Kiarie Mbugua and Another v Garam Investment Limited and Another ML HCCC No. 444 of 2005 [2006] eKLR**, Ochieng’ J., came to the conclusion that there was no requirement for the auctioneer to issue another notice following suspension of the sale. In relation to the **Auctioneers Rules**, the learned Judge observed as follows:

Rule 15 (d) reads as follows;

"Upon receipt of a court warrant or letter of instruction the auctioneer shall in the case of immoveable property –

(a).....

(b)

(c)

(d) give in writing to the owner of the property a notice of not less than forty-five days within which the owner may redeem the property by payment of the amount set forth in the court warrant or letter of instruction."

The rule does not impose an obligation on the chargee or the auctioneer to issue notices every time before the charged property can be put up for sale. It says that "a notice" will be issued; and that is singular. The time of issuance is when the auctioneer received the letter of instruction.

27. The Company has failed to establish a prima facie case with a probability of success. Since the Company has admitted indebtedness and having found that the statutory notices were properly issued and served upon the Company and the valuation of the suit properties is proper, no purpose will be served by proceeding on any further inquiry in light of the dicta in ***Nguruman Limited v Jane Bonde Nielsen and 2 Others (Supra)***.

Disposition

28. The Notice of Motion dated 15th December 2020 is now dismissed with costs to the Defendants. The interim orders in force are now discharged.

DATED and DELIVERED at NAIROBI this 24th day of FEBRUARY 2021.

D. S. MAJANJA

JUDGE

Ms Mudaye instructed by Mudaye and Company Advocates for the Plaintiff.

Mr Oguye instructed by Mwamuye, Kimathi and Kimani Advocates for the Defendants.