REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL AND TAX DIVISION

COMMERCIAL CASE NO. E385 OF 2020

BETWEEN

COLLOGNE INVESTMENTS LIMITED .....PLAINTIFF

AND

BANK OF AFRICA KENYA LIMITED.....DEFENDANT

AND

NAKUMATT HOLDINGS LIMITED

(UNDER ADMINSITRATION) ..... INTERESTED PARTY

R U L I N G

1. Before court is a Motion on Notice filed by the Interested Party ("Nakumatt") dated 27/8/2020. The same was made under ***Order 40(1), (3), (4) of the Civil Procedure Rules, section 90(3), 96 (3) (g), section 101 of the Land Act No.6 of 2012, section 576 & the Rule 5 of the Fourth Schedule of the Insolvency Act No.18 of 2015 and section 3A of the Civil Procedure Act.***

2. The Motion sought orders, *inter alia*, that pending the hearing and determination of the suit, an injunction do issue to restrain the defendant ('the Bank") from selling by public auction the property known as LR.NO.209/11158 ("the suit property") which was scheduled for 31/8/2020 and/or any other date thereafter.

3. The application was supported by the affidavit of **Peter Obondo Kahi,** the Court appointed administrator of Nakumatt, sworn on 27/8/2020 together with the grounds set out on the face of the application.

4. The background to the application is that; the Bank advanced various facilities to Nakumatt secured by, among other securities, a third-party legal charge dated 4/5/2015 ("the Charge") given by **Collogne Investments Limited**, the Plaintiff herein, over the suit property. Nakumatt defaulted in repayment prompting the Bank to issue the requisite Statutory Notices with a view to realize its security.

5. With no repayment forthcoming from either Nakumatt or the Plaintiff, the Bank instructed lgare Auctioneers ("the auctioneers") to sell the suit property. On 22/6/2020, the auctioneers issued the plaintiff and Nakumatt with a redemption Notice pursuant to **Rule 15(d)** of the ***Auctioneers Rules, 1997.*** The notice gave them 45 days within which to redeem the suit property by paying the Bank Kenya Shillings 456,480,969.04 and USD 114.272.41 together with interest thereon.

6. Nakumatt contended that the Bank had breached the mandatory requirement in **section 96(3) (g)** of the ***Land Registration Act No.6 of 2012***, by failing to serve the 45 day notice upon all the other charges. It had scheduled the sale by auction of the suit property on 31/8/2020 (now past). That if the intended sale proceeded, Nakumatt will suffer irreparable loss and damage as the other Chargees will pursue it for the recovery of monies owed to them.

7. That a substantial written offer had been made to the Administrator for the purchase of the suit property. That sale would be able to satisfy all the debts now claimed by the chargees and thereafter clear the indebtedness of Nakumatt. This will achieve a better outcome for all the creditors of Nakumatt in terms of ***section 522*** of the ***Insolvency Act, 2015***

8. It was further contended that, the redemption notice was only copied to the County Commissioner, Nairobi County without any postal address and without any indication as to how the notice was served on the said County Commissioner. That having failed to comply with mandatory provisions of the law, the intended sale was clearly and obviously illegal and should be stopped.

9. The application was opposed by the Bank through the affidavit of **Kenneth Mawira Murithi**, the Senior Legal Counsel of the Bank, sworn on 17/9/2020. The Bank contended that it had properly served Nakumatt with the all the requisite notices. That it was well within the knowledge of Nakumatt that the sale of the suit property was being coordinated between the Bank, Diamond Trust Bank, Standard Chartered Bank and KCB Bank Kenya ("the Other Chargees"). That there was no requirement for the Bank to serve the redemption notice upon the other chargees.

10. The Bank accused Nakumatt of material non-disclosure by failing to annex the Notice to Sell served upon it. That that Notice would have shown that all the other chargees had been served with the same. That there was a syndicated inter-lenders agreement dated 5/4/2013, by which all the lenders of Nakumatt had agreed, *inter alia*, to join in the exercise of each chargees' statutory powers of sale and share the proceeds of the sale of the suit property in accordance with the terms and conditions of the said agreement. All of the chargees were claiming from Nakumatt in excess of KES 4 billion.

11. It was further contended that, the fact that, pursuant to section 91 of the Land Act, Nakumatt will have to provide additional security to cover the outstanding balance due and owing to it and to the other Creditors after sale of the suit property was immaterial. The same could not form the basis for the injunctive orders sought.

12. That the objectives of administration as stipulated under the ***Insolvency Act, 2015*** were, *inter alia*, to achieve a better outcome for the company's creditors as a whole than would likely be the case if the company was liquidated. In any event, Nakumatt's creditors had passed a resolution to liquidate Nakumatt. There was no evidence that there had been any offer for the purchase of the suit property for an alleged amount that would be able to satisfy the outstanding amounts claimed by the Bank and the other chargees.

13. That the application was *sub-judice* and as such the injunctive orders sought by Nakumatt cannot be granted. That there had been previous applications by the plaintiff which had been dismissed. In any event default had not been disputed.

14. I have considered the rival depositions and submissions on record. This is an injunction application. The principles applicable were well set out in **Giella v Cassman Brown [1973] EA 358**. These are that an applicant has to establish that he has prima facie case, demonstrate irreparable injury if a temporary injunction is not granted, and in the event of doubt, the court will determine the application on a balance of convenience.

15. 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 the same to be a case in which on the material presented, 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 that party.

16. In this case, the Bank seeks to exercise its statutory power of sale. Nakumatt claims that the said sale ought to be stopped because the 45 days Redemption Notice was not served on all the chargees as is required by ***section 96(3) (g) of the Land Registration Act No.6 of 2012.*** I believe Nakumatt must have meant ***section 96(3), (g) of the Land Act and not the Land Registration Act***.

17. The relevant provision provides that a copy of the Notice to sell shall be served upon among others *"any other chargee of money secured by a charge on the charged land of whom the chargee proposing to exercise the power of sale has actual notice"*. The Bank contended that it had served the other chargees. A copy of that notice produced as *"KM-6"* in the Bank's replying affidavit shows that the same was copied to the other chargees.

18. However, although the notice shows on the face of it that the other chargees were copied, there was no evidence to show that the same was served and received by them. On the face of the Notice, there are endorsements of receipt thereof by the plaintiff and the guarantors but none by the other Chargees.

19. Further, there is no Certificate of Postage to show that the Notice was sent to the other chargees by way of Registered Post. It is trite that it is upon the Bank to demonstrate that it has served the notices to the Chargor and the other parties listed under ***section 96(3) of the Land Act.*** In the absence of an admission, that burden must be discharged by the bank and it never shifts to the chargor. (See the Court of Appeal decision in **Nyagilo Ochieng and Another v Fanuel Ochieng and 2 Others [1995-1998] 2 EA 260**).

20. This burden is never on the Chargor and/or Borrower as contended by the bank. In this regard, it is my finding that the Bank failed to discharge the burden that it had served a copy of the said Notice upon the other chargees as is mandatorily required under ***section 96(3) (g) of the Land Act.*** Since this is a pre-requisite for selling a charged property, the intended sale of the suit property cannot stand. On that basis, I find that Nakumatt has established a prima facie case with a probability of success.

21. Does the omission or failure by the Bank mean that its equity of redemption has been fettered? Of course not. This is so because the debt owed to the Bank by Nakumatt and the default has been expressly admitted by the plaintiff and Nakumatt. In this regard, the Bank can still take steps to sell the suit property after complying with ***section 96(3)(g) of the Land Act.*** For avoidance of doubt, no new Notice of Sale ought to be issued since all the other parties, including Nakumatt and the Plaintiff, have acknowledged receipt of the same. All that the Bank has to do is to serve the other chargees with the said Notice.

22. On whether Nakumatt will suffer irreparable loss, it may not. But I take the view that, the fact that the Bank has breached the law is ground enough to issue the orders sought. No one should be allowed to breach the law on the ground that he can be able to pay compensation or to meet any damages that might arise therefrom.

23. I am alive to the fact that the Bank deposed that the sale is in conjunction with the other chargees. That assertion was denied by Nakumatt but the copy of the agreement referred to was not produced to prove the claim.

24. In this regard, the Motion dated 27/8/2020 is successful to the extent that the Bank had failed to comply with the law as to the service of

the Redemption Notice on the other chargees. The Bank should bear the costs of the application.

DATED and **DELIVERED** virtually this **18th** day of **February, 2020**.

A. MABEYA, FCIArb

JUDGE