



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

MILIMANI LAW COURTS

HCCC NO. E 062 OF 2021

NAKUMATT HOLDINGS LTD (UNDER ADMINISTRATION).....PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LIMITED.....1ST DEFENDANT

LEAKEY'S AUCTIONEERS.....2ND DEFENDANT

HARSHA ATUL KUMAR

MAGANLAL SHAH.....PROPOSED INTERESTED PARTY

RULING

1. Nakumatt Holdings Limited is under administration. The administrator brings this suit against Kenya Commercial Bank Limited (KCB or the 1st defendant) and Leakey's Auctioneers (the 2nd Defendant).

2. Simultaneous with filing of the Complaint, the Plaintiff has filed a Notice of Motion dated 28th January 2021 for the following prayers:-

3. *THAT the 1st and 2nd Respondents be restrained, whether acting by their servants, agents or any other person acting under its authority, from selling, disposing of and/or transferring or causing to be transferred any interest in the property known as Land Reference Number 5/134 Nairobi or interfering with howsoever, the said property pending the hearing and final determination of the Application and suit herein.*

4. *THAT the 2nd Respondent's purported Notice 45 Days redemption Notice and Notification of Sale of Immovable Property dated 10th November 2020 and the 1st Defendant/Respondent's 40 day Notice to sell under section 96(2) of the Land Act of 21st September 2020 be declared null and void.*

5. *THAT the charge of 22nd December 2011 between the 1st Defendant, Plaintiff and proposed Interested Party be discharged and that the Defendant to forthwith and not later than seven (7) days execute the appropriate instrument of discharge of Charge on Land Reference Number 5/134 Nairobi.*

3. The matter now before Court is the Plaintiff's request for a temporary injunction and as a first, the Plaintiff's suit must muster the threshold of a prima facie case with probabilities of success (see *Giella vs Cassman Brown Co. Ltd 1973 E.A. 358.*).

4. In the Complaint, the Plaintiff presents the following case. Nakumatt holds two accounts namely numbers 1107115167 and 1238519393 with the Bank. Certain facilities were advanced by the Bank to the Plaintiff. As part security, a charge for Kshs.25,000,000/= was taken over Land Reference Number 5/134 (the suit property) whose registered proprietor is Harsha Atul Kumar Maganlal Shah, joined in these proceedings as the interested party.

5. The 2nd Defendant has, on instructions of the 1st Defendant, issued a 45 days redemption Notice and Notification of 10th November 2020 for the sale of the suit property unless a sum of Kshs.1,900,511,235.45 is settled. The Plaintiff assails this Notice and demand and gives a raft of reasons.

6. First, that the interested party has not been served with the said notices. Second, that both the notices and the Notice of 21st September 2020 said to have been issued in compliance with Section 96(2) of the Land Act, 2012 are fraught with gross and fundamental misrepresentations of fact apparent on the face of the record. Further, service of a Notice under section 90(1) and (2) of the Land Act No. 1 of 2012 is denied.

7. It is also the Plaintiff's case that the charge of 22nd December is not security and/or collateral for the debt claimed and is not linked to the accounts referred to in the Notices.

8. Last that the Plaintiff does not owe the Bank any money and believes that it is the Bank that owes it money.

9. The Plaintiff seeks the following prayers:-

1. A declaration that the 2nd Defendant's purported 45 days Redemption Notice and Notification of Sale of Immovable Property dated 10th November 2020 and the 1st Defendant's 40 day Notice to sell under section 96(2) of the Land Act of 21st September are null and void.

2. An order that the 1st and 2nd Respondents be restrained, whether acting by their servants, agents or any other person acting under its authority, from selling, disposing of and/or transferring or causing to be transferred any interest in the property known as Land Reference Number 5/134 Nairobi or interfering with howsoever the said property.

3. That the charge of 22nd December 2011 between the 1st Defendant, Plaintiff and proposed Interested Party be discharged and that the Defendant to forthwith and not later than seven (7) days execute the appropriate instrument of discharge of Charge on Land Reference Number 5/134 Nairobi.

4. In default of execution of the instrument in (b) above, the Deputy Registrar shall execute one in favour of the Proposed Interested Party and the Plaintiff.

5. The Costs of this suit.

6. Any other orders or further relief deemed fit and just to grant by this Honourable court.

10. In resisting the Motion, counsel Chacha Odera for the Bank argues that all the four substantive prayers in the Plaintiff can only be argued by the Interested Party and not the Applicant.

11. In contending the strength of its case, the Plaintiff's counsel M/s Wanyonyi submitted that it is only the company that could maintain a claim that it had paid the entire amount under the facility and cited the decision in Allan Symon Njugi Maina & Another v Development Finance Company of Kenya & Another [2018] eKLR in support of that proposition.

12. While it may be true that Nakumatt as the principal debtor is the right party to maintain a claim that its debt to the Bank has been fully settled, it cannot, unless good reason is shown, use this as a basis for resisting the exercise of the chargees statutory power of sale without the chargor being co-joined as a Plaintiff.

13. In similar circumstances such as this Majanja J in Eldoret Concrete Poles Limited v Bank of India & Another [2021] eKLR not so long ago (21st January 2021) stated:-

“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)”

14. In the matter at hand, the chargor is cited by the Plaintiff as an Interested Party. No reason is proffered as to why she is not a co-Plaintiff or why she could not take out these proceedings against the Bank. When arguing the application, counsel for the Plaintiff indicated that there was an intention to join the chargor as a co-plaintiff. Still the Court is not told why she is not a co-plaintiff up to now. She is the proprietor of the charged property and the chargor. No good reason has been demonstrated as to why matters which truly belong to her corner must be urged by the principal debtor without her participation as a substantive party.

15. This Court is not persuaded that the suit, as currently presented, demonstrates a prima facie case with a probability of success. Being unable to surmount that hurdle, it is needless for this Court to discuss other aspects raised in the application. The Notice of Motion dated 28th January 2021 is dismissed with costs.

Dated, Signed and Delivered in Court at Nairobi this 31st Day of March 2021

F. TUIYOTT

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 17TH April 2020, this Ruling has been delivered to the parties through virtual platform.

F. TUIYOTT

JUDGE

PRESENT:

Ms Wanyonyi for the Plaintiff.

Mbaluto for the Defendant.