



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL CASE NO. E007 OF 2021

LORNA CATHERINE PHILIPS.....PLAINTIFF

VERSUS

I & M BANK LIMITED.....1ST DEFENDANT

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

RULING

1. This ruling is in respect of an application dated 28.01.2021 brought by way of Notice of Motion by the plaintiff/applicant seeking for orders that:

1. Spent;

2. That 1st and 2nd Defendants, their agents, employees and/or servants be restrained by a temporary injunction from advertising for sale by public or private contract, offering for sale, selling, transferring or in any way dealing with the property known as HOUSE ON PLOT NO. 1889 (C.R. NO.14036) SECTION 1 MAINLAND NORTH situated along the main Mishomoroni Road and fronting the Tudor Creek within Nyali west residential area of Mombasa County pending hearing and determination of this application inter-partes.

3. That 1st and 2nd Defendants, their agents, employees and/or servants be restrained by a temporary injunction from advertising for sale by public or private contract, offering for sale, selling, transferring or in any way dealing with the property known as HOUSE ON PLOT NO. 1889(C.R. NO. 14036)

SECTION 1 MAINLAND NORTH situated along the main Mishomoroni Road and fronting the Tudor Creek within Nyali west residential area of Mombasa County pending hearing and determination of this suit.

4. That the costs of this application be provided for.

2. The application is based on the grounds on the body of the motion, the supporting affidavit sworn on the 21st June 2018 by the plaintiff. She avers that she and her husband, Mr. Peter John Philips and here are the joint proprietors of all that parcel of land known as **PLOT NO. 1889(C.R. NO.14036) SECTION 1 MAINLAND NORTH situated along the main Michomoroni Road(hereinafter "the suit property")** which is a residential building utilized by them as their matrimonial home.

3. The Plaintiff avers that on or around 24th October, 2020, Leakey Auctioneers the 2nd Defendant advertised the suit property for sale by public auction in the National Newspapers.

4. It is the plaintiff's case that she was served with a notification of sale of the suit property on or about the 24.10.2020 as a result default in payment of a loan facility advanced to her husband, in respect of which she was a chargor and or guarantor and the suit premises charged.

5. According to the Plaintiff, the 1st Defendant advanced to her husband two credit facilities on various dated all totalling to USD 1,100,000.00 for which she was a guarantor. That a legal charge and for that legal charge was created over the suit property to act as security of the two credit facilities.

6. The Plaintiff avers that 1st Defendant never informed her of any default in payment of the loan and neither did it serve her with the 90 days chargee's Statutory Notice of sale in the aforesaid credit facilities advanced to her husband, as is required by law.

7. Consequently, the Plaintiff submits that if the scheduled sale proceeds she would be greatly be prejudiced since she is separated from her

husband and she would be rendered homeless and or destitute.

8. The plaintiff also avers that the said Notification of sale undervalued the suit property by a difference of Kshs.98,000,000/= -(US\$ 980,000/=) compared to what is provided in valuation report conducted by Coral Property Consultant Limited who were instructed by the 1st defendant.

9. The plaintiff avers that she is willing and ready to arrive at an amicable solution with the 1st defendant concerning the two credit facilities and no prejudice will be suffered by the 1st Defendant if the order sought herein are granted.

The Response

10. In opposition to the Applicant's Notice Motion herein, the 1st Defendant filed a Replying Affidavit sworn by **Ms. Janet Gatwiri**, the 1st Defendant's Manager Debt Recovery, on 12.03.2021. She, **Ms. Gatwiri**, deposed that pursuant to a letter of offer dated 3.11.2010, the 1st defendant extended a credit facility to Peter John Philips and as security, the plaintiff and the Borrower executed a Charge dated 28.12.2010 over the suit property in favour of the 1st defendant.

11. Further, the deponent avers that pursuant to a letter of offer dated 24.2.2017, the 1st defendant extended another credit facility to the borrower to make an aggregate charge of US\$ 1,100,000/= and the borrower as security executed a further charge dated 31.01.2012 over the suit property.

12. The deponent avers that following breach by the Borrower on the facilities, the 1st defendant issued all the requisite notices as required under the law. However, the borrower refused, failed, and or neglected to rectify the default in the said Notices, and in consequence, whereof, the bank instructed the 2nd defendant to issue a 45 days Notification Sale of the property.

13. Further the deponent avers that there is no evidence adduced to demonstrate that the suit property was undervalued by a difference of Kshs. 98,000,000/= However, the 1st Defendant has demonstrated through a valuation by Coral Property Consultation Limited that an open market value of the property was Kshs. 200,000,000 as at 11.11.2020 and forced sale value of property is Kshs. 155,000,000/=as at 11.11.2020.

14. In conclusion, the deponent avers that the plaintiff's remedy lies in special damages against the 1st defendant in the event this court finds the 1st defendant culpable after a full hearing of the suit.

15. On 3.2.2021, when the application came before court for mention to fix a hearing date, parties agreed to canvass the same by way of written submissions. The plaintiff's submissions were dated and filed the next day while those by the 1st defendant were dated and filed on the 14th October, 2018. Counsel for the parties agreed to rely on their submissions in their entirety.

ANALYSIS AND DETERMINATION

16. I have very carefully considered the **Notice of Motion** application filed herein, the affidavits in support thereof and the Replying affidavit filed in opposition. I have also considered the written submissions as filed by both counsel in support of their opposing positions. The issue arising therefrom for consideration and determination is; *whether on the evidence and material placed before court, the plaintiff has satisfied the conditions upon which a temporary injunction can be granted?*

17. In an application for an interlocutory injunction the onus is on the applicant to satisfy the court that it should grant an injunction. An injunction, being a discretionary remedy is granted on the basis of evidence and sound legal principles and this court is required to refrain from venturing into the merits of the main suit.

18. In the Case of **Hosea Kiplagat & 6 Others...Vs...National Environment Management Authority & 2 Others (2015) eKLR**, the court (Ombwayo j) held that:-

“At the interlocutory stage the Court should not venture into making definitive findings of fact or law and particularly where the affidavits filed are contradictory as the court cannot believe or disbelieve the statements made on oath of either party without in effect trying the case.”

19. The principles to be considered before a temporary injunction pending hearing of a suit remain those established in the celebrated case of **Giella Vs Cassman Brown and Co .Ltd (1973) E A 358**. Those principles are:-

- 1. The Plaintiff must establish that he has a prima facie case with high chances of success.***
- 2. That the Plaintiff would suffer irreparable loss that cannot be compensated by an award of damages.***
- 3. If the court is in doubt, it will decide on a balance of convenience.***

20. The position above was further reiterated by the Court of Appeal in the case of **Nguruman Ltd v. Jan Bonde Nielsen & 2 Others, [2014] eKLR** where the opinion was rendered that:-

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

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

21. Guided by the law as established, I will first examine whether the Applicants have established a prima facie case. If I find in the affirmative, I shall then consider the requirement of whether they are likely to suffer irreparable harm not capable of being compensated by an award of damages, and finally, if I remain in doubt, I will then consider in whose favour the balance of convenience tilts. If however I find that no prima facie case exists then there would be no need to consider the other parameter because without a prima facie case the court cannot grant an injunction for the sake of it. It is also noteworthy

22. In the case of **Mrao Ltd v. First American Bank of Kenya Ltd & 2 Others [2003] eKLR**, Bosire, JA sought to define a prima facie case and said:

“So what is a prima facie case? I would say that in civil cases 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 as to call for an explanation or rebuttal from the latter.”

23. The Court of Appeal in deliberating what amounted to a prima facie case in **Nguruman (Supra) case**, made the following comments:

“We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right, which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right, which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant’s case is more likely than not to ultimately succeed.”

24. In applying the above principles to this matter, I have given regard to the issue regarding service of statutory notices. It is evident that the 1st Defendant has produced copies of the posted statutory notices. There are even certificates of posting annexed at pages 85 and 89 of the Defendant’s bundle of documents. The statutory demand dated 11.5.2020, issued pursuant to **Section 90(2) (e)** and **103** of the **Land Act 2012** was posted on 14.5.2020, and the plaintiff is listed as a person who was a recipient of the said notices and the postal address the said notices were posted to are P. O. Box 84321-80100 and P.O. Box 94081-80100.

25. The second statutory notice is dated 11.08.2020 and is issued pursuant section 96(1) as read with section 90(e) of the Land Act. However, the copy of the certificate of posting annexed at page 89 of the Defendant’s bundle shows that the notice was posted on 15/5/2020 which is about 2 months before the 2nd statutory notice was issued.

26. It is noteworthy that the Plaintiff has not disowned fact that the registered postal address to which the notices of intention to sell dated 11.08.2020 were dispatched to belong to her. The cause of disagreement is that the certificate of posting supporting the dispatch of the said notice is dated two months earlier than the said second notice.

27. From the evidence, I find that it was not possible for the second notices to be dispatched two months earlier, even before the date of issue. I therefore hold that, on a balance of probabilities, the plaintiff has proved that the requirement for service of the notice of sale was never effected. In the absence of proof that the said notice under Section 96(2) of the Land Act was issued and served, the Bank cannot exercise its power to sell the charged property until at least 40 days have lapsed. On this ground, the scheduled auction was null and void since the right to sell had not accrued and any sale purportedly ensuing will be void and cannot be sanctioned by the court.

28. In the case of **Nyangilo Ochieng & Another v Kenya Commercial Bank, Court of Appeal at Kisumu, Civil Appeal No. 148 of 1995 (1996 eKLR)**, the Court of Appeal stated as follows:-

“It is for the chargee to make sure that there is compliance with the requirements of s.74 (1) of the Registered Land Act. That burden is not in any manner on the chargor. Once the chargor alleges non-receipt of the statutory notice it is for the chargee to prove that such notice was in fact sent”.

29. The import of the above case law cited is that failure to issue and serve a statutory notice upon the persons mandated, amounts to a clog on the person’s equity of redemption. The chargor’s spouse rights as guaranteed by statute must always be protected despite default by the chargor. She must also be afforded reasonable opportunity to settle the debt and redeem her land. In the instant case, it is clear that the defendant, as the person obligated to prove service, failed to show that the requisite notices were indeed served upon the Plaintiff.

30. On the issue of the 1st Defendant relying on a undervalued valuation, the Plaintiff averred that the valuation report did not march its own valuation report by a difference of Kshs. 98,000,000/=. Section 97(1) and (2) of the Land Act, embodies the duty of care owed to the chargor by the chargee. The duty therein is no more than *“to obtain the best price reasonably obtainable at the time of sale.”* Apart from this, there is no other duty imposed.

31. **Section 97 (2)** requires the chargee to undertake a valuation of the property. The purpose of the valuation is to enable the chargee discharge the duty of care required by Section 97 of the Act. The said provisions provide that:

Duty of chargee exercising power of sale.

97. (1) A chargee who exercises a power to sell the charged land, including the exercise of the power to sell in pursuance of an order of a court, owes a duty of care to the chargor, any guarantor of the whole or any part of the sums advanced to the chargor, any chargee under a subsequent charge or under a lien to obtain the best price reasonably obtainable at the time of sale.

(2) A chargee shall, before exercising the right of sale, ensure that a forced sale valuation is undertaken by a valuer.”

32. In the case of **Palmy Company Limited vs Consolidated Bank of Kenya Limited [2014] eKLR**, the Court observed as follows:

“The onus of establishing on prima facie basis, that the Applicant’s right has been infringed by the Defendant by failing to discharge the duty of care under section 97(1) of the Land Act lies on the Applicant.”

And went on to state that:

“The court needs cogent evidence and material in order to say that prima facie, there has been an undervaluation of the suit property which is an infringement of section 97(2) of the Land Act by the Defendant as to entitle the court to call for an explanation or rebuttal from the Defendant.

33. I note that the Plaintiff has not tabled a current and independent report to give his version of what should be the value of the property. Consequently, I come to the conclusion that there was no proof to the requisite standards that the property had been advertised to be sold at gross-undervalue. I therefore find no merit in that complaint.

34. It is for that reason that I find that the Plaintiff has shown a prima facie case with probability of success. This will lead this court to grant restraining order against the defendants. Since I do not entertain any doubt on this first principle of granting an injunction as set out in the case of **Geilla -Vs- Cassman Brown & Co. Ltd [1973] EA 358** I will not proceed to consider where the balance of convenience lies. The court finds it prudent to give the Plaintiff herein an opportunity to protect her interests in and over the charged property for the sole reason that there is no evidence that the second statutory notice issued by the 1st Defendant on 11.08.2020 were served upon the Plaintiff.

35. Having said so, the Chargor and/or Plaintiff ought not to be allowed to escape the contractual obligations under the contract between the Chargor and the 1st Defendant. However, the 1st Defendant is therefore at liberty to exercise its statutory power of sale provided that it re-issues valid statutory notices that fully comply with the provisions of the Land Act.

36. Since it is not disputed that the borrower and/or the Plaintiff have not paid the loan in the tune of more than KShs. 1,091,699,591.16/=as at 11.3.2021. In the circumstances and taking into account all the rival interests of the parties, I proceed to issue the following **ORDERS**:

a) The 1st Defendant, shall through its agents proceed to re-issue the Plaintiff with the notice under Section 96(2) of the Land Act; under the Auctioneers Rules 1997, to thereafter, the sale shall abide by the relevant provisions of the Auctioneers Act and rules under the Auctioneers Rules.

b) Upon fulfilment of the aforesaid conditions, the Defendant shall be at liberty to exercise its statutory power of sale against the Plaintiff.

c) The application dated 28.1.2021 having succeeded in part, each party shall bear its own costs.

It is so ordered.

Dated, Signed and Delivered at Mombasa this 22nd day of June 2021.

D. O. CHEPKWONY

JUDGE

In the Presence of:

Mr. Azige counsel for Plaintiff/Applicant

Mr. Wawire Counsel for the Defendant/Respondent

Court Assisnt - Bancy