REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAJIADO

CIVIL SUIT NO. E007 OF 2021

DORCAS APONDI OMONDI .....1ST PLAINTIFF/APPLICANT

JAIRUS GILBERT MIDHUNE OMONDI.....2ND PLAINTIFF/APPLICANT

KAPUTIEI SAFARILAND HOTEL.....3RD PLAINTIFF/APPLICANT

VERSUS

CREDIT BANK LIMITED.....1STDEFENDANT/RESPONDENT

LYDIAH N. WAWERU T/A

PURPLE ROYAL AUCTIONEERS.....2ND DEFENDANT/RESPONDENT

RULING

1. The applicants took out a motion on notice dated 19th March, 2021,seeking a temporary injunction restraining the respondents, their servants and or agents from selling, transferring, alienating or in any other way disposing of or interfering with parcel Nos. **Kajiado/Kaputiei North/22282;22283** and **22284 and Kajiado/ Kaputiei North/55793** and **55794,** until the hearing and determination of the main suit.

2. The motion is premised on the grounds on the body of the application and the supporting affidavits of the 1st and 2nd applicants, filed together with the motion. The grounds are that: the 1st applicant is the registered proprietor of **Parcel Nos. Kajiado/ Kaputiei North/ 22282, 22283** and **22284,** while the 1st and 2nd applicants are joint proprietors of **Parcel Nos. Kajiado/Kaputiei North/55793** and **55794**. The 1st and 2nd applicants are also directors of the 3rd applicant.

3. The 3rd applicant applied for and obtained a financial facility from the 1st respondent of Kshs. 56,000,000 through its application dated 3rd April 2017. The loan was secured by legal charges over the five properties and the 1st and 2nd applicants were guarantors for that loan.

4. Due to accrual of arrears on the loan aggravated by the Covid 19 pandemic which lead to closure of the 3rd applicant's business following the government's directive as a measure of containing the pandemic, the 3rd applicant requested the 1st respondent to restructure the loan facility through its letter of 29th May 2020, but the letter was not responded to.

5. The applicants state that they were not served with statutory notices on the default or the outstanding amount or requiring them to perform their obligations under the charges. Instead, they state, on 14th January 2021, the 1st respondent through the 2nd respondent, issued what they say was an illegal 45 days' notice to sale the securities by public auction for non-payment of the loan. The 2nd respondent also proceeded to advertise the properties on 8th March 2021 for sale by public auction which was to take place on 24th March 2021.

6. The applicants assert that the notification of sale and subsequent advertisement of sale of the properties through the intended public auction, were illegal and irregular, contravened the law and the terms of the legal charges on realization of the securities.

7. In her supporting affidavit, the 1st applicant, states that on 3rd April 2017, the 3rd applicant applied for financial accommodation from the 1st respondent of Kshs, 56,000,000 which was secured by legal charges registered on 16th May 2017 over their properties. She deposes that due to the Covid 19 Pandemic, the 3rd applicant was forced to close temporarily as was directed by the government and as a result, the loan facility fell into arrears. The 3rd applicant wrote to the 1st respondent on 29th May 2020 requesting for restructuring of the loan, but the letter

was not responded to.

8. She deposes that she was not served with any statutory notice by the 1st respondent on the 3rd applicant's default. Only the 2nd respondent issued the forty-five (45) days' notice of sale on 12th January 2021. The 2nd respondent proceeded to advertise the property on 8th March 2021 for sale by public that was to take place on 24th March 2021. This, she asserts, was done without following the law, rendering the action unlawful. The 2nd applicant swore an affidavit on 19th March 2021, adopting the 1st applicant's depositions.

Response

9. The respondents have filed a replying affidavit by Francis Wainaina Ngaruiya, head of legal at the 1st respondent, sworn on 29th March 2021. He deposes that the applicants admit that the 3rd applicant obtained a financial facility of Kshs, 56,000,000. The loan was to be repaid in ninety-six (96) monthly instalments of Kshs. 972,802 after a moratorium of twelve months during which period the 3rd applicant was to service monthly interest on the amount drawn. Legal charges were duly registered against the properties to secure the loan. The 1st and 2nd applicants also executed personal guaranties in favour of the 1st respondent as further guarantee for repayment of the loan.

10. The 3rd applicant accessed the financial facility but defaulted on the repayments and as a result, the loan fell into arrears. Several demand letters were sent to the applicants calling on them to regularize the default to no avail. The state of affairs persisted up to 5th March 2021 with the outstanding amount standing at Kshs. 85,432,624. The 1st respondent had to initiate the process of realizing the securities. On 4th March 2019, it issued a statutory notice under section 90(1) (2) (3) of the Land Act to the chargors demanding rectification of the default.

11. It is deposed that immediately the applicants received the statutory notice, they engaged the 1st respondent and requested for more time to put their house in order and clear the outstanding arrears. The 1st respondent indulged them and reminded them through letter dated 11th September 2019 of the intention to sell the properties (WFN7) but the applicants did not rectify the situation. The 1st respondent then issued the forty (40) days' notice under section 96(2) (3) of the Act dated 16th December 2019 to the 1st and 2nd applicants as chargors.

12. By the time the days lapsed, Covid 19 had set in and the applicants again requested the 1st respondent to restructure the loan and also sought additional facility to enable the 3rd applicant complete construction of the hotel. The first respondent acceded to their request, to give further advance. A new letter of offer dated 23rd September 2020 restructuring the loan and to include additional loan facility of Kshs. 31,000,000, was sent to the applicants but they did not execute it. Despite this, on 8th December 2021, the 1st respondent's officials held a meeting with the 1st and 2nd applicants who promised to execute the new letter of offer failure to which the 1st respondent would proceed to realize the securities.

13. Since the letter of offer on the restructure of the loan facility was not executed within the agreed timelines promised, the 1st respondent instructed the 2nd respondent to proceed and issue appropriate notices which was done. It is the respondents' case that the applicants concealed material facts from the court and, therefore, they have not come to court with clean hands, given that there is clear default on their part.

14. The applicants filed supplementary affidavit sworn on 7th May 2021 responding to the 1st respondent's replying affidavit. The 1st applicant stated that when they signed the letter of offer and offered their properties as securities, it was incumbent upon the 1st respondent to honour its terms (original terms of the offer) and that the loan was to be released in whole and not in instalments. The moratorium would have started running from 31st May 2018 when the last disbursement was made (into the applicant's account), in the absence of a notice in terms of clause 5 of that letter of offer.

Applicants' submissions

15. The applicants' written submissions are dated 18th June2021. They submit that they have satisfied the conditions for grant of injunction in terms of ***Giella vs Casman Brown & Co. Ltd*** [1973] EA 358. In their view, they have established a prima facie case in that if an injunction is not granted, they will suffer irreparable injury that cannot be compensated by way of damages. If in doubt, the court should decide the application on the balance of convenience and the two requirements are to be looked at separately.

16. They also rely on ***Ngurumani Ltd v Jan Bonde Nielsen & 2 others*** [2014] eKLR and argued that when considering whether or not a prima facie case has been established, the court does not conduct a mini trial. It is their submission that the 1st respondent violated the law in issuing statutory notices and kick starting the process to realize securities which rendered the process irregular and or illegal. They rely on paragraph 5 of the letter of offer to argue that the facility was payable on demand. The loan facility was for 96 months after a moratorium period of 12 months which was reiterated in each of the legal charges created over the properties.

17. According to the applicants, the last disbursement of Kshs. 5,500,000 was on 30th May 2018 and, therefore, the moratorium ended on 30th May 2019. During the moratorium, the borrower was not required to service the principal amount or interest.

18. The applicants argue that the 1st respondent served the notice on 4th March 2019, three months before expiry of the moratorium contrary to the terms of the charges which was not only illegal but also irregular. In their view, the ninety (90) days' notice was premature.

19. They also argue that the 1st respondent did not comply with section 97 (2) of the Land Act to undertake a valuation of the property prior to exercising its power of sale. They maintain that there was no valuation of the property before the 1st respondent embarked on the process of realizing the security. They rely on ***Acquinas Wasike & 2 Others v Sidian Bank Ltd & Another*** [2016] eKLR (citing ***Sablebrook PK v***

Credit Union Australia Ltd [2008] OSC 242 42.

20. The applicants submit that if the respondents proceed with the intended sale, they will suffer irreparable harm that cannot be compensated by damages in that were the court to finally find that the process was illegal, they would have lost their properties. They cite ***Ali Elmi Abdi v Nairobi County Government*** [2018] eKLR citing ***Waithaka v Industrial and Commercial Development Corporation*** [2001] eKLR. They also cite ***Stars & Garters Restaurant & Another v National Bank of Kenya Ltd*** [2019] eKLR to argue that a chargor whose security is sold without compliance with statutory provisions and terms of the mortgage will suffer irreparable loss.

21. Regarding the balance of convenience, they argue that it tilts in their favour since the 1st respondent still holds the securities. They again rely on ***stars & Garten Restaurant & Another v National Bank of Kenya*** (Supra)

22. On the accusation that they did not disclose material facts to the court, they argue that the communication on the restructure of the loan was without a *"prejudice"* basis and, therefore, they did not conceal material facts from the court. They rely on ***Guardian Bank Ltd v Jambo Biscuits Kenya Limited*** [2014] eKLR on the without prejudice rule. They also cite ***Ronnie Rogers Malumbe v Erasto Muga*** **[2015] eKLR** on the same principle. They urge the court to allow their application with costs.

Respondents' submissions

23. The respondents written submissions are dated 7th July 2021. They submit that the applicants obtained a loan of Kshs. 56,000,000 which was secured by legal charges over the suit properties. When the 3rd applicant defaulted in the repayment, the 1st defendant sent out demand letters and reminders and issued a statutory notice under section 90(1) of the Act. According to the respondents, all statutory notices were served and the applicants tried to engage the 1st respondent to have the loan restructured. It is their submission that they followed the procedure and complied with the law in issuing and serving statutory notices.

24. The respondents further argue that the applicants failed to disclose material facts to the court when they first approached it for interim orders. They contend that the fact that communication on the restructuring of the loan was made on without prejudice basis, is not a ground to reject the communication. They rely on ***Brinks Mat Ltd v Elcombe & Others*** [1988] 3 ALL ER 180 on the duty to disclose.

26. They also argue that the applicants have not established a prima facie case with a probability of success and rely on ***Stek Cosmetics Ltd v Family Bank Ltd &Another*** [2020] eKLR. On what amounts to prima facie case, the respondents cite ***Mrao v First American Bank of Kenya Ltd & 2 Others*** [2003] eKLR, that a prima facie case is one which on the material presented to court, a tribunal property directing itself will conclude that there exists a right which has been infringed by the opposite party as to call for an explanation or rebuttal. It is their case that the applicants have not shown that they have met this threshold. They argue that the facts in the ***stek communication case*** (supra) apply to the present case and urge the court to adopt the reasoning in that case and dismiss the application.

26. Regarding the submission that no pre-sale valuation was conducted, the respondents argue that this was not an issue in the applicants' application and was not even adverted to in the affidavits in support of the application. In their view, the submission on this point is akin to framing pleadings and prayers through submissions since parties are bound by their pleadings. They rely on ***Dakianga Distributors (K) Ltd v Kenya Seed Company Ltd*** **[**2015] eKLR on this point.

27. The respondents again argue that the applicants have not shown that they will suffer irreparable injury which cannot be compensated by damages. They contend that the 1st respondent is a financial institution capable of compensating the applicants were they to succeed in the suit.

28. On the balance of convenience, they maintain that the balance tilts in their favour and not that of the applicants. They again rely on the ***Stek Cosmetics*** case (Supra). They urge that the application be dismissed with costs.

Determination

29. I have considered the application, the response and submissions. I have also considered the decisions relied on by parties. What is before this court is a motion seeking an interlocutory injunction to restrain the 1st respondent from exercising its statutory power of sale over parcel Nos. Kajiado/KaputieiNorth/22282;22283;22284andKajiado/Kaputiei North/55793 and 55794, pending the hearing and determination of the main suit.

30. The grounds for seeking injunction as they appear on the face of the application and supporting affidavits are that statutory notices were not served and that invocation of the statutory power of sale was premature. The applicants also argued through their submissions that the 1st respondent did not undertake presale valuation of the properties. They therefore argue, that if the auction is allowed to go on, they will suffer irreparable loss which cannot be adequately compensated by way of damages.

31. The respondents on their part argue that the application is unmeritorious; that they complied with the law before exercising the statutory power sale; that the 3rd applicant is in default and that the applicants have not established a prima facie case with probability of success, or that they will suffer irreparable loss that cannot be adequately compensated by way of damages.

32. The law on an application for interlocutory injunction is settled that an applicant must demonstrate that he has a prima facie case with probability of success, that he will suffer irreparable loss that cannot be adequately compensated by damages if the order is not granted or that the balance of convenience tilts in his favour. In that regard, it is the applicant's duty to demonstrate that it meets the test set in ***Giella v Cassman Brown & Company Limited*** (supra).

33. The 3rd applicant obtained a financial facility from the 1st respondent which was secured by legal charges over the suit properties. The applicants state that the 3rd applicant encountered difficulty in repaying the loan due hard economic conditions following the outbreak of Covid 19 pandemic which forced the 3rd applicant to close down its business. The applicants do admit that there was accrual of arrear which means the 3rd applicant did not pay the loan. They also admit that they requested the 1st respondent to restructure the loan but it did not respond to their request.

34. The applicants argue that they were not served with statutory notices and therefore, the process of realization of the securities was not only illegal but also irregular.

35. The law allows the 1st respondent, as chargee, to exercise its statutory power of sale in the event of default by the borrower in this case the 3rd applicant, to repay the loan. Section 90(1) of the Land Act, provided that if a chargor is in default of any obligation and fails to pay interest or any other periodic payment or any part thereof due under a charge or in the performance or observation of any covenant, and continues to be in default for one month, the chargee may serve a notice in writing on the chargor requiring him to pay the money owing, or to perform and observe the terms of the agreement.

36. Section 90(2) provides that the notice to be served should adequately inform the chargor the nature and extent of the default; the amount that must be paid to rectify the default and the time, being not less than three months, by the end of which the default must have been rectified. The notice should also inform the borrower of the consequences to follow should he fail to comply.

37. Subsection (3) contains the options available to the chargee if the chargor does not rectify the situation within the given period. One of the options is to sell the charged property. That is the option the 1st respondent has chosen in the present situation. It instructed the 2nd respondent to serve the notice and advertise the suit properties for sale, giving rise to the present suit and application.

38. In terms of section 90(1), the 1st respondent was required to serve the applicants with a statutory notice calling on them to rectify the default. The applicants argue that the statutory notice required under section 90(1) was not served while the 1st respondent maintains that the applicants were served with all statutory notices.

39. I have gone through the application and the response as well as the documents annexed to the affidavits filed by both parties in support of their respective positions. The 1st respondent has attached a letter dated 4th October 2018 to the 3rd respondent reminding it that it was in arrears and unless the arrears were cleared, the 1st respondent would take steps to realize the securities (Annex 4).

40. The 1st respondent then issued a statutory notice issued under section 90(1) dated 4th March 2019 and addressed to the 1st and 2nd applicants and addressed to the 3rd applicant. The Notice was sent to the applicants by registered post and a certificate of posting was also attached. The notice required the applicants to pay the outstanding amount arrears within three months. (annex 6).

41. The 1st respondent then issued a fourteen days' notice dated 13th September 2019 reminding the applicants that the statutory period of three months had expired and that it would invoke its statutory power of sale since they had failed to regularize the situation. The letter was again sent to the three applicants by registered post a copy of certificate of posting is attached to the 1st respondent's replying affidavit (Annex 7).

42. Further, the 1st respondent issued a notice under section 96(2) dated 16th December 2019 to the applicants. Annex 8. It was again sent y registered post and a certificate of posting was annexed as annex 9. The 2nd respondent then took action and served the forty five days notification of sale which the applicants admit was served. The notices issued by the 1st respondent have the applicants' addresses which they do not dispute.

43. The law requires the applicants to show that they have a prima facie case with a probability of success in order to persuade the court to grant them an interlocutory injunction. In ***Mrao Ltd v First American Bank of Kenya Ltd & 2 others*** (supra), the Court of Appeal stated that the principles which guide the court in deciding whether or not to grant an interlocutory injunction were settled by the decision in ***Giella v Cassman Brown (supra).***

44. On what a prima facie case is, the court in the ***Mrao case*** held 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 as to call for an explanation or rebuttal from the latter.

45. In ***Nguruman Limited v Jan Bonde Nielsen & 2 others*** (supra), the Court of Appeal adopted the definition of a prima facie case in the ***Mrao case*** and stated that the party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained. The invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion.

46. In considering whether or not a prima facie case has been established, the court should not hold a mini trial or examine the merits of the case closely. All that the court is to see is that on the face of it the person seeking an injunction has a right which has been or is threatened with violation**.** The parties' positions are not to be proved in a manner that would give a final decision in discharging a prima facie case. The applicant is required show that he has a fair and bona fide question to raise as to the existence of the right which he alleges.

47. In the present application, the applicants were required to show that their right is being violated or is likely to be violated by the respondents to shift the burden to the respondents to explain or rebut the applicants' claim. It is not enough for the applicants to merely state that they have a prima facie case. That alone will not bring them within the meaning of a *prima facie* case as required by law.

48. I have considered the material placed before this court, the basis of which the applicants seek a temporary injunction. This court is not conducting a mini trial of the applicants' case. Its task at present is to determine on the material placed before it, whether the applicants have indeed put forward a case that would require it to intervene and issue a temporary injunction in their favour so that the 1st respondent does not exercise its statutory power of sale. In other words, if the order is not granted, the applicants will suffer irreparable injury that cannot otherwise be compensated by way of damages.

49. The applicants' main argument is that the 1st respondent did not serve statutory notices as required by sections 90(1) and 96(2) of the Land Act. The 1st respondent on its part attached notices addressed to the 1st and 2nd applicants as chargors and the 3rd respondent the borrower. As already stated, the notices are shown to have been sent to the three applicants through registered mail. The Notices issued by the 2nd respondent are however admitted to have been served. The applicants' argument that they were not served with statutory notices has no merit.

50. The applicants' other grievance is the 1st respondent invoked the statutory power of sale prematurely. According to the applicants, there was a one year moratorium and therefore they were not required to repay the loan or interest until after the entire loan had been disbursed. The 1st respondent o its part argues that the 3rd applicant was to pay repay interest on the amount drawn which it did not do.

51. I have perused the letter of offer dated 3rd April 2017. Paragraph 5 states that "the loan facility s for 96 months after a moratorium of 12 months. The client (3rd applicant) shall service **Monthly interest** on the amount drawn during the moratorium." This is contrary to the applicants' claim that there was no requirement for repayment of the loan or interest during the moratorium.

52. The applicant further argues that the properties were not valued prior to being advertised for sale by public auction. The respondents on their part argue that this was not one of the reasons why the applicants sought an injunction and that the issue has only been raised in the submissions. I have perused the application and the supporting affidavits. It is true that the applicants did not raise the issue of valuation of the properties in the application. The issue has only been raised in the submissions after parties had exchanged responses. The respondents could not therefore respond to that issue through submissions. Parties are bound by their pleadings and cannot raise issues through submissions ambushing the other party.

53. On the facts of this application and the response, I am not persuaded that the applicants have satisfied the test for granting a temporary injunction. That is to say they have not demonstrated that they have a prima facie case with a probability of success. The applicants have not denied there is default. In fact they admit that there is accrual of arrears and on that basis, 1st respondent issued notices as required by law and the 2nd respondent served the 45 days' notice and the notification of sale, thus complying with the law.

54. On whether the applicants will suffer irreparable injury which cannot be compensated by damages unless temporary injunction is granted, I am not also persuaded that this will be the case. The 1st respondent is a financial institution that can easily compensate the applicants were their suit to eventually succeed. The charged properties values are known or can be ascertained and, therefore, the applicants can recoup the value of the properties if the suit succeeds.

55. Regarding the balance of convenience, does it tilt in the applicants' favour? I think not. The loan amount continues to attract interest and it could easily outstrip the value of the charged properties. This means that if the 1st respondent is restrained from exercising its statutory power of sale until the suit is heard and determined, it may not be able to recover the outstanding loan amount and interest by the time the suit will be determined. This is so because the value of the properties cannot be guaranteed to be sufficient to cover the amount that will be then outstanding. In that regard, I find the balance of convenience to tilts in favour of the 1st respondent which can pay the value of the properties if it loses the suit.

56. As the Court of Appeal stated In ***Giro Commercial Bank Limited v Halid Hamad Mutesi*** **[2002] eKLR**, *a mortgagee cannot be restrained from exercising his power of sale because the amount due is in dispute or that the mortgagee has commenced a redemption action* **or because the mortgagor objects to the manner in which the sale is being arranged. Where** *the debt is admitted as due and the loan is not being serviced, the court should not grant an injunction***.**

57. It is clear to this court that the applicants are in default which they admitted and that was why they requested for restructuring of the loan. They did not show that they had made any repayment and having failed to do so, they cannot turn to this court for an injunction to restrain the chargee from exercising its statutory power of sale.

58. In the circumstances, having considered the application, the response and submissions as well as the decisions relied on, I am not satisfied that the applicants have made a case for grant of the interlocutory injunction they seeks. Consequently, the application dated 19th March 2021 is declined and dismissed with costs.

DATED, SIGNED AND DELIVERED IN AT KAJIADO THIS 26TH DAY OF OCTOBER, 2021

E.C MWITA

JUDGE