



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

COMMERCIAL DIVISION

CIVIL CASE NO. E053 OF 2021

EAST AFRICA TRANSPORT LOGISTICS LIMITED.....PLAINTIFF

VERSUS

BANK OF AFRICA KENYA LIMITED.....DEFENDANT

RULING

1. This Ruling concerns a **Notice of Motion** application dated **13th May, 2019** brought by the Plaintiff/Applicant under **Order 40 Rules 1,2,3 and 4**, all the **Civil Procedure Rules, 2010, Sections 1A, 1B and 3A**, all of the **Civil Procedure Act**, the inherent jurisdiction of the court and all other enabling provisions of the law. The same is filed simultaneously with a **Plaint** dated on even date.

2. The application seeks the following orders:-

a) Spent;

b) Spent;

c) That pending the hearing and determination of the suit herein the Defendant by itself, its servants and/or agents be restrained by a temporary injunction from alienating, selling or in any other way dealing with the Plaintiff's property known as L.R.No. Mainland North Section 1/9475 (Orig No.1399 & 9474) Cr.32445 Shanzu/ Mombasa.

d) That costs be provided for.

3. The same is premised on six(6) grounds on the face of it and a sixteen(16) paragraphs affidavit sworn by Plaintiffs'/Applicants' Managing director, one **Hannah Wambui**.

4. The main ground on the face of it is that there was no proper Notice to the Applicant in order for it to exercise its legal right of redemption according to the law and that no Statutory Notice was served as required hence the procedure for foreclosure is defective.

5. The application is opposed vide a **Replying Affidavit** sworn by **Charles Waiyaki**, a Recoveries Officer of the Respondent in which he has raised thirty (30) grounds. He asserts that the Application and the suit are res-judicata, this court having dismissed an application for injunction based on the same premises being **HCCC No.042 of 2019**, with same parties.

6. The Respondent refuted the claim that it had not issued a Notice of Foreclosure as required by law and that the covenant for sale was as a result of the Ruling delivered on **13th May, 2020**. It provided evidence to show that valuation was carried out and annexed a copy of the same thereto.

7. When the counsel for the parties appeared in court, they agreed to canvass the application by way of written submissions. The parties then proceeded and elected to rely on their written submissions and cited authorities in their entirety.

Analysis and Determination

8. Having read through the application, the **Supporting Affidavit**

thereof and **Replying Affidavit** in response thereof together with the submissions and cited authorities by both parties, I find the following issues arise for trial:-

a) Whether the second statutory notice is a requirement in law after dismissal of a matter challenging its issuance in the first instance.

b) Whether an injunction should be confirmed or sale by auction to proceed.

c) Who is to bear costs of the application and suit (if any).

9. The law that governs the Equity of Redemption is commenced by **Section 90** of the **Land Act, 2012** which provides as follows:-

(1) If a chargor is in default of any obligation, fails to pay interest or any other periodic payment or any part thereof due under any charge or in the performance or observation of any covenant, express or implied, in any charge, and continues to be default for one month, the chargee may serve on the chargor a notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be”.

(2) ...

(3) If the chargor does not comply within ninety days after the date of service of the notice under, subsection (1), the chargee may—

(e) sell the charged land;

10. From the reading of the above cited provision, it clearly comes out that by a chargor failing to comply with the Notice, the chargee is allowed by law to sell the property as per the provisions of **Section 96** of the **Land Act** which provides as follows:-

96(1) Where a chargor is in default of the obligations under a charge and remains in default at the expiry of the time provided for the rectification of that default in the notice served on the chargor under section 90(1), a chargee may exercise the power to sell the charged land.”

11. From this provision, it is clear that a chargee shall not sell the land unless a further Notice is given by the auctioneer for not less than 40 days. **Sub-section (2)** provides as follows:-

(2) Before exercising the power to sell the charged land, the chargee shall serve on the chargor a notice to sell in the prescribed form and shall not proceed to complete any contract for the sale of the charged land until at least forty days have elapsed from the date of the service of that notice to sell”.

12. From the proceedings as per the court record, I am informed that these

processes were exhausted in the first instant which triggered the Applicant to file the dismissed case being **HCCC No.042 of 2019**, which had the same parties.

13. I have looked at the **Replying Affidavit** in the case cited above at **Page 5 – 21, 83 – 85 and 112 – 120**. The **Demand Letters** to rectify the breach and or default are contained in letters dated **4th November 2016, 30th November, 2016 and 12th January, 2017**. The Statutory Notice to foreclosure is contained in the letter dated **6th February, 2017 and 24th May, 2017**.

14. I have no doubt in my mind that the law was complied with and the Ruling delivered on **13th February, 2020** is conclusive on the issue of whether a proper notice to foreclose was given.

15. The second part of the dispute is whether a second Notice was required after the matter in that case was dismissed.

16. I have perused the relevant Sections of the Act and I have not come

across any, which expressly states that the process of sale commences afresh after an injunction stopping the sale is lifted.

17. With due respect, I find that, the Plaintiffs lamentations have no legal protection and accordingly dismissed the same. As for the law on “*Resjudicata*”, the same is provided for by **Section 7** of the **Civil Procedure Act (Cap 21) Laws of Kenya**, as follows:-

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court”.

18. I have read through the Complaint and application, both dated **4th June, 2019** filed simultaneously in **HCCC No.042 of 2019** in which this

court dismissed the application in its Ruling delivered on **13th February, 2020**. It is note-worthy that the pleadings in the instant case are a replication of the pleadings in **HCCC No.042 of 2019** in terms of content and prayers (word for word) except for the dates which have been changed.

19. The other salient feature is that in the latter case, the application was dismissed and the main suit withdrawn, in an effort to circumvent the plea of *resjudiata* and filing of this suit. The withdrawal of the suit was deliberately done so as to defeat **Section 6** of the **Civil Procedure Rules** which provides as follows:-

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed”.

20. It will be noted that after discussing the existence of the other one, the Applicant merely stated that the same had been withdrawn and failed to disclose that the application for injunction had been withdrawn. The Applicant also failed to annex copies of the pleadings to assist the court at first instance to know and appreciate the nature of claim in either suit.

21. I take great exemption in this kind of practice where a party fails the test of material disclosure and attempts to dupe the court to grant orders already discharged and or it refused to grant. In conclusion, I find the application dated **13th May, 2021** is *res-judicata* and say nothing of the main suit.

22. With regard to the injunction, the conditions for grant of an injunction are well settled in the East African and Kenyan courts. The conditions were pronounced in the decision in the case of **Giella –vs- Cassman Brown & Co. Ltd [1973] 1EA 358**, where Spray, V.P of the Court of Appeal of East Africa expressed himself as follows:-

“The condition for grant of an interlocutory injunction are now, I think, well settled in East Africa.

First, an Applicant must shows a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the Applicant must otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on a balance of convenience”.

23. A *prima facie* case is defined as a set of facts giving rise to rights protected by a law. In this regard, a party has to show that on the set of facts existing, the Defendant is trampling upon the rights of the Plaintiff who therefore needs the protection of the court. This is what is commonly referred to as a cause of

action.

24. I have made a finding that the Defendant followed due process in the effort to foreclose and there is no law providing that after an injunction granted to stop a sale is lifted, the chargee ought to repeat the process all over again in order to realize the security. The Plaintiff/Applicant has failed to satisfy the court on this ground.

25. In its **Plaint**, the Applicant has not prayed for general damages based on its over valuation of the sale property. Such evidence is necessary as it would go a long way in supporting the allegations of undervalue in order for the court to make a finding on *malafides* on the part of the Defendants.

26. I have perused through the entire **Plaint**, and the application and the **Supporting Affidavits**. I have not come across a plea on how much money has been paid and the balance sought to conclude on the efforts the Plaintiff has made. The law is that since the amount of loan is known and the Defendant is restrained by **Section 97 and 98** of the **Land Act, 2021** to find the best price. The Plaintiff has not challenged the valuation annexed at **Page 163 to 183** of the **Replying Affidavit** with another valuation giving a different amount.

27. In the circumstances, the court has been denied the opportunity to make a finding on this issue. In the resultant, the balance of convenience lies in favour of the Defendant which advanced the money the Plaintiff used and has defaulted in repayment thereof and not demonstrated good faith by making any payments.

28. In conclusion, the Plaintiff/Applicants’ application dated **13th May, 2021** be and is hereby dismissed with costs to the Defendant. Subsequently, the temporary injunction granted *exparte* on **13th May 2021** be and is hereby discharged.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT MOMBASA THIS 26TH DAY OF NOVEMBER, 2021.

D. O. CHEPKWONY

JUDGE

In the presence of:

Mr. Gikandi counsel for Plaintiff

Mr. Wafula counsel for Defendant

Court Assistant - Bancy