REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CIVIL SUIT NO.E005 OF 2021

JOHN MAURICE AYEIYE.....PLAINTIFF/APPLICANT

VERSUS

KENYA COMMERCIAL BANK LIMITED ...1ST DEFENDANT

KEYSIAN AUCTIONEERS .....2ND DEFENDANT

R U L I N G

[1] The Notice of Motion dated 25th May 2021, was essentially brought under the provisions of **Order 40 Rules** (**1**) (**2**) and (**9**) of the **Civil Procedure Rules** among other provisions of the Law.

The main prayers being sought by the applicant/plaintiff, **John Maurice Otieno Ayieye** against the first respondent/defendant, **Kenya Commercial Bank Ltd** and the second respondent/defendant, **Keysian Auctioneers**, is prayer three (**lll**) that an order of injunction be granted by this court restraining the respondents either by themselves or their authorized agents from offering for sale either by public action or private treaty the parcel of land described as **No.Busia Municipality/334** pending hearing and determination of the main suit.

[2] The application is based on the grounds set out in the notice of motion as fortified by the applicant's averments in the supporting affidavit dated 25th May 2021.

The respondents filed a replying affidavit dated 24th June 2021 and deponed by the first respondent's Recovery Manager, **Bertha Oduor**, opposing the application which was canvassed by way of written submissions.

[3] In that regard, both parties filed their respective submissions through **Akenga Kimutai & Associates**, **Advocates** and **Mukele Moni & Co. Advocates** respectively. These were given due consideration by this court. As may be borne from the pleadings herein, the current dispute arises from a commercial transaction involving the plaintiff and the first defendant bank. It is thus pleaded that in the year 2014, the plaintiff applied for a mortgage loan of ksh.21 million from the defendant bank. This was accordingly granted on specified terms and conditions upon which the plaintiff pledged his parcel of land Busia Municipality/334, on which stands his business premises known as **Afrique Hotel** as collateral for the repayment of the loan.

[4] It is the applicant's contention that he made various payments to the defendant bank in repayment of the loan but the bank claims and continues to claim from him a colossal sum of kshs.15,727,752/82 as at 3rd August 2020, yet the amount is payable for a period of ten (**10**) years. That, he still went ahead to service the loan and on 29th September 2020, he made a payment of kshs.100,000/= and on the 2nd October 2020, he made a further payment of kshs.300,000/=, but that notwithstanding, the defendant bank advertised the sale of his property by public auction on the 26th May 2021, in exercise of its statutory power of sale.

[5] As a result, the applicant filed the present application at the same time with the statement of claim (**plaint**) praying for a temporary injunction pending the hearing of the application and the main suit.

On the 25th May 2021, this court issued an ex-parte temporary injunction pending hearing and determination of the application.

[6] Under **Order 40 Rule** (**2**) of **Civil Procedure Rules** it is provided under **Rule 2** (**1**) that:-

> "**In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, or any time after the commencement of the suit, and either before or after judgment apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of or any injury of a like kind arising out of the same contract or relating to the same property or right**."

Under **Rule 2** (**2**), it is provided that:-

> "**The court may by order grant such injunction on such terms as to an inquiry as to damages, the duration of the injunction, keeping an account giving security or otherwise, as the court deems fit**."

[7] The decision whether or not to grant an injunction is an exercise based on discretion.

The principles applicable in such circumstances were long settled in the case of **Giella Vs. Cassman Brown & Co. Ltd**. (**1973**) **E.A. 358**, where it was held that:-

> "**The conditions for the grant of an interlocutory injunction are now well settlement in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might 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**."

[8] These principles were reiterated in the case of **Nguruman Limited Vs. Jan Bonde Nielsen & others** (**2014**) **eKLR**, where it was held:-

> "**In an interlocutory injunction application, the applicant has to satisfy the triple requirements to:**
>
> **(a) establish his case only at a prima facie level**
>
> **(b) demonstrate irreparable injury if a temporary injunction is not granted, and**
>
> **(c) ally (sic) any doubts as to (b) by showing that the balance of convenience is in his favour.**
>
> **These are the three pillars on which rests (sic) the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially**".

[9] With regard to the first principle, it was stated in **Mrao Ltd Vs**. **First American Bank of Kenya & others (2003) eKLR**, that a prima facie case", includes;

> "**but is not confined to a "genuine and arguable case.". It is a case which, on the material presented to the court, a tribunal property 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……**
>
> **A prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case**."

[10] In the **Nguruman Ltd case** (**supra**), the court went on to say 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. 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**."

[11] In this case, the applicant does not deny the existence of the material mortgage loan which was advanced to him by the first respondent on the basis of the terms and conditions expressed in the letter of offer dated 4th March 2014, which led to the creation of a charge over the suit property, being land parcel **No.Busia Municipality/334** on the 10th April 2014. The change instrument was duly executed by the chargee (**first respondent**) and the chargor (**applicant**) and registered on 16th April 2014. It conferred upon the bank, the statutory power of sale.

[12] It was in exercise of such power that the bank put in motion the process of selling by public auction the suit property for purposes of recovering the outstanding balance of the loan amount inclusive of interest and/or any other charges.

There is no denial from the applicant that the respondent had the right of exercising its statutory power of sale under the charge instrument. It is also not denied that the applicant is rightly and truly indebted to the respondent bank in the amount claimed. The only dispute appears to be in the manner of how the claimed amount was arrived at. Indeed, the applicant wishes for the accounts to be taken or reconciled but this is not among his prayers in the main suit.

[13] Basically, the applicant raises issues with regard to the process undertaken by the respondents bank in exercising its statutory power of sale. This is not sufficient to demonstrate the establishment of a "*prima face*" case with a probability of success. The applicant was required

but did not provide credible and sufficient evidence showing an infringement of a right by the respondent bank against himself for this court to exercise discretion in his favour on account of a prima facie case with a probability of success.

[14] With regard to the second principle, the applicant was required to demonstrate irreparable injury if he is not granted a temporary injunction. In the **Nguruman Ltd case** (**supra**), the court held that:-

> "**the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying no interlocutory order of injunction should normally be granted however strong the applicant's claim may appear at that stage.**"

Herein, the applicant avers that he will suffer irreparable loss as the suit property is his only source of livelihood and that it may be sold at a price that is far below the required amount despite having heavily invested in the property.

[15] This is a mere averment which does not demonstrate irreparable injury or loss. Even if the applicant was to suffer any loss, such loss would easily be compensated by an award of damages. He clearly failed in establishing the second principle for exercise of discretion in his favour. As to the third principle, the balance of convenience would in this court's opinion tilt more in favour of the respondents than the applicant for the main reason that the first respondent would be capable of compensating the applicant by way of damages should the suit property be disposed of by sale which later turns out to be unlawful. The applicant in the circumstances would not suffer irreparable loss.

[16] But, if the respondent bank is injucted from exercising its statutory power of sale, the loss it may suffer on account of the loan advanced to the applicant would be greater as the indebtedness would surely increase on the basis of interest and extra charges and there would be no guarantee that the respondent bank would ever recover what is justly and fairly owed to itself by the applicant.

[17] All in all, the present application is devoid of merit and is hereby dismissed with costs to the respondents.

Ordered accordingly.

J.R. KARANJAH

J U D G E

[DELIVERED & SIGNED THIS 25TH DAY OF NOVEMBER 2021]