REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 13 OF 2013

ANWAR MOHAMED BAYUSUF LIMITED...........................PLAINTIFF

VERSUS

DIAMOND TRUST BANK (K) LIMITED............................DEFENDANT

R U L I N G

1. By it notice of motion dated 30/7/2019, the plaintiff has, for the second time, sought from the court an Order of injunction to restrain the defendants from selling or alienating the parcel of land known as LR No. Mombasa/Block X/249 pending the hearing and determination of the suit. The grounds set forth to support the application and disclosed in the face of the application and the Affidavit in support were that the due process ordered by the court in its ruling of 26/10/2018 had not been complied with in that no notification of sale had been served upon the plaintiff and that the plaintiff had reported to the central back criminal transaction in its accounts and the Central bank continued with investigations hence any sale would defeat the purpose and substratum of the suit.

2. It was then denied that the plaintiff owes to the defendant the sum of 174,974,218 as alleged by the defendant. To the Affidavit was annexed a Notice of 45 days demanding that the plaintiff pays the sum due and in default a public action of the suit property would ensue. There was also exhibited a valuation dated 8/5/2017, an order permitting the anti-banking fraud to investigate the account issued on 28/2/2019 and the application leading thereto together with Notices of default and intention to sell issued on 15/11/2018 and 28/3/2019 respectively.

3. The Application was opposed by the defendant by a Replying Affidavit as well as a supplementary Affidavit sworn by one LWANGA MWANGI, who identified himself as the Debt Recovery Officer.

4. The essence of those Affidavits was that as early as 17/7/2017 the court had narrowed down the dispute to the extent of the debt and appointed to determine that question. As a consequence of such appointment, a report dated 26/01/2018 had been filed in court and revealing that the sum outstanding as at the date was 174,974,218.06. It was asserted and deponed in the Replying Affidavit that pursuant to the ruling of 26/10/2018 the bank issued statutory notices pursuant to Section 90 and 96(2) and duty served the same in accordance with the contract between the parties and the law applicable.

5. The defendant therefore denied having been the impediment to the determination of the dispute and that it was the plaintiff who had delayed the process by filing afresh the current application seeking same orders of injunction. It was further deponed that the bank had carried a current valuation of the property and exhibited a valuation report by CHRISCA REAL ESTATE dated 20/9/2019 and setting a reserve price of Kshs.30,000,000/= and that the search and seizure warrants issued by the magistrates court had since been set aside. In short the defendant took the position that it had done everything legal to entitle it to exercise its statutory power of sale and that the application by the plaintiff was thus unmerited.

6. The application was, by direction of the court, canvassed by way of written submissions. The plaintiff's submissions were filed on the 8/11/2019 while those by the defendant were filed on the 14/11/2019. Those submissions made reliance upon decided case and were orally highlighted by counsel.

7. In the submissions, the plaintiff underscored the fact that the plaintiff had changed its address from the one used in the charge instruments and the said new address had been used to send bank statements and therefore the notices issued and allegedly sent to the address in the contractual documents could not have reached the plaintiff. It was therefore contended that such notices could not form the basis to exercise the statutory power of sale. An argument was then advanced that having been aware of the dispute as to address it was not explicable why bank did not go for personal service and that courtesy would have demanded that the counsel for the plaintiff be copied in the communication giving notices.

8. It was then contended, away for the position of lack of service that the notices served were defective notices the plaintiff was denied his

equity of redemption. An additional submission was made that the plaintiff had made attempts at reducing the debt by making payments of Kshs.70,000,000/=, 10,000,000/= and sale of trucks valued at Kshs.20,000,000/= pursuant to repossession.

9. A word was thrown in to the effect that the defendant had declined to give to the plaintiff statements of accounts and had frustrated efforts to conduct pre-trial conferences and that the plaintiff had revealed a prima facie case and lastly that the application was not abusive of the court process but genuinely made to litigate a cause. The decision on ***Isaack Ben Mulwa vs Jonathan Mutunga [2016] eKLR*** was cited for the proposition that continuous injury to land constituted distinct causes of action.

10. For the defendant, a background to the transaction between the parties was laid it being underscored that there had been a default by the plaintiff to repay the debt upon the covenanted terms leading to the efforts to realize the security which attempts were stalled by this court's decision of 26/10/2017. In that ruling the defendant submitted that there was no requirement that the notices be served otherwise than upon the terms of the charge and that there was evidence that the notices were indeed served.

11. Based on the evidence of service of the notices the defendant took the position and view that no prima facie case had been demonstrated. The decision in ***Mrao vs First American Bank of Kenya Ltd [2003] KLR 125*** was cited for the definition of a prima facie case to be a case that is above an arguable case and must demonstrate an infringement of a right with probabilities of success.

12. It was then submitted that there were notices duty served in accordance with the law under Land Act and in conformity with the parties' agreement at clause 24(o) of the charge providing that service of notice would be sufficient done if a notice is sent by registered post to the address in the charge.

13. The defendant then underscored the fact that the notices were indeed sent to the contractual address being Post of 88650 Mombasa and a certificate of posting to that effect exhibited. It was then argued, citing ***National Bank of Kenya vs Pipeplastics Sankolel (K) Ltd [2002] E.A. 503*** that a court of law cannot rewrite a contract between the parties.

14. On the sum due to the defendant and any dispute in computation thereof, the defendant again placed reliance on the decision in ***Mrao Ltd (supra)*** for the position of the law that dispute as to accounts is not a basis to grant an injunction and restrain the realization of security offered by a chargor. Other decisions were also cited for the same proposition it being stressed that position is now trite including **Francis Ichatha vs HFCK CACA No. 105/2005** that a dispute of a mathematical nature should not be a basis for grant of an injunction.

15. On whether damages would be an adequate remedy, ***Andrew Muriuki Wanjohi vs Equity Bank [2006]eklr*** was cited for the proposition of the law that once a property is offered as a collateral its sale would not constitute a loss incapable of repair by an award of damages because the value thereof has been equated with the loan for which it is a security and that the Land Act had provided a monetary damages as a remedy to the chargee effected by an irregular exercise of the statutory power of sale. The decision in Andrew Wanjohi (Supra) was additionally cited for the proposition that in some situations stopping the sale would lead to the debt outstripping to security thus tilting the balance of convenience in favour of the sale being allowed to proceed.

16. On the application being *res judicata,* the defendant took the position that there having been a determination by the court on an earlier application for injunction, the current application was bad for being res judicata. The decision in **Uhuru Highway Developers Ltd vs Central Bank [1996] eKLR** was cited for the position of the law that there must be an end to application of similar nature and that the doctrine applies to applications as it does to the suits heard and determined on the merits. For those reasons the defendant prayed that the application be dismissed with costs.

17. I have had the benefit of perusing the pleadings filed as well as the Affidavits and the record of proceedings taken so far and have come to the conclusion that in considering the current application the starting point is the ruling of 26/10/2017.

18. The only issue in this matter is whether after the ruling by the court dated 26/10/2018 the defendant has remedied the undoing the court had found against it to be entitled to pursue its chargee's power of sale.

19. In that decision, the basis of grant of the injunction was that no notice had been issued and proved to have been served pursuant to the process of Section 96 of the Land Act. For that failure and lapse of time, the process was ordered to commence afresh. In coming to is conclusion, the court found, based on concession by the defendant's counsel, that there was no evidence that the issued notices under Land Act had been served. That was, in the funding of the court, a demonstration of a prima facie case and a limited injunction was granted to enable the defendant make good the default.

20. Pursuant to that decision it is apparent that indeed notices were again issued but the plaintiff takes the position that the same were dispatched to an address which had been changed and therefore did not reach it. What I find to be irreconcilable with such assertion is the fact that the plaintiff has itself exhibited the said notices as annextures to the application. Those annextures having been filed in court in April 2019 show that as at that date the plaintiff had in fact become aware that the notices had been issued.

21. It cannot however be said that the plaintiff had changed its address. The position of the law is that parties agreed by the instrument of the legal charge that the address for service would be that of P.O. Box 88650, Mombasa. That covenant is to this court an integral term of the parties' agreement at least as far as the right to sell is concerned. To change, it would require that the parties execute an addendum to the charge to change the address of service. Parties are bound by their contracts and it is not the duty of the court to interfere or amend covenants between parties. I therefore find that there is no basis to hold that there had been a change in the address to effect service upon the plaintiff. To the contrary I do find that in issuing the Notices dated 15/11/2018, 20/3/2019 and the notification of sale dated 22/7/2019, the defendant did fully comply with the ruling by the court of 26/10/2017.

22. The court having found that the only default was evidence of service of the notices, once there is availed evidence of service of the notices as directed, there cannot be a basis to scuttle the sale further. I find that the court having founded a prima facie case on lack of

evidence of service, once that evidence has been availed, the foundation of the

Plaintiff's case has been demolished and no basis now exist to issue another injunction.

24. That being the case, I find no merit in the application dated 3/7/2019 which I hereby order to dismissed with costs.

Dated, signed and delivered at Mombasa this 23rd day of January 2020

P J O OTIENO

JUDGE