

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CIVIL CASE NO. 21 OF 2018

JOSEPH OTUMA SHIROKO.....APPELLANT

VERSUS

KENYA COMMERCIAL BANK LTD.....1ST RESPONDENT

KEYSIAN AUCTIONEERS.....2ND RESPONDENT

RULING

1. The applicant has filed a notice of motion dated 31st July 2018 seeking for orders that;

1) Spent

2) Spent

3) That pending the hearing and determination of this suit an order of temporary injunction do issue restraining the defendants jointly and severally either by themselves or through their agents, employees, servants, representatives or any other persons acting under their direction from putting for, disposing or in any other way from dealing with the following properties described as:

i. LR. Kisumu/Kogony/3311

ii. LR. No. South Wanga/Lureko/2539

iii. LR. No. Kisa/Khushiku/1361

iv. LR. No. Kisumu/Municipality/Block 12/230

4) That in the alternative pending the hearing and determination of this application as well as the suit herein this honorable court be pleased to grant stay of sale by way of public auction by the defendants scheduled for 22nd August 2018 the following properties described as:

i. LR. Kisumu/Kogony/3311

ii. LR. No. South Wanga/Lureko/2539

iii. LR. No. Kisa/Khushiku/1361

iv. LR. No. Kisumu/Municipality/Block 12/230

5) That the 1st defendant to compute its loan due and allow the Plaintiff/Applicant reschedule the same for payment by way of installments in consideration of what the Plaintiff/Applicant has already paid under the circumstances.

6) The costs of this Application be provided for.

2. The application was supported by the affidavit of the applicant. It is the case for the applicant that on various dates between the year 2013 and 2016 he was advanced loan facilities by the 1st respondent to the total sum of Kshs.97,807,196/=. That it was agreed that the 1st respondent would be deducting Kshs. 1.3 million per month from the applicant's business account of Magharibi Service Station. That contrary to the agreement the 1st respondent thereafter deducted 9 million that was in the accounts thereby frustrating his business. That he requested the 1st respondent to supply him with his bank statements but never did so. That on the 8th June, 2018 he learnt of a letter dated 4th June, 2018 by the 2nd respondent giving notice to dispose of his aforementioned property with a view to recover Kshs.87,047,057.37/=. That the 2nd respondent has advertised the property for sale. That the applicant has re-valued the properties. The valuation by the 2nd respondent is way below the forced value price. That the failure to restrain the respondents will occasion him irreparable harm and loss which cannot be quantified in monetary terms as he has sentimental value to the said properties. The applicant did annex to the application his valuation reports - marked JOS 2(a) - (c).

3. The application was opposed by the respondents through the replying affidavit of **Edward Siya**, the 1st respondent's Recoveries

Manager, mortgages. He depones that the said loan facilities advanced to the applicant were secured by the aforementioned properties. That subsequently the applicant defaulted in paying the loans. That on 17th November 2017 the 1st respondent served the applicant with three months statutory notice, marked Es-11 that was sent through registered post as evidenced by certificate of postage marked Es-3. That on 8th January, 2018 the respondent invited Damon Appraisers Valuers to conduct a valuation of the subject properties. That the valuers undertook a valuation of the subject property and established the current open market and forced sale value of the properties. The valuation reports were marked Es-13. That on 9th April, 2018 the 1st respondent served upon the applicant the statutory notice to sell, the same marked Es-14, that was also sent by registered post as evidenced by certificate of postage marked Es-4. That upon receipt of the statutory notice to sell the applicant responded by way of a letter dated 10/5/2018 that was marked Es-15. That on 30/5/2018 they instructed the 2nd respondent to issue the applicant with the requisite notices. That the 2nd respondent served the applicant with the notification of sale and redemption notice marked Es-16(a) as evidenced by certificate of postage marked 16(b). That on 30/7/2018 the 2nd respondent advertised the subject properties for sale by public auction in the Standard Newspaper, advertisement marked Es-14. That in the foregoing the applicant was served with all the requisite notices as required by law.

4. Mr. Siya further deponed that the deductions from the appellant's accounts were in according with the terms of the facilities advanced to him. That they had always furnished the appellant with statements of accounts, marked Es-10. That the applicant has not established a prima facie case with a probability of success.

5. The advocates for the respondents, **Mukele Moni & Company Advocates**, submitted that the applicant acknowledges receiving the amount of the loan. That he concedes that the amount has not been paid and that he is in default. That a statutory notice under section 90(1) of the Land Act 2012 was served by the 1st respondent as evidenced by certificate of postage marked Es-3. That the said notice was sent through the registered postal address provided by the applicant at the time of creating the legal charges. That a 40 days' notice before exercising the 1st respondent's statutory power of sale in accordance with section 96 (2) of the Land Act was issued as evidenced by the document marked Es-14 that was also served by registered post as evidenced by certificate of postage, marked Es-4.

6. Counsel further submitted that in the event that the court finds that the notices were not served, that an injunction can only be issued pending issuance of fresh notices. Reliance was made on the case of **National Bank of Kenya Limited -V- Shimmers Plaza Limited, Nairobi Civil Appeal No 20 of 2002**.

7. Counsel submitted that the demand and statutory notices served upon the applicant indicated the extent of the indebtedness. That a dispute on account is not a ground for issuing an injunction. Reliance was made on the case of **Jamii Bora Bank Limited -V- Wapaka Developers, Civil Suit No. 22 of 2018** and **Air Travel and Related Studies Limited -V- Equity Bank (Kenya) Limited - Nairobi Civil Appeal No. 272 of 2017**.

6. Counsel submitted that a pre-sale valuation of the suit properties was conducted as required by section 97 of the Land Act as shown by copies of the valuation reports marked Es-13. That the applicant has not shown that the valuation reports did not result in the best price reasonably obtained for the suit property. The case of **Zum Zum Investments limited -Vs- Habib Bank Limited, High Court Commercial Case No. 60 of 2013 (Msa)** was relied upon on that proposition.

7. Counsel submitted that the applicant has not established a prima facie case as set out in the case of **Giella -Vs- Cassman Brown (1973) EA 350**. That he has not shown that he has an arguable case as set out in the case of **Mrao -Vs- First Community Bank of Kenya & 2 others Civil Appeal No.39 of 2002**. That he has not demonstrated the irreparable damage that he will suffer if the orders sought are denied. That the applicant has not come to court with clean hands as he failed to disclose that he was served with the requisite notices.

8. Counsel submitted that the application was an attempt to delay the 1st respondent from exercising its statutory power of sale under the charges. He urged the court to dismiss the application.

9. The firm of J.J Khayumbi & Co. Advocates, advocates for the applicant did not make any submissions in the application.

10. The issues for determination are: -

1) Whether the applicant was issued with the requisite notices.

2) Whether the applicant is aware of his extent of indebtedness to the 1st respondent.

3) Whether the suit properties have been undervalued.

4) Whether the application has attained the requisite threshold for the grant of injunction.

11. Section 90(1) of the Land Act No. 6 of 2002 requires a chargor who is in default to be issued with a three months' notice requiring him to rectify the default. Section 96(2) of the Act requires a 40-day notice to be issued to the chargor before a chargee can exercise his statutory power of sale. Both notices were annexed by the 1st respondent. The applicant however contends that he was not served with the said notices. That he came to learn of the latter notice on 8/6/2018.

12. The 1st respondent says that the notices were sent by registered post by use of the address that the applicant had given when he charged the property. The 1st respondent attached copies of certificate of postage of the documents. They attached the applicant's letter dated

10/5/2018 in which he made reference to the notice dated 9/4/2018 stating that the 40 days given to them to sought out the land sale matters was not adequate. This is a clear indication that the requisite notices had been served on applicant through registered post. His averment that he learnt of the 45 days' notice on 8/6/2018 cannot be true. It is my finding that the applicant was served with all the requisite notices.

13. The applicant attached a statement of accounts issued by the

1st respondent. The statement was filed in court on 31/7/2018, whereas the 1st respondent contends that the applicant was in arrears of loan payments, the applicant did not file any document to counter that. He in fact admits that he was in arrears and wants the 1st respondent to be ordered to reschedule the debt payments. He does not fault anything in the bank statements. The appellant has filed a bank statement showing the extent of indebtedness by the applicant. This is not challenged. I find no arguable case on the question of indebtedness.

14. A mortgagor cannot be restrained from exercising his statutory power of sale solely because there is a dispute to the amount due. This was emphasized by the Court of Appeal in **Mrao Limited -V- First American Bank of Kenya Limited & 2 Others (2013) eKLR**, where it was held that:

“The circumstances in which a mortgagee may be restrained from exercising his statutory power of sale are set as out in Halsbury’s Laws of England vol 32 [4th edition] par .725 as follows:”

“725 When mortgagee may be restrained from exercising power of sale. The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute or because the mortgagor has begun a redemption action, or because the mortgagor objects to the manner in which the sale is being arranged. He will be restrained, however if the mortgagor pays the amount claimed into court, that is, the amount which the mortgagee claims to be due to him unless on the terms of the mortgage the claim is excessive.”

15. The 1st respondent has valued the attached property. The applicant has engaged his own valuer who has come up with a report showing that the property has been undervalued. A comparison between the two reports reveals the following: -

Property	Forced sale value by valuer for 1 st respondent	Forced sale value by valuer for applicant	Difference
Kisumu/Municipality Block 12/230	45,000,000/=	Not available	-
Kisumu Kogony/3311	15,000,000/=	22,500,000/=	7,500,000/=
S/Wanga/Lureko/2539	11,250,000/=	11,250,000/=	Nil
Kisa/Khushiku/1361	9,000,000/=	10,900,000/=	1,900,000/=

16. Section 97 of the Land Act 2012 provides as follows: -

“(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.”

17. In the case of **Zum Investment Limited -V- Habib Bank Limited (2014) eKLR** Kasango J. held that where both parties have produced valuation reports it is incumbent upon the plaintiff to show that the valuation by the defendant’s valuers did not result in the best price reasonably obtainable for the suit property. Said the learned Judge:-

“Section 97(2) only bestows a duty on the chargee to ensure that a forced sale valuation is undertaken by a valuer...In my view, the plaintiff has not demonstrated satisfactorily why this court should disregard the defendant’s valuation report and only rely on the plaintiff’s valuation report. It is not sufficient for the plaintiff to merely claim that the intended selling price is not best price obtainable at the time by producing a counter-valuation report. The plaintiff must satisfactorily demonstrate why the valuation report that the defendant intends to rely on in disposing of the suit property does not give the best price obtainable at the material time. The plaintiff needs to show for instance that the defendant’s valuer is not qualified or competent to carry out the valuation, or that the valuation was carried out in consideration of irrelevant factors or that the valuation was done way before the time of

the intended sale. The plaintiff has not raised any of such grounds.”

18. I have perused both valuation reports by the respective valuers for the parties. Both valuers valued property No. S.Wanga/Lureko/2539 at a value of Kshs.11,250,000/= . In

Kisa/Khushiku/1361 there was a variation of Kshs.1,900,000/= while in Kisumu/Kogony/3311 there was a variation of Kshs.7,500,000/= . Both reports were seemingly made by qualified valuers. None of the parties gave any explanation as to why there was a huge difference in the valuation of two of the properties - Kisa /Khushiku/1361 and Kisumu/Kogony/3311. In that case there is a possibility that the property was undervalued by one party or overvalued by the other. The respondent was under duty to obtain the best price reasonably obtainable at the time of sale. I do not think that this can be achieved when the forced sale value of the property is not clear. I am of the considered view that an independent valuation needs to be done on the two properties to establish their forced sale value.

19. Injunctions are equitable remedies that are granted at the discretion of the court. The principles for grant of temporary injunctions were laid down in the case of **Giella -V- Cassman Brown (1973) EA 358** to wit: -

“.....the conditions for the grant of interlocutory injunction are now well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally 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 the balance of convenience.”

20. A prima fade case was defined in **Mrao -V- First Community**

Bank of Kenya & 2 Others (supra) thus:-

“..... 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.”

21. The applicant concedes that he obtained financial facilities from the respondent and offered the subject properties as security. It is not in dispute that he has defaulted in paying the loans. The applicant has thus not established that his case has any probability of success. There is no evidence that his rights will be infringed as a result of the 1st respondent exercising its statutory power of sale. Since the applicant has failed to fulfill his obligations under the agreement, the respondent is justified in exercising its statutory power of sale. The applicant has failed to establish that he has a prima facie case with a probability of success.

22. The applicant says that he will suffer irreparable loss and damage if the orders sought are not granted as he has sentimental attachment to the properties. Sentimental attachment to property cannot be a ground for issuance of an order of injunction. In the first place the applicant should not have offered the property as security if he had sentimental value to it. The moment he placed the property as security meant that he was ready to part with it if he failed to pay the loan. In **Andrew M. Wanjohi -V- Equity Bank Society & 7 others (2006) eKLR** it was held that:-

“By offering the suit property as security the chargor was equating it to a commodity which the chargee may dispose of, so as to recover his loan together with the interest thereon.”

It is my finding that the applicant has not established that he will suffer irreparable loss if the prayers sought are not granted.

23. In the foregoing there are no sufficient grounds to restrain the 1st respondent from exercising its statutory power of sale. However since there is a dispute as to the forced sale value of two of the properties, the 1st respondent ought to be restrained from selling the property till after the forced sale value is established. In the case of **National Bank of Kenya Limited -V- Shimoners Plaza Limited Nairobi Civil Appeal No. 26 of 2016** the Court of Appeal held that where the court is inclined to grant an interlocutory orders restraining a mortgagee from exercising its statutory power of sale solely on the ground that the mortgagee has not issued a valid notice the order of injunction should be limited in duration until such time as the mortgagee shall give a fresh statutory notice in compliance with the law. In my view this ought to extend to a situation where the forced sale done by mortgagee is contested.

24. I find that the forced sale value of two of the properties - **Kisumu/Kogony/3311** and **Kisa/Khushiku/1361** - has not been established. I accordingly order that the two properties be re-valued by an independent valuer so as to establish their forced sale value before the 1st respondent proceeds with the sale. Consequently, I grant the advocates for the parties time of 14 days from the date of delivery of this ruling in which to agree on an independent valuer for the purpose of revaluing the two properties. In case the advocates fail to agree on the same they are to file a joint list of three valuers from which the court’s Deputy Registrar will appoint a valuer for the said purpose. Both parties to share the costs of the valuation on equal basis.

In the meantime, I do hereby issue orders of injunction against the respondents to restrain them from selling the suit properties till the forced sale value of the above said two properties has been established and until further orders of this court. Save for the above the application dated 31st July 2018 is dismissed with costs to the respondents.

Orders accordingly.

Signed:

JESSE N. NJAGI

JUDGE

Delivered, dated and signed at Kakameg this 30th day of April, 2020.

By:

W. M. MUSYOKA

JUDGE

Appearances: -

..... for Applicant

.....for Respondents

Applicant

Respondents

Court Assistant

30 days right of appeal.