IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL CASE NO. E101 OF 2020

BETWEEN

SILAS MISOI YEGO T/A

SIRO INVESTMENTS …..……..…… PLAINTIFF

AND

TRANSNATIONAL BANK LIMITED…… 1ST DEFENDANT

LYDIAH N. WAWERU T/A

PURPLE ROYAL AUCTIONEERS ……2ND DEFENDANT

RULING

Introduction

1. The Plaintiff is the registered proprietor of the parcel of land known as LR No. 209/6887 (I.R. 23309) situated in Kileleshwa within Nairobi County ("the suit property"). He is a customer of the 1st defendant ("the Bank"). In 2014, the Plaintiff requested and was granted a loan of Kshs. 140,000,000.00 by the Bank to construct approximately 50 apartment units on the suit property. The loan was secured by a charge registered in favour of the Bank on 7th November 2014. The Plaintiff seeks to restrain the defendants from selling the suit property by public auction in exercise of its statutory power of sale.

The Plaint

2. The gravamen of the Plaintiff's claim is set out in the plaint dated 16th April 2020 and he states as follows;

> *[7] That the 1st defendant has without lawful reason, instructed the 2nd defendant to advertise for sale and subsequently sell the suit property by way of public auction within fourteen days from 2nd April 2020. This is ostentatiously to recover a sum of Kshs. 143,629,386.45 alleged to be the balance owing as at 31st March 2020.*
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> *[8] The 2nd defendant has issued and/or caused to be issued to the Plaintiff/applicant a "Courtesy Fourteen (14) Day's Notification of Sale" and the 2nd defendant has undertaken to advertise and sell the suit property after expiry of the said notice on 16/04/2020.*
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> *[9] The Plaintiff/applicant further avers as follows:*
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> > *a. The project he undertook fell into problems caused by 3rd parties and arbitration proceedings commenced and was decided in his favour. He is yet to receive the arbitration award and has commenced the process of execution before this honourable court through a separate suit.*
> >
> > *b. After falling into arrears/default in repayment as agreed, he approached the 1st defendant with a proposal on the repayments. The 1st defendant had indicated that the amount owing was Kshs. 116,000,000. He engaged the 1st defendant*

which accepted his proposal on repayment to the arrears. He had made efforts to clear the loan payments amounting to Kshs. 34,000,000 within the last few months in servicing the loan, with the last instalment being made in January 2020. (Between January and November 2019, [he] paid Kshs. 32,651,828. In January 2020, [he] paid Kshs. 996,800. The repayments brought down the amount owed to Kshs. 82,351,372.

c. The 1st defendant accepted his proposal and acknowledged the sum owing to be Kshs. 89,200,000. He therefore denies that he owes the 1st defendant Kshs. 143,629,386.45.

d. Thereafter, the 1st defendant failed to issue a statutory notice of at least 40 days as required under ***Section 96(2) (3) of the Land Act 2012****, Laws of Kenya.*

e. The Plaintiff avers that the 1st defendant has grossly undervalued the suit property, which has been independently valued to be in excess of Kshs. 200,000,000. The forced sale value as indicated in the notification of sale is inordinately low as compared to the market price of the properties surrounding the suit property.

f. The Plaintiff had a legitimate expectation that the 1st defendant, in accepting the instalments amounting to Kshs. 34,000,000 within the last few months, had accepted his proposal of settling the arrears of 86,000,000 and further that the amount owing was Kshs. 86,000,000 and not Kshs. 143,629,386.45.

[10] The Plaintiff avers that he entered into a separate private arrangement of an agreement for sale of the suit property to a 3rd party, with part of the proceeds therefrom to be utilized in clearing the balance of the facility owed to 1st defendant. The agreed purchase price is Kshs. 200,000,000 and the discussions are still alive but execution of the agreement has been curtailed by the measures placed in alleviating the COVID-19 pandemic. He duly informed the 1st defendant of this arrangement and was accommodated. The first instalment from his sale of the suit property was due to be received on 30th April 2020.

[11] That the outbreak of the COVID-19 pandemic and the measures put in place by the government authorities have stalled, albeit temporarily, the process of the private sale.

[12] If the sale proceeds based on the valuation done and/or forced sale value, the proceeds will only benefit the defendant bank and the auctioneers to the applicant's detriment as he has incurred so much costs in payment of the loan facility and also in the preliminary payments before the loan facility.

3. As a result of the matters aforesaid, the Plaintiff prayed for a permanent injunction restraining the Bank from exercising its statutory power of sale without following the law.

The Application

4. Together with the plaint, the Plaintiff filed a Notice of Motion dated 16th April 2020 invoking, inter alia, **Order 40 rule 1, 2, 4** and **10** of the ***Civil Procedure Rules*** seeking an injunction restraining the Bank from exercising its statutory power of sale pending the hearing and determination of the suit. The application was supported by the grounds set out in the face of the motion and the Plaintiff's supporting affidavit sworn on 16th April 2020 which mirror the facts set out in the plaint.

5. The Plaintiff also filed a further Notice of Motion dated 4th May 2020 supported by the Plaintiff's affidavit. The application was filed as a result of the Bank advertising the suit property for sale by public auction on 12th May 2020 during the pendency of these proceedings.

6. The defendants opposed the application. They relied on the replying and supplementary affidavit of Silas Aluku, the Bank's Legal Officer, sworn on 8th and 12th June 2020 respectively.

7. Both parties filed written submissions and their counsel made brief oral submissions in support of their respective positions which I shall now consider.

Whether the Plaintiff has established its case

8. As the application before the court is one for an interlocutory injunction, the parties agreed the principles guiding the exercise of this court's discretion are those settled in ***Giella v Cassman Brown*** **[1973] EA 348**. The applicant has to satisfy three requirements; establish that he has a prima facie case with a probability of success, demonstrate irreparable injury if a temporary injunction is not granted, and if the court is in doubt show that the balance of convenience is in his favour.

9. The basic facts of the parties' relationship are not disputed and in determining the matter, I shall refer to what is disputed and make the appropriate conclusions. Whether the Plaintiff has established a prima facie case depends on the case pleaded in the plaint. I have set out the essential part of the Plaintiff's claim in the plaint above. The Plaintiff's case is based on three broad grounds. First, he disputes the amount demanded by the Bank. Second, he complains that the Bank failed to issue the required notification of sale under **section 96** of the ***Land Act, 2012*** ("the ***Land Act"***). Lastly, he faults the Bank's for violating **section 97** of the ***Land Act*** by undervaluing the suit property.

A prima facie case with a probability of success

10. On the first issue regarding the debt, the Plaintiff does not deny that he is indebted to the Bank. At paragraph 9(b) of the plaint, the Plaintiff contended that the Bank accepted his proposal to repay the loan hence the amount claimed by the Bank is not due to it. In the supporting affidavit, the Plaintiff annexed a letter dated 7th February 2019 referenced, *"FINAL REPAYMENT PROPOSAL FOR SILAS MISOI YEGO …"* The Plaintiff proposed to amend an earlier proposal he had made to the Bank following a meeting with the Credit Manager and Debt Recovery Manager by paying Kshs. 116,000,000.00 in four instalments, the last being on 21st May 2019. He also attached another letter dated 29th July 2019 addressed to the Bank referenced, *"REPAYMENT PROPOSAL FOR SILAS MISOI YEGO …."* In this letter he informed the Bank that he was trying to dispose of a property but was unable to get a purchaser. He however stated that he would be ready to clear the loan by December 2019, *"or on terms agreeable by the Bank."*

11. The Plaintiff also referred to the Bank's letter dated 20th February 2020 addressed to him under reference, *"RECISSION OF THE KSHS 89.2M OFFER BY THE BANK AS FINAL SETTLEMENT AMOUNT OVER THE OUTSTANDING DEBT OF KES 141.3M"* in which the Bank rescinded its offer to accept Kshs. 89,200,000.00 as final settlement of the debt then standing at Kshs. 141,300,000.00. It informed the Plaintiff that it was proceeding to sell the property by public auction.

12. In response to the Plaintiff, the Bank through the replying affidavit of Mr Aluku, explained that the Bank had extended indulgence to the Plaintiff on several occasions evidenced by several letters. He deponed that in May 2018, the Plaintiff approached the Bank seeking to delay the realization of the security. He requested the Bank to indulge him as he was in the process of disposing another property to enable him repay the loan subject to being granted a discount on the interest. At the time the Plaintiff only paid Kshs. 10,000,000.00. By a letter dated 5th February 2020, the Plaintiff requested the Bank to accept Kshs. 105,000,000.00 which the Bank rejected. By a letter dated 7th February 2019, the Plaintiff once again indicated that he would pay Kshs. 116,000,000/- in 4 installments. The Bank responded to him by a letter dated 7th February 2019 informing him that it would accept the offer on condition that the source of repayment would be disclosed and that the loan would be cleared within 90 days with all instalments being paid on indicated dates without default and the last instalment being received on 21st May 2019. The Bank further indicated that if the terms were not met, the full debt outstanding on 21st May 2019 should be paid without any interest waiver.

13. After failing to meet the conditions imposed by the Bank, he approached the Bank for renegotiation. The Bank informed him by a letter dated 6th February 2020 that it would accept settlement if he paid Kshs. 89.200,000.00 within 30 days of the letter. The Bank rescinded its offer on 20th February 2020 and the loan reverted to Kshs. 141,300.000.00 when the Plaintiff failed to meet the conditions of the offer.

14. As I understand, the Plaintiff's case is that the parties entered into an agreement that he would pay Kshs. 89,200,000.00 in full and final settlement of the debt and that the Bank was wrong to demand Kshs. 143,626,386.45. Whether there was an agreement between the parties depends on whether the offer made by the Plaintiff was accepted by the Bank and whether the Plaintiff complied with the terms thereof. The first offer to pay Kshs. 116,000,000.00 was accepted by the Bank on condition that the amount would be settled by 21st May 2019. The Plaintiff did not comply with terms offered by the Bank. He requested for further indulgence. On 7th February 2020, the Bank was ready to accept Kshs. 89,200,000.00 in full and final settlement provided the sum was paid within 30 days of the letter. The evidence is clear that the Plaintiff did not comply with the offer.

15. The Bank made several offers to the Plaintiff to pay a fixed sum in settlement of the entire debt but he did not comply with the terms of the offers. No agreement was reached hence the entire debt owed was still outstanding and the Bank was entitled to exercise its contractual and statutory remedies. In conclusion, I find and hold the Plaintiff is indebted to the Bank, he has admitted his indebtedness and has not complied with the terms of any offers made by the Bank to resolve the debt.

16. Although counsel for the Plaintiff raised the issue of interest and submitted that the Bank violated the *in duplum* rule, this matter was not pleaded in the plaint. He was never raised it in the earlier correspondence and engagements with the Bank. In any case, it is an issue that would only affect the level of indebtedness. It is an accepted principle that the court will not restrain a charge from exercising its statutory power of sale merely because the debt it disputed (see ***Joseph Okoth Waudi v National Bank of Kenya*** **CA NRB Civil Appeal No. 77 of 2004 [2006] eKLR**).

17. The second issue raised by the Plaintiff concerns the statutory notices. The Plaintiff does not deny that the Bank's statutory power of sale under **section 90** of the ***Land Act*** has crystallized. He complains that the Bank failed to issue a 40-day notice required under **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.*
>
> *(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.*

18. Since the Plaintiff has denied that it received the notification of sale, the burden rests on the defendants to show that they have complied with the law. In ***Nyagilo Ochieng & Another v Fanuel Ochieng & 2 Others*** **[1995-1998] 2 EA 260**, the Court of Appeal held that the burden to show that the statutory notice has been served does not in any way rest on the chargor. Once the chargor alleges non receipt of the statutory notice, it is for the chargee to prove that such notice was in fact served.

19. In the replying affidavit, Mr Aluku deponed that after issuing the 90-day statutory notice under **section 90** of the ***Land Act***, the Bank followed up with a 40-day notice to sell the suit property dated 25th September 2019 issued under **section 96(2)** of the ***Land Act***. The notice was sent by registered post to the Plaintiff's address and evidenced by a certificate of posting which was annexed to the affidavit. The Bank instructed the Auctioneer to issue the 45-day Notification of Sale in accordance with the ***Auctioneers Rules***. The Auctioneer duly issued a

Notification of Sale dated 26th November 2018 granting the Plaintiff 45 days to redeem the suit property by paying Kshs. 142,327,626.35 before the public auction scheduled for 21st February 2019. Service of the 45-day was evidenced by an affidavit of service sworn by a court process server.

20. Based on the defendant's uncontested evidence, I am satisfied that the Plaintiff was served with the 40-day notification of sale under **section 96(2)** of the ***Land Act***. Having served the said notice, the additional notice as stated by the Auctioneer was a matter of courtesy. I do not find any breach of **section 96** of the ***Land Act***.

21. The final issue raised was in regard to the valuation. The Plaintiff relief on **section 97** of the ***Land Act*** to submit that the Bank, as chargee, has a duty of care towards a chargor, failing which it would be liable for breach of duty of care. The section provides as follows:

> *97(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.*

22. Under **section 97** of the ***Land Act, 2012*** the chargee has a duty of care to the chargor to obtain the best price reasonably obtainable at the time of sale and in that regard, it is required to ensure a forced sale valuation is obtained. Under **Rule 11(b)(x)** of the ***Auctioneers Rules***, a professional valuation of the reserve price must be carried out not more than 12 months prior to the proposed sale. The collective effect of these provisions is that the Bank is required to obtain a forced sale value of the property within the year of the intended sale.

23. The Plaintiff's complaint is that the Bank has grossly undervalued the suit property which has been independently valued in excess of Kshs. 200,000,000.00 thus the forced sale value is inordinately low compared to the market value of other properties in the area. The Plaintiff has annexed a sale agreement made between him and Peter Kivolonzi who has agreed to purchase the suit property for Kshs. 200,000,000.00

24. In the supplementary affidavit sworn on 12th June 2020, the Plaintiff annexed a valuation report dated 30th April 2020 prepared by Sedco Valuers Limited. The valuers assessed the open market value at Kshs. 160,000,000.00 and the forced sale value at Kshs. 123,750,000.00.

25. In order to assess the fair and reasonable value, the law requires a valuation of the charged property to be conducted by a professional valuer. A valuation report is based on the professional and expert opinion of a duly qualified valuer who assessed the value of land based on accepted parameters. In order to displace a professional valuation, the Plaintiff must produce clear evidence that the valuation is wrong or at least doubtful. Mere assertions or statements will not do. I would adopt the statement of principle in ***Palmy Company Limited v Consolidated Bank of Kenya Limited*** **ML HCCC No. 527 of 2013 [2014] eKLR** where the court observed as follows:

> *The court needs cogent evidence and material in order to say that prima facie, there has been an undervaluation of the suit property which is an infringement of* ***section 97(2) of the Land Act*** *by the Defendant as to entitle the court to call for an explanation or rebuttal from the Defendant. That approach is necessary to prevent defaulters from filing valuation reports with value way beyond the open market value just to obtain an injunction. Needless to state that having an arguable point, as is the case here, is not sufficient to establish a prima facie case for the grant of an injunction especially in cases of exercise of the power of sale by a chargee who has shown that the Applicant has defaulted and continue to be in default. It be known that, as long as it is lawfully exercised, the Statutory Power of Sale is not a favour that the chargor extends to the chargee or an infringement on the right of or a foreclosure of the chargor's equity of redemption; it is a statutory remedy which is inextricably tied to the right of the chargee to recover its money-which is property guaranteed under* ***Article 40 of the Constitution.***

26. The Plaintiff based his case on the fact that he has entered into a sale agreement with a third party for Kshs. 200,000,000.00. What the law requires is that the chargor must, *"obtain the best price reasonably obtainable at the time of sale."* A reasonable price is not based on one proposed sale but is grounded on various other factors like comparative sales. The Plaintiff did not produce another valuation or challenged the valuation with cogent evidence. The sale price of the property does not, in my view, amount to a valuation though it is a factor to consider in assessing the value of property. Based on the material on record, I am unable to find that the Plaintiff has established that the Bank has violated **section 97** of the ***Land Act***.

27. On the basis of the findings I have made above, I find and hold that the Plaintiff has not made out a prima facie case with a probability of success.

Whether damages are an adequate remedy

28. In ***Nguruman Limited v Jane Bonde Nielsen and 2 Others*** **NRB CA Civil Appeal No. 77 of 2012 [2014] eKLR** the Court of Appeal reiterated the three conditions to be fulfilled before an interim injunction set out in ***Giella v Cassman Brown*** **(Supra)** and stated as follows:

> *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. (See* ***Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86****). If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, 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. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between.*

29. Thus, if the applicant does not establish a prima facie case with a probability of success, the issue whether the damages are sufficient to compensate the Plaintiff in the event the suit succeeds does not arise. However, and for the sake of completeness, I will deal with the matter.

30. Counsel for the Plaintiff relied on the case of ***Kanorero River Farm Ltd and 3 Others v National Bank of Kenya Ltd*** **[2002] 2 KLR 207** where it was held that "*No party should be allowed to ride roughshod on the statutory rights of another simply because it could pay damages.*" The Plaintiff complains that the Bank is demanding a disputed sum of Kshs. 143,629.386.45 yet it advanced only Kshs. 73,000,0000.00 out of which he has paid KShs. 47,086,306.00 which amount is more than half of what was advanced initially. He contends that the entire amount advanced was pumped into the development of the apartment units hence losing the suit property at this late stage without having the chance to have his matter considered on its merits will amount to irreparable loss.

31. The defendants relied on the provisions of **section 99 (4)** of the ***Land Act*** which provides that:

> ***99. (4) A person prejudiced by unauthorized, improper or irregular exercise of the power of sale shall have a remedy in damages against the person exercising that power.***

32. Counsel for the defendants further added that by the Plaintiff charging the suit property in favour of the Bank, it became a commodity for sale as the Plaintiff knew that it would be sold in the event of default. Counsel cited ***Andrew M. Wanjohi v Equity Building Society &7 another*** **[2006] eKLR,** where the Court 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."***

33. In view of the admission of indebtedness by the Plaintiff, he cannot suffer loss that cannot be compensated by damages. The Plaintiff understood that once he defaults, the Bank was entitled to exercise its remedies under **section 90** of the ***Land Act*** which includes sale of the property. Further, **section 99(4)** of the ***Land Act*** contemplates that irregular exercise of the power of sale would entitle the Plaintiff to damages. He has not shown the Bank would not in a position to pay any damages that may be found due in the event his suit succeeds.

Balance of convenience

34. According to the correspondence between the parties, the Plaintiff has been in default since 2019. He has not met its promise to settle the debt despite several offers by the Bank to accept settlement. The interest rate on loan continues to escalate which will, in all probability, eat into the value of the security. I find that the balance of convenience does not favour the grant of an interlocutory injunction.

Conclusion and disposition

35. Based on the matters pleaded, deposition and submissions, I find and hold sthat the Plaintiff has not established the conditions for the grant of an injunction pending hearing and determination of the suit.

36. I therefore dismiss the Notices of Motion dated 16th April 2020 and 4th May 2020 with costs to the defendants. The interim orders in force are now discharged.

DATED and DELIVERED at NAIROBI this 30th day of JUNE 2020.

D. S. MAJANJA

JUDGE

Mr Maloba with him Mr Amalemba instructed by Maloba and Amalemba Advocates for the Plaintiff.

Mr Akello instructed by Robson Harris and Company Advocates for the defendants.