



IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL CASE NO. 342 OF 2018

BETWEEN

TURITU SERVICE STATION LIMITED.....PLAINTIFF

AND

HOUSING FINANCE COMPANY OF KENYA LIMITED1ST DEFENDANT

GARAM INVESTMENTS AUCTIONEERS 2ND DEFENDANT

AND

LAZINOS HOTEL AND RESTAURANT LIMITED1ST INTERESTED PARTY

CYNTHIA WAMBUI T/A

LAIBON VILLA AND GUEST HOUSE 2ND INTERESTED PARTY

RULING

Introduction

1. The plaintiff (“the Company”) moved the court by a Notice of Motion dated 21st April 2020 for interlocutory injunctions, *inter alia*, under **Order 40 rule 2 and 4** of the **Civil Procedure Rules**. The application was supported by the affidavit of its director, David Njuguna Ngoi, sworn the same day. The application was followed by the Amended Notice of Motion dated 14th May 2020 and a supplementary affidavit of David Njuguna Ngoi sworn the same day. The Company also filed an amended plaint dated 21st April 2020.

2. The 1st defendant (“the Bank”) opposed the application through the replying affidavit and further affidavit of Joseph Lule, its Legal Officer, sworn on 8th and 20th May 2020 respectively.

3. The parties filed written submissions in support of their respective positions. Before I deal with the Company’s application, I will set out the history of the case and matters that are common ground as these are well outlined in the parties’ pleadings, depositions and written submissions.

Background

4. In February 2013, the Company applied for and was advanced Kshs. 250,000,000.00 by the Bank. The advances were secured by charges over two properties (“the suit properties”) namely; LR No. 37/254/32 situated in Nairobi West (“the Nairobi West property”) and LR No. 209/178/29 situated along Limuru Road (“the Limuru Road property”). Although the Company serviced the loan for some time, it started defaulting causing the Bank to instruct the 2nd defendant (“the Auctioneer”) to advertise the properties for sale by public auction. The sale was slated for 28th August 2018.

5. The proposed sale precipitated this suit in which the Company sought, amongst other reliefs, injunctions to restrain the Bank from selling

the suit properties. The plaint was accompanied by a Chamber Summons dated 23rd August 2018 praying for an interlocutory injunction restraining the Bank from selling the suit properties pending hearing and determination of the suit. When the application came up for hearing before Kasango J., on 22nd November 2019, the parties recorded a consent order wherein the application was marked as withdrawn upon the Company undertaking to continue paying Kshs. 3,000,000.00 for the months of November and December 2018 and with effect from January 2019 to pay Kshs. 4,500,000.00 per month and on every 30th day of every subsequent month.

6. When the Company failed to meet the terms of the consent order, the Bank instructed the Auctioneer to advertise the Nairobi West property for sale by public auction. The Company filed another Chamber Summons dated 28th February 2019 seeking to restrain the Bank from selling the suit properties. On 5th March 2019, Kasango J., dismissed the application. The Bank initiated recovery proceedings and advertised the Nairobi West property for sale by public auction on 13th August 2019.

7. The Company moved the court by the Notice of Motion dated 9th August 2019 seeking orders to restrain the Bank from selling the suit properties. On 13th August 2019, the Bank's attempt to sell the Nairobi West property by public auction was unsuccessful. By a consent order recorded before Okwany J., the parties agreed as follows:

(a) *THAT the sale of the subject property LR No. 37/254/31 Nairobi West be sold by way of public auction on 13th August 2019.*

(b) *THAT the Respondent sell the property for not less than Kenya Shillings Two Hundred and Twenty-Five Million (Kshs. 225,000,000.00) being the then forced value.*

(c) *THAT if the sale is not successful on the said date and price above, the Applicant shall:-*

i. *Be at liberty to sell the Property via private treaty within fourteen (14) days.*

ii. *The Respondent shall be at liberty to re-advertise the Property within (14) days.*

8. The sale by private treaty envisaged by the consent order did not materialize and the Nairobi West property was once again scheduled for sale by public auction on 30th August 2019. Prior to the auction, a tenant Wilfred Barasa Opondo filed a suit against the Bank and Company namely; ***Milimani Chief Magistrates Court Case No. 5973 of 2019, Wilfred Barasa Opondo v Turitu Service Station Limited and Housing Finance Company of Kenya Limited***. He obtained an order on 13th August 2019 restraining the defendants from selling the Nairobi West property. The property was nevertheless sold to the Bank as the highest bidder at the auction.

9. The Bank informed the Company of the sale of the Nairobi West property and made a demand for the outstanding debt by letters dated 23rd September 2019 and 1st November 2019. According to the Bank, the Company remained in default causing it to issue instructions to the Auctioneer to sell the Limuru Road property by public auction. It was advertised for sale on 28th April 2020 causing the Company to file these proceedings and seek an interlocutory injunction which I granted on 28th April 2020.

Issues for determination

10. In the Amended Notice of Motion dated 14th May 2020, the Company sought a raft of orders in respect of the suit properties. It sought an injunction to restrain the Bank from selling the Limuru Road property pending the hearing and determination of the suit or by the end of the COVID-19 pandemic. It also sought an order restraining the Bank from transferring the interest in the property or registering the transfer of the Nairobi West property in its favour as a result of the purported sale and also an injunction restraining the Bank from interfering or dealing with the Nairobi West property pending the hearing and determination of the suit or by the end of the COVID-19 pandemic.

11. The Company prayed for an order directing the Bank to provide relief to it through extension of loan repayments in line with Central Bank of Kenya directives in respect of the prevailing COVID-19 pandemic as well as restructuring arrangements before selling the Limuru Road property pending the hearing and determination of the suit or the declaration of the end of the COVID-19 pandemic. The Company also prayed that the Bank be directed to deliver to it true, accurate and correct statements of account for its loan account held by the Bank following the sale of the Nairobi West property.

12. The Company also prayed for a declaration that the sale through public auction of the Nairobi West property which took place on 30th August 2019 is unlawful, null and void as it was in contravention of a court order issued on 9th August 2019 in ***Milimani Chief Magistrates Court Case No. 5973 of 2019, Wilfred Barasa Opondo v Turitu Service Station Limited and Housing Finance Company of Kenya Limited***.

13. One issue that has caused me some anxiety is the fact that the Company filed an Amended Plaint dated 21st April 2020 without leave of the court. The Bank filed its statement of defence on 12th February 2019. Under **Order 1 rule 1 and 8** of the ***Civil Procedure Rules***, a plaintiff can only amend the plaint with leave of the court after the pleadings close. No such leave was sought or granted. The Amended Plaint introduces new causes of action and reliefs. The Bank did not raise any objection to the Amended Plaint and the matter proceeded for hearing on the basis of the material presented by the parties. I shall proceed to determine the matter on that basis in order to fully and efficaciously deal with the dispute between the parties as neither of the parties is unduly prejudiced.

14. From the prayers sought in the Amended Notice of Motion dated 14th May 2020, I propose to deal with the issues for resolution framed by counsel for the Company as follows:

- (i) Whether the sale of the Nairobi West property which took place on 30th August 2019 is illegal, null and void.
- (ii) Whether the Company has met the threshold for the grant of an interim injunction.

Whether the sale of the Nairobi West Property is illegal, null and void

15. Counsel for the Company submitted that the Bank sold the Nairobi West property despite the fact that it was served with the order issued in ***Milimani Civil Case No. 5973 of 2019*** stopping the sale. The Company therefore contended that the sale of the Nairobi West property was illegal, unlawful, null and void as it was in violation of a court order.

16. Counsel for the Company cited the case of ***Koinange Investments and Development Ltd v Nairobi City Council & 3 others NRB HCCA No. 535 of 2006 [2009] eKLR*** where the court invalidated a sale by auction where the sale was conducted in contravention of an order that stayed the sale and communicated to the parties. In that case, the court relied on the decision of the Court of Appeal in ***Omega Enterprises (K) Ltd v KTDA [1993] LLR 2525 (CAK)*** holding that such a sale was automatically void and that in any case it was the unqualified duty of a person served with a court order to obey it without question.

17. In response, the Bank denied that it intentionally disobeyed a court order. Mr Lule deponed that the order served on it did not have the court seal, was not accompanied by any application and the jurisdiction of the court issuing the order to determine the matter was doubtful hence it could not be authenticated. The Bank submitted that the party in whose favour the injunction was given, Wilfred Barasa Opondo, is not a party to this suit and has not prosecuted the matter in which the order was given. Counsel for the Bank questioned why the Company was purporting to enforce the rights of another party and accused the Company of raising the issue as an afterthought.

18. I agree with the principles enunciated in the ***Omega Enterprises v KVDA (Supra)*** and ***Koinange Investments and Development Limited v Nairobi City Council (Supra)*** to the effect that the court orders must be obeyed and where there is disobedience an act flowing therefrom is null and void. It must however be recalled that an injunction is an equitable remedy that is *in personam* which means that it is an order made in favour of a specific person against a specific person. It is not a remedy *in rem* that avails against the whole world or against the parties unless of course the order is directed to that party. In the cases cited above where the court has invalidated actions based on contravention of a court order, the orders in question were issued in the same case where the issues were litigated by the parties to that suit.

19. The Company is attempting to litigate an order that was issued in another case and made in favour of another party who is not party to this suit. Any issues regarding the order ought to be litigated before the court which issued the orders and which must necessarily involve the party in whose favour it was made. In these circumstances, I cannot permit a collateral attack on a separate court process. I therefore decline to set aside or invalidate the sale.

20. Related to the Nairobi West property is the case of the 1st and 2nd interested parties who occupy the premises. The 1st interested party filed a replying affidavit of Peter Kiniki, its director, sworn on 21st May 2020 while the 2nd interested party filed an affidavit of Cynthia Wambui sworn on 21st May 2020. From the depositions, the 1st interested party claims that it is a tenant and has sub-let part of its premises to the 2nd interested party. Their complaint and that of the Company is that in September 2019, the Bank instructed hooligans to invade the Nairobi West property, locked them out of their premises and vandalized their properties. The Bank denies these allegations.

21. The 1st interested party commenced proceedings at the Business Premises Tribunal in ***BPRT Cause No. 979 of 2019, Lazines Hotel and Restaurant Limited v Turitu Service Station Limited and Housing Finance Company Limited*** which is still pending. Since the matter involving the interested parties is before the Tribunal, I restrain myself from commenting any further on those issues. I must point out that interested parties have not sought direct relief from the Company.

22. The Nairobi West property was sold at the auction on 30th August 2019. The Company was informed of the sale soon thereafter by letters dated 23rd September 2019 and 1st November 2019. It has waited for over 10 months to seek equitable relief. There has been no explanation for the delay. It is disentitled to relief. Moreover, following the successful sale, under **section 99** of the ***Land Act, 2012*** ("the ***Land Act***"), the Company's equity of redemption was extinguished. As a result, the Company's remedy lies in seeking damages and not an injunction as prayed in the application.

Whether the plaintiff has met the threshold for the grant of an interim injunction

23. From the grounds set out in the face of the Company's application, submissions and depositions, its case for an interim injunction is founded on two pillars. The first is related to the amount claimed by the Bank and the second, the valuation of the property.

24. On the amount claimed, the Company's case is that the Bank informed it by a letter dated 30th March 2020 on the outstanding loan balance of Kshs. 113,929,625.00. It stated that this amount is not a true reflection of the debt owed by the Company. It complained that despite requesting for statements, the Bank has refused to provide them. It also accused the Bank of failing to disclose the selling price of the Nairobi West property.

25. Counsel for the Company submitted that Mr Lule, in the replying affidavit, deponed that although the loan balance as at 31st March 2020 was Kshs. 111,922,211.02, the sum of Kshs 225,000,000.00 being the purchase price for the Nairobi West property was not reflected in the statement of account produced by the Bank. All this, as submitted by the Company, is a clear manifestation of mischief on its part and its decision to auction the Limuru Road property is malicious, done in bad faith and an attempt by the Bank to deprive it of its property contrary to **Article 40** of the Constitution.

26. The Company cited ***Ezekiel Osugo Angwenyi & Another v National Industrial Credit Bank Limited ML HCCC No. 387 of 2004***

[2017] eKLR to support its submission that the Bank was under a duty to produce accurate statements of accounts to enable the Company know the outstanding balance. It submitted that the Bank, having only credited Kshs. 167,886,920.85 to its loan account out of the total purchase price of Kshs. 225,000,000.00 for the Nairobi West property, has failed to produce accurate statements of account. It submitted that it is incapable of ascertaining the alleged debt owed and is entitled to an injunction as its right of redemption is prejudiced.

27. The second plank of the Company's case is that the Bank advertised the Limuru Road property without conducting a forced sale valuation as required by **section 97(2)** of the **Land Act** before exercising its statutory power of sale.

28. To support this argument, counsel for the Company referred to an earlier valuation report prepared by Centenary Valuers Limited on the Bank's instructions which showed that the value of the land as at 29th June 2018 was Kshs. 180,000,000.00 and the value of improvements was Kshs. 80,000,000.00. Counsel criticized the valuation report prepared by CMT Realtors Limited which the Bank relied on and which showed the forced sale value as Kshs. 112,500,000.00 yet the earlier report showed the forced sale value at Kshs. 195,000,000.00. Counsel submitted that the valuation relied on by the Bank was erroneous as a redeveloped property would not be less valuable than its pre-developed value and the forced sale value in the earlier valuation report could not be higher than the later one.

29. Counsel for the Company cited **Koileken Ole Kipolonka Oromos vs Mellech Engineering & Construction Limited & 2 Others ML HCCC No. 545 of 2014 [2015] eKLR** where the court held that the purpose of carrying out a forced sale value before the auction reinforces the right of the chargor to have a reasonable value for his property. In the circumstances, the Company urged the court to hold that the Bank acted in breach of **section 97(2)** of the **Land Act** by relying on an erroneous valuation report.

30. In response to the Company's contention regarding the statement of accounts, Mr Lule deponed that the outstanding loan balance as at 31st March 2020 was Kshs. 111,922,211.02 as shown in the Company's mortgage statement of account running from 1st January 2016 to 29th April 2020. In the further affidavit, Mr Lule explained that the Bank received the full purchase price of Kshs. 225,000,000.00. The deposit of Kshs. 56,250,000.00 received from the purchaser was used to offset the Company's existing overdraft facility as evidenced by the statement attached to the deposition. The Bank contended that the Company has not shown that it had been denied statements of account as these were always available. Counsel for the Bank submitted that in any case the issues raised by the Company would only go to the amount owed which would not entitle it to an injunction as was held in **Innercity Properties Limited v Housing Finance Company and Another ML HC COMM No. E030 OF 2020 [2020] eKLR**.

31. The Bank refuted the allegation that it failed to carry out a valuation in compliance with **section 97(2)** of the **Land Act**. Mr Lule deponed that it commissioned CMT Realtors Limited to conduct a valuation of the Limuru Road property and who prepared a report dated 29th July 2019. The open market value was assessed at Kshs. 150,000,000.00 while the forced sale value was assessed at Kshs. 112,500,000.00. Counsel for the Bank submitted that on the basis of the evidence, the property was appropriately valued and that the Company did not produce any evidence or its own valuation to rebut the Bank's position. Counsel for the Bank cited the case of **Consolidated Bank Limited v Jockbed Njeri Muriithi t/a Njesh Enterprises ML HCCA No. 27 of 2019 [2019] eKLR** to support this submission.

32. In determining whether the Company has made a case for an interlocutory injunction, I am guided by the decision of the Court of Appeal in **Nguruman Limited v Jane Bonde Nielsen and 2 Others NRB CA Civil Appeal No. 77 of 2012 [2014] eKLR** where it reiterated the settled principles set out in **Giella v Cassman Brown [1973] EA 358** as follows:

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 any doubts as to (b) by showing that the balance of convenience is in his favour.

These are the three pillars on which rests 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.

33. I now turn to consider the Company's case in light of the aforesaid principles. Although the issue was not pleaded, counsel for the Company submitted that the Bank had not served a statutory notice in accordance with **section 90** of the **Land Act**. I reject this submission as the Company did not plead it either in the original or amended plaint hence denying the Bank the opportunity to show that it had issued and served the statutory notices. In fact, in its pleadings and depositions, the Company has not challenged the fact that the Bank's statutory power of sale has crystallized.

34. The Company has not denied that it is indebted to the Bank. In the Amended Notice of Motion, the Company prays that, "*pending the hearing and determination of this Suit and in line with the directive issued by Central Bank of Kenya in respect of the prevailing corona virus (Covid-19) pandemic, this Honourable Court be pleased to issue an Order directing the 1st Respondent to provide relief to the Applicant through extension of loan repayment as well as other restructuring arrangements before resulting to sale of the property known as L.R No.209/178/29 (I.R No. 85343) Hotel Grace Villa and Guest House Ngara through public auction and/or private treaty.*" This plea, in my view, is an implicit admission of indebtedness.

35. The issue of accounts and whether the proceeds from the sale of the Nairobi West property were credited to the Company's loan account only determines the extent of indebtedness. The Bank has produced the Company's statements of account from 1st January 2016 to 1st May 2020. It explained how part of those proceeds were used to clear the Company's overdraft account whose statements were also produced in evidence. Further, the claim that the Company was never informed of the sale of the Nairobi West property was rebutted by the letter dated

23rd November 2019 which confirmed that indeed a meeting had taken place between the parties where the issue of the sale was discussed. These averments in Mr Lule's further affidavit were not controverted.

36. The Company has not demonstrated how the entries in the statements of account are incorrect to the extent that it is not indebted. Since the Company's indebtedness is not in doubt, this court cannot restrain the Bank from exercising its statutory power of sale. I adopt the principle so clearly stated by the Court of Appeal in **Joseph Okoth Waudi v National Bank of Kenya CA NRB Civil Appeal No. 77 of 2004 [2006] eKLR** that:

It is trite that a court will not restrain a mortgagee from exercising its 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. It 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 it, unless, on the terms of the mortgage, the claim is excessive. See Halsbury's Laws of England Vol. 32, 4th Edition page 725 and Lavuna & Others vs. Civil Servants Housing Co. Ltd. & Another Civil Appeal Nairobi No. 14 of 1995 (unreported). Middle East Bank (K) Ltd vs. Milligan Properties Ltd, Civil Appeal No. 194 of 1998 (unreported).

37. The Company complained about the valuation of the property. Under **section 97** of the **Land Act** 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 Bank is required to obtain a forced sale value of the property within the year of the intended sale. The Bank obtained a valuation report by CMT Realtors Ltd dated 29th July 2019 which was within the prescribed period.

38. The Company's complaint regarding the valuation is set out at paragraph 33 of the Amended Plaint as follows:

33. The Plaintiff avers that the Defendants have acted maliciously in advertising the sale of the property known as L.R. No. 209/178/29 (I.R No. 85343) Hotel Grace Villa and Guest House Ngara by failing to exercise a forced sale valuation as required under section 97(2) of the Land Act No.6 of 2012 before exercising its statutory power of sale.

39. The Company has not detailed how the Bank has violated **section 97(2)** of the **Land Act** in its pleading. In this respect I would do no better than adopt what the court stated in **Palmy Company Limited v Consolidated Bank of Kenya Limited ML HCCC No. 527 of 2013 [2014] eKLR** that:

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.

40. It must be recalled that a valuation of property is based on professional and expert opinion. The Company did not produce another valuation or challenge the valuation with cogent evidence to show that the opinion of the valuer was wrong or at least doubtful. Since the Bank is entitled to sell the suit property pursuant to its power of sale, it is also entitled to follow the procedures necessary to exercise that power including valuation of the property in compliance with the law. I am not satisfied that merely because the previous valuation differs from the current valuation is sufficient ground to issue an injunction.

The implication of COVID-19

41. The Company has sought relief to have its loan restructured due to the COVID-19 pandemic in line with the Central Bank guidelines. To my mind, the guidelines are voluntary as parties are bound by their contractual arrangements which the court cannot vary, at least in this case. I would only point out that under **section 103** of the **Land Act**, a chargor is entitled to seek relief from the court against any chargee from exercising any of its statutory remedies under **section 90** thereof and the court may grant any of the reliefs under **section 104**. Since the Company has not invoked those statutory provisions that are intended for a situation like the COVID-19 pandemic, I decline to grant any such relief.

Conclusion

42. I find and hold that the plaintiff has not established a prima facie case with a probability of success. Whether damages are an adequate remedy is answered by **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.

43. Further, the parties always contemplated that the suit properties would be sold in the event of default hence damages are an adequate remedy in the event the suit ultimately succeeds. In view of its admitted indebtedness, the balance of convenience is against the Company as the debt will continue to escalate thus eroding the value of the security.

Disposition

44. For the reasons I have set out above, I find that the plaintiff has not established a case for the injunction sought in the Amended Notice of Motion dated 14th May 2020. It is dismissed with costs to the 1st defendant. For avoidance of doubt, the interim orders granted are discharged.

45. In the interests of justice, I allow the plaintiff to amend its plaint and the amended plaint dated 21st April 2020 is deemed as duly filed upon payment of the requisite court fees.

DATED and DELIVERED at NAIROBI this 29th day of JUNE 2020.

D. S. MAJANJA

JUDGE

Mr Wathuta instructed by Kiragu Wathuta and Company Advocates for the plaintiff.

Mr Kamwamu instructed by J. Louis Onguto and Company Advocates for the 1st and 2nd defendants.