REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL CASE NO. 9 OF 2019

PETER BOGONKO ONCHONGA.....PLAINTIFF/ APPLICANT

VERSUS

1. **NATIONAL BANK OF KENYA LIMITED**
2. **MUGANDA WASULAWA T/A**

KEYSIAN AUCTIONEERS.....DEFENDANTS/ RESPONDENTS

RULING

1. Before this court is an application dated 30th September 2019. It is an application seeking a temporary injunction to restrain the respondents, their agents and/ or assigns or any of them from selling, disposing of or otherwise interfering with the applicant's land parcels Nos. West Kitutu/Bogeka/3220 and 3437 ("the suit properties") pending the hearing and determination of the substantive suit.

2. The grounds in support of the application are that the 1st respondent intends to exercise its statutory power of sale over the suit properties without issuing the mandatory statutory notice of 3 months. It is also alleged that the 2nd respondent has served the applicant with a notification of sale giving an inordinately low forced sale value for the suit properties against the contractual forced sale value.

3. The respondents have jointly opposed the application through the affidavit of James Osewe sworn on 14th October 2019. It is averred that the applicant offered the suit properties as security for credit facilities advanced to PEBO (K) Limited ("the Company") where he is a director. The applicant is also said to have executed a personal guarantee and indemnity for Kshs. 191,010,000/= as further security for additional facilities advanced to the Company in favour of the 1st respondent. It is deposed that as neither the Company nor the applicant have shown an intention or capability to pay the outstanding balance of the amalgamated facilities which stood at an excess of Kshs. 216,889,800.13, as of 1st October 2019, the 1st respondent is entitled to exercise its statutory power of sale.

4. The 1st respondent is apprehensive that if the accumulated debt is not recovered immediately, the debt will accrue and outstrip the value of the securities given by the applicant. It claims that it has served statutory notices upon the Company and the applicant. It is also averred that the applicant cannot purport an undervaluation of the properties when he has failed to avail a contradictory valuation report.

5. The applicant does not dispute the averment that he offered the suit properties as security for facilities advanced to the Company or that the Company has defaulted in repaying the loan. In a brief rejoinder to the respondents' affidavit, the applicant, in a supplementary affidavit sworn on 12th November 2019, rehashed his misgivings on the valuation of the properties. He claimed that on 3rd May 2018, he was served with a valuation report which assessed LR. No. West Kitutu/ Bogeka/3437 at an open market value of Kshs. 115,000,000/= and a forced sale value of Kshs. 86,500,000/= and assessed LR. No. West Kitutu/ Bogeka/3220 at an open market value of Kshs. 140,000,000/= and a forced sale value of Kshs. 105,000,000/=. However, in July 2019, he was served with a notification of sale by the 2nd respondent which put the forced sale value of LR. No. West Kitutu/ Bogeka/3437 at Kshs. 45,000,000/= and Kshs. 54,000,000/= for LR. No. West Kitutu/ Bogeka/3220. The applicant contends that the tremendous reduction of the value of the suit properties is a deliberate act by the respondents to defraud him. He avers that it would be improper for the respondents to sell the suit properties at an undervalue given that the forced sale value formed part of the contract.

6. The parties took directions to canvass the application by way of written submissions. Having heard the highlights of the applicant's submissions, this court saw it fit to have a current and independent valuation of the suit properties. The parties were each directed to appoint a valuer who would conduct a joint valuation of the suit properties. In accordance with those orders, the parties filed a joint valuation report on 18th September 2020.

7. This court is called upon to determine whether an interlocutory injunction should issue against the respondents to restrain them from disposing of the suit properties in exercise of the 1st respondent's statutory power of sale.

8. The conditions to be satisfied for grant of an interlocutory injunction are settled and indeed elementary. In **Giella vs Cassman Brown & Co. Ltd [1973]EA 358**, which is the *locus classicus* on the principles for grant of interlocutory applications, the court held that;

> "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 the balance of convenience (E.A. INDUSTRIES VS. TRUFOODS [1972] E.A. 420.)"

9. It is common ground that the applicant offered the suit properties as securities for loans advanced to the Company where he is a director. A charge dated 30th July 2014 was registered in favour of the 1st respondent over land parcel No. West Kitutu/Bogeka/ 3437 and a subsequent charge dated 2nd February 2015 was registered over land parcel No. West Kitutu/Bogeka/ 3220. It is also agreed that the Company has failed to meet its obligation to pay the loans and the 1st respondent is thus entitled to exercise its statutory power of sale over the suit properties. Through this application for injunctive orders, the applicant hopes to temporarily halt the sale of the properties.

10. The applicant raised two issues in his application to demonstrate that he had established a *prima facie* case with a likelihood of success at trial. First, he contended that the 1st respondent intends to exercise its statutory power of sale over the suit properties without issuing the mandatory statutory notice of 3 months provided for in **section 90** of the **Land Act**. The evidence on record is however clear that the applicant was served with a 3 month's notice dated 2nd January 2018 in accordance with section 90 of the Land Act. He was also issued with the 40 days notice dated 16th April 2018 in line with **section 96 (2)** of the **Land Act**. A further 45 days notice dated 12th July 2018 was also served upon the applicant in accordance with **Rule 15** of the **Auctioneers Rules**. A reading of the submissions for the applicant shows that he has abandoned the argument that he was not served with the statutory notices and rightly so.

11. The second issue raised by the applicant relates to the valuation of the suit properties. **Section 97(2)** of the **Land Act** puts a mandatory obligation on a chargee who intends to exercise its statutory power of sale over land to ensure a forced sale valuation is conducted. The provision stipulates;

> *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.*** ***[Emphasis added]***
>
> *(2) A chargee shall, before exercising the right of sale, ensure that a forced sale valuation is undertaken by a valuer.*

12. The applicant complains that he has been served with numerous notifications of sale and a valuation report with varying values for the suit properties. In the most recent notification of sale dated 19th July 2019, the 2nd respondent indicated that the forced sale value of land parcel no. 3220 was Kshs. 45,000,000/= and the forced sale value for land parcel no. 3437 was Kshs. 54,000,000/=.

13. Prior to that, the 2nd respondent had served the applicant with a notification of sale dated 9th July 2018, giving a forced sale value for land parcel No. 3220 as Kshs. 105,000,000/= and a forced sale value of Kshs. 86,500,000/= for land parcel no. 3437. A notification of sale dated 6th December 2018 put the forced sale value of land parcel no. 3220 at Kshs. 105,000,000/= and gave a forced sale value of Kshs. 86,000,000/= for land parcel no. 3437. The applicant was also served with a valuation report dated 3rd May 2018 which assessed the forced sale value of land parcel no. 3220 as Kshs. 105,000,000/= and put the forced sale value of land parcel no. 3437 at Kshs. 86,500,000/=.

14. The applicant finds it odd that the land which had been appreciating from 2012 to 2018 would suddenly depreciate in value for the purpose of the intended sale. He is convinced that the depreciation has no basis and is only calculated to defraud him taking into account previous valuations of the property. The applicant's counsel submitted that the latest notification of sale dated 19th July 2019 was not accompanied by a valuation report to support the tremendous reduction of the properties' value. He argued that under Section 97 (2) of the Land Act, the respondents were required to ensure that a forced sale valuation of the properties was undertaken before purporting to exercise their right of sale.

15. A comparison of earlier valuations of the suit properties with the value indicated in the notification of sale dated 19th July 2019 shows colossal devaluation of the suit properties. The applicant did have a valid cause for concern given his right to have a reasonable value for his property. I concur with the observations of the court in ***Koileken Ole Kipolonka Orumoi vs. Mellech Engineering & Construction Limited & 2 Others Civil Suit No. 545 of 2014[2018]eKLR*** that;

> *"... the forced sale valuation is not only for purposes of carrying through the public auction or solely for recovering the debt, but reinforces the rights of the charger to have reasonable value for his property. That is why the duty under Section 97 (2) of the Land Act is statutory and obligatory. It is not left to the whims of the charge and its agents especially the auctioneers."*

16. The applicant averred that the parties had a contractual agreement for a forced sale price of Kshs. 191,500,000/= for the suit properties. I have so far not seen any evidence to support this claim. According to the Land Act, the chargee's statutory duty is limited to obtaining the best possible price for the land at the time of the sale. In as much as section 97 of the Land Act does not specify the time within which such a forced valuation should be conducted, it is expected that a sale should not occur more than 12 months after valuation, considering **Rule 11 (b) (x)** of the **Auctioneers Rules** which stipulates;

> *11 (1) A court warrant or letter of instruction shall include, in the case of*
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> *(b) immovable property—*

x. the reserve price for each separate piece of land based on a professional valuation carried out not more than 12 months prior to the proposed sale.

17. A prima facie case was defined in the case of **Mrao Limited V First American Bank Limited & 2 Others, [2003] KLR 125** to mean:-

‘’… a case in 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.

…

But as I earlier endeavored to show, and I cite ample authority for it, a prima facie 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"

18. Does the evidence show that there has been an infringement or risk of an infringement of the applicant's right? I think not. On this court's orders, the applicant and respondents appointed valuers who undertook a joint assessment of the suit properties and filed a joint report and valuation dated 18th January 2020 thus fulfilling the conditions under Section 97 (2) of the Land Act. The applicant has also admitted that the Company is in default of repaying the outstanding loan facilities advanced to it by the 1st respondent. He has not demonstrated an ability either by himself or the Company to settle the debt. These facts lead to the inevitable conclusion that the applicant has not established a *prima facie* case. The applicant has not demonstrated why the 1st respondent should be barred from exercising its statutory power of sale. In ***Equip Agencies Limited v I & M Bank Limited CIVIL APPEAL NO. 2 OF 2017 [2017] eKLR*** which is similar to the case here, the Court of Appeal held;

"The Charge, as we have shown, allowed for tacking and consolidation of debts as did the Land Act. The appellant, after taking the first loan, applied for many more facilities which were granted. It would appear that the appellant did not service the loans as required and, upon requesting for restructure of the same, did not service more loans.

The appellant was not entitled to protection of an interim order of injunction and the learned Judge was right to so hold. This appeal has no merit and we dismiss it with costs to the respondent."

19. As to whether the applicant is likely to suffer irreparable injury which would not adequately be compensated by an award of damages, I associate myself with the decision of the court in ***Andrew M. Wanjohi –v- Equity Building Society & 7 Another (2006) eKLR***, where the court held inter alia 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."* (see also ***John Nduati Kariuki T/A Johester Merchants –vs- National Bank of Kenya Limited (2006) 1 EA 96***). It follows that damages are an adequate remedy here. Being a financial institution, it is reasonable to conclude that the 1st respondent would be capable of paying it back. I am also persuaded that the balance of convenience tilts in favour of the respondents as the debt may escalate and exceed the value of the securities by the time of the conclusion of the suit.

20. All considered, I find that the application dated 30th September 2019 must fail. It is dismissed with costs to the respondents.

Dated and delivered at Kisii this 22nd day of July , 2020.

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A. K. NDUNG'U

JUDGE