



IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL CASE NO. E107 OF 2020

BETWEEN

DR MARGARET MADARAKA ODUK.....PLAINTIFF

AND

STANDARD CHARTERED BANK KENYA LIMITED.....1ST DEFENDANT

GEORGE NJOROGE MUIRURI T/A LEAKEY'S AUCTIONEERS....2ND DEFENDANT

RULING

1. The Plaintiff is the registered proprietor of two properties; LR No. 7785/770 located at Runda Mae Estate, Nairobi (“the Runda property”) and Apartment No. 7 erected on LR No. 209/14990/7 located in Kileleshwa, Nairobi (“the Kileleshwa property”) (collectively referred to as “the suit properties”). In November 2015, she applied for and the 1st defendant (“the Bank”) agreed to grant her a remortgage loan facility of Kshs. 80,000,000.00 disbursed in USD and an equity release for Kshs. 14,000,000.00 disbursed in USD. The facilities were secured by charges over the suit properties. In September 2017, the Plaintiff and Bank agreed to restructure the original facilities. The agreement was contained in Supplemental Offer letters dated 31st July 2018 amending the initial facility letters and reflecting new terms of repayment.

2. The Plaintiff’s case set out in the plaint dated 21st April 2020 is that on 18th March 2020, the bank through the 2nd defendant (“the Auctioneer”) served her with a 45-day redemption notice. She complained that she had been servicing the facilities diligently without any hitch until her tenant vacated the Runda property in September 2018. As a result, she was unable to continue servicing the loan. As a result, the house remained vacant leaving her to service the loan from her salary and rent from the Kileleshwa property. Further, because of the COVID-19 pandemic, she could not travel to Kenya to make arrangements to settle the arrears in order to redeem the suit properties.

3. The Plaintiff has accused the Bank of mismanaging her loan account by charging and applying illegal interest on the loan facility and it is now demanding USD 865,292.76 comprising exorbitant, colossal and excessive interest arrears.

4. The Plaintiff further contends that the valuation reports dated 9th March 2020 and 12th March 2020 respectively have grossly undervalued the suit properties. According to her, the Runda property was valued at Kshs. 100,000,000.00 and the Kileleshwa property valued at Kshs. 20,000,000.00 in 2015 when the charge was created. Hence the value of Kshs. 80,000,000.00 and Kshs. 20,000,000.00 attached to the Runda and Kileleshwa properties respectively is way below the prevailing market rates. The Plaintiff avers that the sale of the suit property at this time will jeopardise and clog her right of redemption.

5. The Plaintiff therefore seeks a permanent injunction restraining the defendants from selling the suit properties in a manner prejudicial to her interests. She also seeks an order directed at the Bank to issue her with a correct and accurate loan account statements reflecting the true and current position of the loan status and an order directing the Bank to carry out a fresh valuation of the suit properties that conforms to and reflects the prevailing market value through a different and independent valuer.

6. Together with the plaint, the Plaintiff moved the court by the Notice of Motion dated 21st April 2020 made, *inter alia*, under **Order 40 rule 1, 2, 3, 4 and 8** of the **Civil Procedure Rules** seeking a temporary injunction restraining the defendants from selling the suit property pending the hearing and determination of the suit. The application is supported by the affidavit of Phillip John Oduk, the plaintiff’s son, sworn on 21st April 2020. The affidavit reiterates the contents of the plaint which I have set out above.

7. The Notice of Motion was opposed by the defendants through the affidavit of Boniface Machuki, the Bank's Collection and Recoveries Manager, sworn on 15th June 2020. The thrust of the factual depositions is that the plaintiff admitted being in default and has in fact refused to service the loan despite being employed by the United Nations. He states that the Plaintiff's default predated the COVID – 19 pandemic and that any default could not be attributed to the Bank. As regards valuation of the suit properties, the Bank's position was that the Plaintiff has not furnished any evidence to back her allegations.

8. The parties filed written submissions in support of their respective positions. The principles guiding the court in this determination are settled. I only need to cite the Court of Appeal decision in ***Nguruman Limited v Jane Bonde Nielsen and 2 Others NRB CA Civil Appeal No. 77 of 2012 [2014] eKLR*** where the Court of Appeal reiterated the conditions for grant of an interim injunction in ***Giella v Cassman Brown [1973] EA 360*** 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) allay 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*. (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.

9. In considering the Plaintiff's application, I wish to point out that she did not contest the facilities granted to her. In any case, the Bank, through Mr Machuki, provided a detailed account of the letters of offer, charge documents and email correspondence between the parties. The Plaintiff did not contest the fact that she was indebted to the Bank. In her plaint she admitted that she has been struggling to pay the loan. The Bank provided evidence of her default including email correspondence where she promised to regularize loan repayments. Finally, the Plaintiff has not contested the fact that the Bank's statutory power of sale has crystallised by issuance of a statutory notices pursuant to **section 90** of the ***Land Act, 2012*** ("the ***Land Act***"). The Bank through its advocates sent to the Plaintiff a notice dated 8th August 2019 in respect of the Runda property and one dated 23rd August 2019 in respect of the Kileleshwa property by registered post. Thereafter and pursuant to **section 96(2)** of the ***Land Act***, the Bank, through its advocates, issued and sent to the Plaintiff by registered post notices dated 17th January 2020 informing her of its intention to sell the charged properties. As the Plaintiff admits, the suit was triggered by the receipt of the 45-day redemption notice issued by the Auctioneer.

10. The Plaintiff has raised two issues in the plaint and application to support her case that she has established a prima facie case with a probability of success. First, whether the Bank has charged illegal and unlawful interest. Second, whether the Bank has undervalued the properties.

11. The issue of interest goes to the level of indebtedness. The Plaintiff has complained that the interest is, "exorbitant, colossal and excessive" and it is for this reason that she seeks a correct and accurate loan statement. I find this averment vague and lacking in particulars to demonstrate how the Bank is charging excessive interest. The Plaintiff has not pointed to particular provision in the letters of offer, the charge documents or the law that the Bank has contravened. Even if I accept the Plaintiff's charge that the Bank has charged excessive interest, this would only affect the level of indebtedness. The Plaintiff has admitted that she is indebted and in her correspondence with the Bank, she never raised the issue of interest. The evidence provided by the Bank leaves no doubt regarding her indebtedness. It is well established that the court cannot restrain the Bank from exercising its power of sale merely on the ground that the debt is disputed (see ***Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] eKLR***).

12. The next aspect of the Plaintiff's case is that the property may be sold at an undervalue. 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 the Bank is required to obtain a forced sale value of the property within the year of the intended sale.

13. The plaintiff's case is that she could not understand how the original value of the Runda property would have fallen by Kshs. 20,000,000.00 and the Kileleshwa property would have remained the same over a period of 5 years. On its part, the Bank explained that it instructed Joe Musyoki Consultants Limited to carry out a full and formal valuation of the suit properties and advice on their market value, forced sale value and insurable values in order to guide the sale of the suit properties.

14. The valuation reports were duly produced and I hold that 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 based on personal or anecdotal opinion will not do. In ***Palmy Company Limited v Consolidated Bank of Kenya Limited ML HCCC No. 527 of 2013 [2014] eKLR*** the court dealt with this issue 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**.

15. Based on the material on record, I am unable to find that the Bank violated **section 97** of the **Land Act**. In any case, if the property is sold at an undervalue, the Plaintiff will have a remedy in damages.

16. 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. I therefore dismiss the Notice of Motion dated 21st April 2020. The Plaintiff shall bear the costs of the application.

DATED and DELIVERED at NAIROBI this 14th day of AUGUST 2020.

D. S. MAJANJA

JUDGE

Mr Ayieko instructed by Ochieng Ayieko and Company Advocates for the Plaintiff.

Mr Karanja instructed by Muthomi and Karanja Advocates for the Defendants.