



IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL CASE NO. E310 OF 2020

BETWEEN

AQUINAS F. M. WASIKE.....PLAINTIFF

AND

ABSA BANK KENYA PLC (FORMERLY BARCLAYS

BANK OF KENYA LIMITED)1ST DEFENDANT

REGENT AUCTIONEERS2ND DEFENDANT

TITUS O. KOCEYO 3RD DEFENDANT

RULING

Introduction

1. It is not in dispute that the 1st Defendant (“the Bank”) advanced certain facilities to the Plaintiff which were secured by a legal charge over his property; **LR. No.2/696(PART) IR 119440 Apartment No. L.5 of Block A on 1st Floor of Kirichwa Heights, Kilimani Estate situate in Nairobi City County** (“the suit property”). The Plaintiff has moved the court by the Notice of Motion dated 24th August 2020 seeking orders, inter alia, restraining the Defendants from completing the sale or effecting the transfer of the suit property to the 3rd Defendant.

Plaintiff’s Case

2. The Plaintiff’s case is set out in the Plaint dated 24th August 2020 and his supporting and supplementary affidavits in support of the Notice of Motion dated 24th August 2020. He stated that on 27th February 2020 he received from the 2nd Defendant (“the Auctioneer”), a 45 days’ redemption notice simultaneously with a Notification of Sale indicating that the suit property would be advertised for sale by public auction on the 14th April 2020. In order to forestall the intended sale, he wrote to the Bank on 8th, 24th and 28th April 2020 indicating his intention to settle the outstanding amount over a period of between 6 to 12 months in consideration of the Bank suspending the sale. On 28th April 2020, the Bank acceded to his request, allowed him to pay Kshs. 250,000.00 and look for a purchaser whereupon the sale was suspended for 3 months. The Plaintiff avers that based on the aforesaid understanding, the Bank was required to issue a fresh statutory notice and or notification of sale before proceeding to exercise its statutory power of sale.

3. On 14th August, 2020, the Plaintiff received a letter from the 3rd Defendant indicating that he had purchased the suit property at public auction purportedly conducted on 5th August 2020. The letter required him to enter into a tenancy agreement.

4. The Plaintiff contended that the purported sale of the suit property by public auction on 5th August 2020 was illegal and contrary to the agreement he had reached with the Bank considering that 3 months had not elapsed from the date of the agreement to allow any sale to be validly undertaken. Consequently, the Plaintiff avers that the Defendants colluded to dispose of the suit property to the 3rd Defendant at an undervalue and without carrying out a current valuation.

5. The Plaintiff complained that the Auctioneers advertised and sold the suit property without serving him with a proper statutory notice required by **section 90(2)** of the **Land Act, 2012**. He further complained that the 45-day redemption notice and notification of sale as issued by the Auctioneer were *ex-facie* illegal as the Auctioneers were proceeding on the instructions of a non-existent party i.e. BARCLAYS BANK OF KENYA LIMITED which long transitioned into ABSA BANK KENYA PLC.

6. The Plaintiff further averred that even though the right of redemption is extinguished upon the fall of the hammer, that the same can only be effected when all due processes are followed in accordance with the letter of the law otherwise the purported sale becomes invalid *ab initio* for want of due procedure and compliance with the law as to the exercise of the statutory power of sale.

7. In the Complaint, the Plaintiff prayed for a permanent injunction restraining the Defendants from completing the sale, effecting the transfer and interfering with his quiet possession of the suit property. He also sought an order nullifying the sale and transfer of the suit property to the 3rd Defendant. In the alternative, the Plaintiff prayed for damages amounting to the difference between the current market value and price at which the suit property was sold.

1st Defendant's Case

8. The Bank responded to the Plaintiff's case through the replying affidavit of Samuel Njuguna, its Legal Counsel- Recoveries, sworn on 4th September 2020. The thrust of the deposition was that the Plaintiff admitted that he was in default and upon default, the Bank instructed its advocates to issue a 90-day statutory notice dated 3rd October 2019 sent by registered post. Since the Plaintiff did not respond to the demand, the Bank issued and sent a 40-day notice dated 12th February 2019 by registered post. Thereafter the Bank instructed Knight Frank Valuers Limited to conduct a valuation of the suit property. According to the valuation report dated 20th February 2020 the suit property had an open market value of Kshs. 18 million and a forced sale value of Kshs. 13.5 million. Mr Njuguna pointed out that the Plaintiff admitted that he received the 45-day redemption notice from the Auctioneer.

9. Mr Njuguna admitted that the parties exchanged emails but that the email dated 28th April 2020 was clear that the Plaintiff had 3 months to pursue repayment or sale by private treaty yet he failed to do so. He contended that at no time did the Bank agree to recall the notices. Following the default, the Bank instructed the Auctioneer to advertise the suit property for sale. The suit property was advertised for sale and the auction was conducted on 5th August 2020 as advertised. At the auction, the 3rd defendant emerged the highest bidder having bid Kshs. 13,500,000.00. He paid Kshs. 3,375,000.00 by SWIFT transfer and paid the balance of 10,125,000.00. Mr Njuguna deponed that despite the sale, the Plaintiff was still indebted to the Bank to the extent of Kshs. 11,385,691.80 as at 4th September 2020.

3rd Defendant's Case

10. The 3rd defendant opposed the application through his affidavit sworn on 26th August 2020. He deponed that the suit property was advertised for sale by public auction in the Standard Newspaper of 14th April 2020 and 20th July 2020 and since he was interested in purchasing it, he approached Family Bank to finance part of the purchase price. He attended the auction on 5th August 2020 and emerged the highest bidder as confirmed by the Certificate and Memorandum of Sale that was signed on that day. He deponed that in order to participate in the sale, he had to deposit Kshs. 1,000,000.00 by cheque on 17th July 2020. After the sale he paid the full purchase price to the Bank.

Issues for determination

11. The application before the court is one for an interlocutory injunction, the parties are agreed that 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 it has a prima facie case with a probability of success, demonstrate irreparable injury which cannot be compensated by an award of damages if a temporary injunction is not granted, and if the court is in doubt show that the balance of convenience is in its favour. In ***Mrao Ltd v First American Bank of Kenya Limited and 2 Others [2003] eKLR***, the Court of Appeal explained that a prima facie case is, "*a case in which on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter.*"

12. From the facts I have recounted above, there several matters are common ground. First, the Plaintiff admits that it is indebted to the Bank. His position is that the Bank gave him accommodation to pay the outstanding amount or sell the suit property within 3 months but the Bank reneged on that agreement. Second, that the suit property was sold by public auction on 5th August 2020 and the 3rd Defendant emerged the highest bidder.

13. On the matters in dispute, the parties made brief oral submissions which I have considered alongside the pleadings, depositions and authorities filed. Based thereon, the Plaintiff hinges his prima facie case on the following issues:

- a. Whether there was an agreement between the Plaintiff and the Bank to forebear selling the suit property.
- b. Whether the Bank followed the proper procedure in exercising its power of sale.
- c. Whether the Plaintiff's equity of redemption was extinguished by the sale that took place on 5th August 2020.

Whether there was an agreement to stop the sale

14. The Plaintiff contends that the correspondence between himself and the Bank established an agreement on the part of the Bank to forebear selling the suit property. By the letter dated 8th April 2020, the Plaintiff approached the Bank and requested to pay the outstanding

amount over a period of at least 12 months or to sell the suit property by private treaty in consideration of the Bank withdrawing the Auctioneers Notice served on him on 27th February 2020. The Plaintiff followed up that letter with another letter dated 24th April 2020 reiterating the proposal it had made earlier to settle the outstanding liability. On 28th April 2020, the Plaintiff wrote to the Bank stating that he was able to raise Kshs. 250,000.00 as he was exploring raising the additional amount. He requested that the Bank suspend the sale scheduled for 29th April 2020 to allow him to pursue a sale by private treaty. On the same day, the Bank wrote an email informing the Plaintiff that, “We shall suspend the Auction and give you 3 months to pursue other means of repayment or sale by private treaty.” Thereafter, the Bank on 8th July 2020 wrote to the Plaintiff, an email stating, “The time of 3 months have now lapsed please confirm means of repayment or sale by private treaty.”

15. The Bank agreed to indulge the Plaintiff for a period of 3 months. Had the Plaintiff met the condition upon which the earlier sale was suspended, he would either have made payment or found a buyer for the property by at least 28th July 2020. By the time the suit property was knocked down at the auction on 5th August 2020, the Plaintiff had not complied with the terms of the offer made to him despite the reminder by email dated 8th July 2020.

Procedure for sale of the suit property

16. The second issue for consideration is whether the Bank followed the proper procedure in exercising its power of sale. The Plaintiff admitted his indebtedness and Mr Njuguna, in his deposition, set out the steps the Bank took in exercising its power of sale as I have outlined above. It issued a notice under **section 90(1)** of the **Land Act** giving the Plaintiff 90 days from the date of service of the notice to pay the money due under the charge. Thereafter the Bank issued a 40-day notice to the Plaintiff evincing its intention to sell the suit property if the default set out in the earlier notice was not rectified under the provisions of **section 96** of the **Land Act**. The Bank discharged the burden of showing that it had sent the two notices by registered post to the Plaintiff’s address. The Plaintiff admitted receiving the Auctioneers 45-day notice issued under **Rule 15(d)** of the **Auctioneers Rules**. It is the last notice which triggered the Plaintiff’s correspondence with the Bank.

17. The Plaintiff impugned the instructions given to the Auctioneer on the ground that they emanated from Barclays Bank of Kenya Limited which had long transitioned to ABSA Bank Kenya PLC. The Plaintiff, in his own pleading, admits that the Barclays Bank transitioned to ABSA Bank without a change in its capacity. If the Plaintiff is correct, then his suit would also be incompetent. I reject this argument.

18. Counsel for the Plaintiff also submitted that after the initial sale was suspended, the Bank ought to have issued fresh notices. The answer to this submission was settled by the Court of Appeal in **Mbuthia v Jimba Credit Finance Corporation and Another NRB CA Civil Appeal No. 88 of 1986 [1988] eKLR** as follows:

It is plain that section 74 did not impose on the chargee, the giving of more than one notice and there is no sound policy reason why he should be obliged to give fresh notice to the chargor any time a sale was suspended to accommodate him. If such were a legal requirement, no chargee in his right mind would suspend a projected sale as a matter of favour or indulgence to a defaulting mortgagor.

But in so far as the requirement of a second notice is supposed to be based on common law principles, this is less than correct. The legal position at common law is stated at page 308 of **Fisher & Lightwoods Law of Mortgages 8th Edn.** at p. 308 as follows:-

“If after demand, the sale is stopped on receipt of a cheque for the amount due under the mortgage, but the cheque is afterwards dishonoured, the right of sale and the running of notice having been only suspended revive, and the power may be exercised without serving a new notice.”

19. Prior to selling the suit property, the Bank commissioned a valuation report dated 20th February 2020. 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. The Bank complied with these provisions and the Plaintiff has not produced cogent evidence that the valuation report is wrong or at least doubtful (see **Palmy Company Limited v Consolidated Bank of Kenya Limited ML HCCC No. 527 of 2013 [2014] eKLR**).

20. From all the steps I have outlined, I am satisfied that the right of the Bank to exercise its statutory power of sale had crystallized on the ground that the Plaintiff was indebted and the Bank followed all the statutory procedures before selling the suit property by public auction.

Whether equity of redemption extinguished

21. The final issue is whether the Plaintiff’s equity of redemption was extinguished. The right of the chargor to discharge the property at any time has been fundamental to the institution of the mortgage. It has been said that the redemption of the charged property is of the very nature and essence of a mortgage in equity and cannot be clogged or impeded upon by design, or contrivance, or default or be left to the whims of the chargee (see **Noakes Co. Ltd v Rice [1902] AC 24**).

22. The equity of redemption has statutory expression in **sections 85** and **89** of the **Land Act**. **Section 85** protects the right of the Chargor to discharge the property at any time before the charged land is sold by the chargee or receiver under the power of sale. **Section 85(1)** provides as follows:

85(1) Subject to the provisions of this section, the chargor shall, upon payment of all money secured by a charge and the performance of all other conditions and obligations under the charge, be entitled to discharge the charge at any time before the charged land has been sold by the chargee or receiver under the power of sale.

23. Section 89 prohibits any rule of law; written or unwritten, entitling a chargee to foreclose the equity of redemption and provides that the remedies by the chargee shall be only in accordance with the **Land Act**. It provides as follows:

89(1) Any law, written or unwritten, entitling a chargee to foreclose the equity of redemption in charged land is prohibited.

(2) Upon commencement of this Act, a chargee shall not be entitled to enter into possession of the charged land or a charged lease or to receive the rents and profits of that land or lease by reason only that default has been made in the payment of the principal sum or of any interest or other periodic payment or of any part thereof or in the performance or observance of any agreement expressed or implied in the charge, other than in accordance with the provisions of this Act

24. Thus the Plaintiff, as chargor, has a right at any time before the auction to pay the amount outstanding and redeem the property. Once the Bank exercised its statutory power of sale, the Plaintiff's right to discharge the suit property was extinguished. The finality of the sale is buttressed by **section 99** which protects the purchaser from any action to set aside the sale and provides for damages as a remedy. It states as follows:

99 (1) This section applies to—

(a) A person who purchases charged land from the chargee or receiver, except where the chargee is the purchaser; or

(b) A person claiming the charged land through the person who purchases charged land from the chargee or receiver, including a person claiming through the chargee if the chargee and the person so claiming obtained the charged land in good faith and for value.

(2) A person to whom this section applies—

(a) is not answerable for the loss, misapplication or non-application of the purchase money paid for the charged land;

(b) Is not obliged to see to the application of the purchase price;

(c) Is not obliged to inquire whether there has been a default by the chargor or whether any notice required to be given in connection with the exercise of the power of sale has been duly given or whether the sale is otherwise necessary, proper or regular.

(3) A person to whom this section applies is protected even if at any time before the completion of the sale, the person has actual notice that there has not been a default by the chargor, or that a notice has been duly served or that the sale is in some way, unnecessary, improper or irregular, except in the case of fraud, misrepresentation or other dishonest conduct on the part of the chargee, of which that person has actual or constructive notice.

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

25. These provisions have gained judicial imprimatur in several cases. In **Joyce Wairimu Karanja v James Mburu Ngure & Another KBU HCCA No. 118 of 2017 [2018] eKLR**, Ngugi J., held that:

[30] This section seems quite clear that a purchaser of property sold in the exercise of a chargee's statutory power of sale is protected even in cases where the person had actual notice that the chargee had not properly realized that statutory power of sale in terms of procedure. In this case, there is no evidence to show that the Appellant had any notice of any irregularities in the planned sale – and evidence suggests that there were none anyway. The point is that the Appellant is then inoculated by section 99 from any action to recover the Suit Property from her.

26. The same position was reiterated by Havelock J., in **Simon Njoroge Mburu v Consolidated Bank of Kenya Ltd [2014] eKLR** who stated that:

That section [99] now statutorily encompasses the right of the charger prejudiced by unauthorized, improper or irregular exercise of the power of sale to have a remedy in damages. What is clear is that once a property has been knocked down and sold in a public auction by a chargee in exercise of its statutory power of sale, the equity of redemption of the charger is extinguished. The only remedy for the charger who is dissatisfied with the conduct of the sale is to file suit for general or special damages...

27. I find that the auction that took place on 5th August 2020 and in which the 3rd Defendant successfully bid for the suit property extinguished the Plaintiff's right to redeem the suit property. The allegation of fraud or collusion do not fall within the case as pleaded in the plaint and in any case any irregularities can only be assuaged by damages as provided by the law.

Conclusion and disposition

28. The Plaintiff has failed to demonstrate that it has a prima facie case with a probability of success on the issues I have framed for determination. As a matter of statute, damages are clearly an adequate remedy and since the property has been transferred to the 3rd Defendant, the balance of convenience is against the Plaintiff who remains indebted to the Bank.

29. The Notice of Motion dated 24th August 2020 is now dismissed with costs to the Defendants.

DATED and DELIVERED at NAIROBI this 15th day of SEPTEMBER 2020.

D. S. MAJANJA

JUDGE

Mr Masika instructed by Masika and Koross Advocates for the Plaintiff.

Mr Wilson instructed by Muriu, Mungai and Company Advocates LLP for the 1st Defendant.

Mr Koceyo instructed by Koceyo and Company Advocates for the 3rd Defendant.