



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL CASE NO. 60 OF 2018

BONFACE RENJA ERAMBO.....PLAINTIFF

-VERSUS-

KENYA COMMERCIAL BANK LIMITED..... DEFENDANT

RULING

[1] The Plaintiff herein, **Bonface Renja Erambo**, is the registered owner of all that piece of land known as **Pioneer/Ngeria Block 1 (EATEC)/9203**. He charged that property to the Defendant, **Kenya Commercial Bank Limited**, for a financial facility in the sum of **Kshs. 7,000,000/=**. When the Defendant threatened to sell the land on **28 November 2017** in exercise of its statutory power of sale, the Plaintiff filed this suit at the Eldoret Environment and Land Court along with an application for temporary injunction dated **10 November 2017**. The suit, formerly **ELC No. 366 of 2017**, was subsequently transferred to this Court for hearing and determination. This Ruling is therefore in respect of the Notice of Motion dated **10 November 2017**.

[2] The subject application was filed under **Sections 1 and 1A, 3A and 63(e)** of the **Civil Procedure Act, Chapter 21** of the **Laws of Kenya**; and **Order 40 Rule 1** of the **Civil Procedure Rules 1 and 2** of the **Civil Procedure Rules, 2010**. It seeks the following orders:

[a] Spent

[b] Spent

[c] That a permanent injunction do issue restraining the defendant, its servants, agents and/or assigns from in any way dealing and/or interfering with the Plaintiff/Applicant's legal ownership and to stop any unlawful acts such as transferring, offering for sale and/or sub-dividing, wasting and/or any act that is inconsistent with the Plaintiff's right as the registered owner of the Suit Property pending the hearing and determination of the application *inter partes* and thereafter the main suit;

[d] That costs be provided for.

[3] The application was predicated on the grounds that the Plaintiff is the registered owner of the Suit Property; and that, although he serviced the loan diligently, he defaulted sometimes in the year **2016** due to financial constraints. He averred that the Defendant proceeded to advertise the property for sale yet no statutory notice had been served prior thereto; hence the suit. He therefore prayed that, pending the hearing and determination of the suit, the Court be pleased to issue a temporary injunction to preserve the subject property, as he would otherwise be exposed to irreparable harm. These grounds were expounded on in the Plaintiff's Supporting Affidavit, sworn on **10 November 2017**, to which he annexed copies of the Title Deed, the Letter of Offer and the sale advertisement. The Plaintiff also exhibited a copy of the Valuation Report to augment his averment that the amount being claimed by the Defendant is far below the current market value of the Suit Property; and therefore that its sale will prejudice him immensely.

[4] The Plaintiff filed a Further Affidavit sworn on **20 November 2018** to shore up his case. At paragraph 3 thereof, he averred that as at the time he charged the Suit Property to the Defendant, its value stood at **Kshs. 8,000,000/=**; and that he thereafter carried out developments and improvements on the property, thus raising its value to about **Kshs. 14,000,000/=**. He annexed to the Further Affidavit a current Valuation Report for the property and urged the Court to find that his application has been brought in good faith; and that his inability to liquidate the debt was due to unforeseeable circumstances that were beyond his control.

[5] The application was resisted by the Defendant, on whose behalf a Replying Affidavit was sworn on **14 February 2018** by its Mortgages Recovery Manager, **Fredrick Mung'athia**. He confirmed that the Defendant advanced a loan of **Kshs. 7,000,000/=** to the Plaintiff; and that the Suit Property was charged as security for the loan. He further averred that, since the Plaintiff failed to service the loan as agreed, the Defendant proceeded to instruct **Willima Auctioneers** to issue and serve the requisite redemption notice and a Notification of Sale upon the

Plaintiff. It was therefore the averment of **Mr. Mung'athia** that the Defendant is, in the circumstances, entitled to exercise its statutory power of sale as provided for by law; the Plaintiff having failed to redeem the property within the stipulated period.

[6] In response to Paragraph 8 of the Supporting Affidavit, **Mr. Mung'athia** averred that the Defendant conducted a proper valuation of the charged property before the proposed sale and ascertained the forced sale value of the property; and therefore that the Defendant discharged its duties to the Plaintiff as provided for under **Section 97** of the **Land Act**. A copy of the valuation report was annexed to the Replying Affidavit and marked **Annexure No. 2** thereto.

[7] Pursuant to the directions issued herein on **12 April 2018**, the application was disposed of by way of written submissions. All indications are that the applicant's counsel is yet to comply. As for the respondent, written submissions were filed herein on **23 February 2018** by **M/s Kibichiy & Company Advocates**. The basic contention of **Mr. Kibichiy** was that all the laid down procedures for the exercise of a chargee's statutory power of sale were followed and complied with in this instance before the appointment of **Willima Auctioneers**. He further pointed out that, upon receiving instructions, the auctioneers also proceeded to issue the requisite Redemption Notice as well as the Notification of Sale; copies of which were annexed to the Replying Affidavit as Annexures 1(a) and (b).

[8] Counsel for the Defendant further submitted that, since all the stipulations of the law pursuant to **Sections 90(2), 97 and 97(2)** of the **Land Act, 2012** were complied with by the Defendant, the application falls short of meeting the threshold established in the case of **Giella vs. Cassman Brown & Co. Ltd** [1973] EA 358; and that it has been filed for the sole purpose of defeating the Defendant's statutory right to sell the charged property. Relying on **Showind Industries vs. Guardian Bank Limited & Another** [2002] EA 284, Counsel for the Defendant urged the Court to find that the Plaintiff is not entitled to the equitable relief sought; having admitted as he did, that he failed to meet his obligations under the Charge instrument.

[9] The Court has given careful consideration to the application, its Supporting Affidavit and the annexure thereto, as well as the responses filed herein by the Defendant. Consideration has also been given to the Defendant's written submissions and the authorities relied on therein. One of the enabling provisions cited in support of the application is **Order 40 Rule 1(a)** of the **Civil Procedure Rules**. It provides that:

"Where in any suit it is proved by affidavit or otherwise that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongly sold in execution of a decree ... the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders."

[10] There is no dispute that the Plaintiff did approach the Defendant for a loan, in respect of which title for the Suit Property, namely, **PIONEER/NGERIA BLOCK 1(EATEC)/9203** measuring 0.0949 Ha., was charged as security by the Plaintiff in favour of the Defendant. The Plaintiff annexed to his affidavit a Letter of Offer dated **8 August 2014** confirming that the facility was for **Kshs. 7,000,000/=**. The parties are further in agreement that the Plaintiff defaulted in servicing the facility; and that it was in consequence thereof that the Defendant initiated the process of realizing the security. At paragraph 4 of his Supporting Affidavit, the Plaintiff conceded that he serviced the loan until **2016** when he defaulted due to financial constraints. The same averments are to be found in paragraph 10 of the Plaintiff's Supporting Affidavit as well as paragraphs 7 of his Further Affidavit.

[11] It was nevertheless the contention of the Plaintiff that, other than the advertisement for sale, he was never served with any statutory notice prior thereto. Thus, in his Plaint dated **10 November 2017**, he prayed for:

[a] A declaration that the intended sale by public auction by the Defendant is illegal in view of the fact that the 90 days' notice was never issued or served before the sale advertisement.

[b] A declaration that the intended sale by public auction by the Defendant is illegal as no forced sale valuation was undertaken prior to advertisement.

[c] Costs of the suit.

[d] Any other relief the Court may deem just and expedient to grant in the best interest of justice.

[12] In the premises, the key issue for the Court's determination is whether the Plaintiff has satisfied the conditions for granting a temporary injunction for purposes of **Section 63(c)** of the **Civil Procedure Act** and **Order 40 Rule 1** of the **Civil Procedure Rules**; and the touchstone in this regard is the case of **Giella vs. Cassman Brown & Co. Ltd** (supra), wherein it was held that:

"The conditions for the grant of an interlocutory injunction are ...well settled in East Africa. 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."

[13] As to what amount to a *prima facie* case, the Court of Appeal, in **Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others** [2003] KLR 123 furnished the following helpful definition:

"A prima facie case in a civil application includes but not confined to a genuine and arguable case. It 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 as to call for an explanation or rebuttal from the latter."

[14] The contention of the Plaintiff was that he was not served with the requisite statutory notices under **Sections 90** of the **Land Act**. He also contended that **Section 97** of the **Land Act**, which requires that a current valuation of the charged property be done prior to sale, was not complied with by the Defendant. It is therefore crucial to ascertain whether he is justified in so saying.

On Whether the Plaintiffs were served with the requisite Statutory Notices:

[15] **Section 90** of the **Land Act** provides as follows in part:

(1) If a chargor is in default of any obligation, fails to pay interest or any other periodic payment or any part thereof due under any charge or in the performance or observation of any covenant, express or implied, in any charge, and continues to be in default for one month, the chargee may serve on the chargor a notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be.

(2) The notice required by subsection (1) shall adequately inform the recipient of the following matters--

(a) the nature and extent of the default by the chargor;

(b) if the default consists of the non-payment of any money due under the charge, the amount that must be paid to rectify the default and the time, being not less than three months, by the end of which the payment in default must have been completed;

(c) if the default consists of the failure to perform or observe any covenant, express or implied, in the charge, the thing the chargor must do or desist from doing so as to rectify the default and the time, being not less than two months, by the end of which the default must have been rectified;

(d) the consequence that if the default is not rectified within the time specified in the notice, the chargee will proceed to exercise any of the remedies referred to in this section in accordance with the procedures provided for in this sub-part; and

(e) the right of the chargor in respect of certain remedies to apply to the court for relief against those remedies.

(3) If the chargor does not comply within ninety days after the date of service of the notice under subsection (1), the chargee may--

(a) sue the chargor for any money due and owing under the charge;

(b) appoint a receiver of the income of the charged land;

(c) lease the charged land, or if the charge is of a lease, sublease the land;

(d) enter into possession of the charged land; or

(e) sell the charged land.

[16] In response to the assertions by the Plaintiff, the Defendant annexed to its Replying Affidavit a copy of the Statutory Notice served by it in accordance with the requirements of **Sections 90** of the **Land Act** (See **Annexure "FM 1(a)** to the Replying Affidavit). That notice is dated **28 June 2016**. It was issued pursuant to **Section 90** of the **Land Act** and is explicit as to the nature and extent of the default by the chargor; and the amount that needed to be paid by the Plaintiff to rectify the default. More importantly, the notice is specific as to the three months' period within which the Plaintiff had to pay the arrears to rectify his default, failing which the Defendant would proceed to exercise its right to sell the charged property. Additionally, the Defendant complied with **Section 90(2)(e)** of the **Land Act** by advising the Plaintiff that he was at liberty to apply to court for any relief that the court may deem fit to grant against the Bank's statutory power of sale.

[17] The aforementioned notice is expressed to have been dispatched by way of registered post to the Plaintiff at his last known address. That address is the same as the address used in the Letter of Offer dated **8 August 2014**. Needless to say that the Plaintiff did not take any steps to rectify his default within the three months set out in the aforementioned notice. Accordingly, the Defendant was perfectly entitled to issue a further notice for purposes of **Section 96** of the **Land Act**. That provision states thus:

(1) Where a Chargor is in default of the obligation under a charge and remains in default at the expiry of the time provided for the rectification of the 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] The Defendant sufficiently demonstrated, on a *prima facie* basis, that it served the **Section 96** Notice as required by producing a copy

thereof as **Annexure FM1(a)** to the Replying Affidavit. The notice is dated **30 May 2017** and was similarly sent by registered post to the Plaintiff's address. Its purpose was to give the Plaintiff the requisite **40 days' Notice to Sell**. The said notice also contained all the requisite particulars for purposes of **Section 96** of the **Land Act**. That being the case, the burden of proof shifted to the Plaintiff to demonstrate that it did not and could not have received the said notices. In **Nyagilo Ochieng & Another vs. Phaniel B. Ochieng & 2 Others [1996] eKLR**, the Court of Appeal pronounced itself on this point thus:

Unless the receipt of statutory notice is admitted, posting thereof must be proved and upon production of such proof the burden of proving non-receipt of such notice or notices shifts to the addressee as is contemplated by section 3(5) of the Interpretation and General Provisions Act, Cap 2, Laws of Kenya.

[19] And, **Section 3(5)** of the **Interpretation and General Provisions Act**, provides that:

"Where any written law authorizes or requires a document to be served by post, whether the expression "serve" or "give" or "send" or any other expression is used, then, unless a contrary intention appears, the service shall be deemed to be effected by properly addressing to the last known postal address of the person to be served, prepaying and posting, by registered post, a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would have been delivered in the ordinary course of the post."

[20] In the premises, there being no proof to the contrary by the Plaintiff, service herein is deemed to have been duly made of the **Section 90** and **Section 96** Notices.

[21] As for the Redemption Notice issued under **Rule 15** of the **Auctioneers Rules**, a copy was exhibited as **Annexure "FM 1(b)** to the Defendant's Replying Affidavit with evidence of service appended thereto. Clearly therefore, there is *prima facie* proof that that the Defendant complied with the requirements of the law and served the requisite Statutory Notices.

On Whether there was failure by the Defendant to comply with Section 97 of the Land Act:

[22] **Section 97** of the **Land Act** provides as follows:

(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 court, owes a duty of care 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.

(3) If the price at which the charged land is sold is twenty-five per centum or below the market value at which comparable interests in land of the same character and quality are being sold in the open market-

(a) There shall be a rebuttable presumption that the Chargee is in breach of the duty imposed by subsection (1); and

(b) The Chargor whose charged land is being sold for that price may apply to a court for an order that the sale be declared void, but the fact that a plot of charged land is sold by the Chargee at an undervalue being less than twenty-five per centum below the market value shall not be taken to mean that the Chargee has complied with the duty imposed by subsection (1).

[23] Hence, while the provision imposes a duty on the charge to ensure the best interest of the charger while exercising its statutory power of sale, that duty is limited to ensuring the best sale price is obtained by undertaking a forced sale valuation before sale. Again, there is credible evidence herein that the Defendant did comply with this provisions and has exhibited the Valuation Report as **Annexure FM2(b)** to the Replying Affidavit. According to the report, the Open Market Value of the property was **Kshs. 8,500,000/=**; while the Forced Sale Value was fixed at **Kshs. 6,400,000/=**. That report is dated **8 May 2017** in respect of a sale that was scheduled for **28 November 2017**. Hence, for purposes of **Section 97(2)** of the **Land Act**, the Defendant was compliant.

[24] I note that the Plaintiff also exhibited a Valuation Report in a bid to show that the valuation by the Defendant was an undervalue. The Plaintiff's report gives an Open Market Value of **Kshs. 14,000,000/=** and a Reserve Price/Forced Sale Value of **Kshs. 10,500,000/=**. It remains to be seen at the hearing whether indeed the Defendant's was an undervaluation and which between the two valuation reports is more accurate. However, for purposes of compliance, I have no hesitation in holding that there was compliance with the provisions of the law; for it would be entirely speculative to predict what the outcome of the auction would have been. Hence, I agree entirely with the decision of the Court in **Zum Zum Investment Limited vs. Habib Bank Limited [2014] eKLR** that:

"...Once the Defendant has undertaken a forced valuation, the burden shifts to the Plaintiff to prove that the value arrived at by the Defendant's valuer was not the best price reasonably obtainable at the time...It is not sufficient for the Plaintiff to merely claim that the intended selling price is not the best price obtainable at the time... The Plaintiff must satisfactorily demonstrate why the valuation report that the Defendant intends to rely on in disposing of the suit property does not give the best price obtainable...The Plaintiff needs to show, for instance, that the Defendant's valuer is not qualified or competent to carry out the valuation, or that the valuation was done way before the time of the intended sale..."

[25] In the circumstances, I am far from persuaded that the Plaintiff has a good reason to warrant the issuance of the injunctive orders sought. In the premises, there would be not need to consider the question as to whether the Plaintiff stands to suffer irreparable harm, or in whose

favour the balance of convenience tilts; for in Nguruman Limited V. Jan Bonde Nielsen & 2 Others (*supra*) the Court of Appeal held that:

“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.”

[26] In the premises, the Plaintiff’s Notice of Motion dated 10 November 2017 fails and is hereby dismissed with costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 22ND DAY OF OCTOBER 2020

OLGA SEWE

JUDGE