



IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL CASE NO. E104 OF 2020

BETWEEN

TERRACRAFT (K) LIMITED.....1ST PLAINTIFF

HENRY NDUNGU KINUTHIA.....2ND PLAINTIFF

AND

KCB BANK KENYA LIMITED.....DEFENDANT

RULING

Introduction and Background

1. The 1st Plaintiff (“the Company”) is a construction business. In order to finance its business, it applied for and was advanced Kshs. 8,000,000.00 by the Defendant (“the Bank”) as evidenced by the letter of offer dated 11th May 2018 secured by a legal charge over the property of its Managing Director, the 2nd Plaintiff, namely; LR No. LAIKIPIA/KALALU/425 (“the suit property”). The Bank has now threatened to sell the suit property by public auction this precipitating this suit.

2. The case set out in the Plaint dated 17th April 2020 is that on 5th February 2020, the Bank through Cleverline Auctioneers served on the Plaintiffs a Redemption Notice and a Notification of Sale indicating that the public auction was scheduled for 24th April 2020. The Plaintiffs aver that the Bank advised the Company to clear the arrears of Kshs. 384,295.00 and reduce the overdraft balance by Kshs. 4,000,000.00 to enable it consider its request. The Company wrote back to the Bank on 4th April 2020 explaining that it could not pay Kshs. 4,000,000.00 since the Government suspended the expected payment of Kshs. 16,808,963.00 following the COVID-19 pandemic. By a letter dated 7th April 2020, the Bank informed it that the auction would proceed unless it cleared the outstanding balance. The Plaintiffs contend that the Bank acted in bad faith since the parties were in the middle of negotiations bearing in mind the intervening circumstances related to the COVID-19 pandemic which is beyond its control.

3. The gravamen of the Plaintiffs’ case is that the Notice to sell was not served on the 2nd Plaintiff as required by **section 96(3)(h)** of the **Land Act** and that the Notification of sale indicated a sum of Kshs. 27,833,501.85 which is erroneous and deliberately misleading. They further allege that the Notification of Sale does not indicate the open market value or forced sale value of the suit property as required by **section 97(2)** of the **Land Act**. The Plaintiffs also aver that the Bank has not issued a Notice to Sell under **section 96(2)** of the **Land Act**.

4. The Plaintiffs contend that their right to secure and enforce its right to redeem the suit property has been violated. They therefore seek a declaration that the recovery process for the outstanding amount due to the Bank by way of sale of the suit property is flawed, illegal and unlawful and a permanent injunction restraining the Bank from selling the suit property in exercise of its statutory power of sale.

5. Together with the Plaint, the Plaintiffs filed a Notice of Motion dated 17th April 2020 made, inter alia, under **Order 40 Rule, 2** of the **Civil Procedure Rules** seeking the following orders:

1. [Spent]

2. [Spent]

3. [Spent]

4. That temporary injunction do issue to restrain the Defendant/Respondent by themselves, their trustees, servants, workmen and agents or otherwise howsoever from auctioning, selling by private treaty, taking possession of, leasing, transferring, charging or otherwise in any manner whatsoever interfering with the property known as Laikipia/Kalalu/425 pending the hearing and determination of the suit herein.

5. That in the alternative to prayer (d) above, the time for compliance and/or rectifying any default to redeem Land Title No. Laikipia/Kalalu/425 be extended for a period of eight(8) months or for such period as the court may deem fit in the circumstances of this case.

6. Costs of this Application be provided for.

7. The Honourable Court be pleased to make such further or other orders as it may deem just and expedient in the circumstances of this case.

6. The application is supported by the 2nd Plaintiff's affidavits sworn on 17th April 2020 and 3rd September 2020 respectively. The depositions basically reiterate the facts set out in the Plaint which I have outlined above.

7. The Bank opposes the application through the replying affidavit of its Recoveries Manager, Jane Orumoi, sworn on 11th June 2020. The Bank's position is that it has complied fully with the legal provisions regarding the exercise of its statutory power of sale since the Plaintiffs have not denied that they are in arrears and have not honoured monthly payments as agreed.

8. Both parties filed written submissions in support of their respective position for consideration by the court.

Analysis and Determination

9. The main issue for determination is whether the court should grant the injunctive orders sought by the Plaintiffs.

10. The principles upon which the court is required to apply in determining the Applicants' case are not disputed. In ***Nguruman Limited v Jane Bonde Nielsen and 2 Others NRB CA Civil Appeal No. 77 of 2012 [2014] eKLR***, the Court of Appeal reiterated the settled principles 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.

11. As to what constitutes a prima facie case, the Court of Appeal in ***Mrao Ltd v First American Bank of Kenya Limited and 2 Others [2003] eKLR*** explained that 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 to call for an explanation or rebuttal from the latter."

12. The Plaintiffs' do not dispute the fact that the Company is indebted to the Bank. The Plaintiffs' fault the process undertaken by the Bank in exercising its statutory power of sale. Before I consider the case, it may be appropriate to outline the procedure set out in the ***Land Act***.

13. In order to exercise its statutory power of sale, the Bank must issue a notice under **section 90** of the ***Land Act*** when the chargor defaults in any of its obligations under the charge. Such obligations include payment of interest or any other periodic payment or any part thereof due under the charge. If the chargor does not comply with the demand within 90 days after service of the notice, the chargee may proceed to sell the charged property. It is at this point that it is said the statutory power of sale has crystallised. In this case, the Plaintiffs do not dispute the fact that the 2nd Plaintiff has been served with the Statutory Notice under **section 90** of the ***Land Act***. The issue turns on the subsequent processes.

14. Upon crystallization of the power of sale, the chargee is required to issue and serve on the chargor a 40-day notice to sell. **Section 96(1)** and **(2)** of the ***Land Act*** provides as follows:

96(1) Where a chargor is in default of the obligations under a charge and remains in default at the expiry of the time provided for the rectification of that 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.

(3) A copy of the notice to sell served in accordance with subsection (2) shall be served on –

(h) any guarantor of the money advanced under the charge:

15. Upon expiry of the 40 days, the chargee is required to issue a Notification of Sale under **Rule 15 (d)** of the **Auctioneers Rules** provides as follows:

15. Upon receipt of a court warrant of letter of instruction the auctioneer shall in the case of immovable property-

(d) Give in writing to the owner of the property a notice not less than forty-five days within which the owner may redeem the property by payment of the amount set forth in the court warrant or letter of instruction.

16. Based on the Plaint and supporting depositions, the Plaintiffs have raised the following issues which they contend entitle them to an injunction:

- The Bank did not issue and serve the Notice to Sell on the Company as required by **section 96(2)** of the **Land Act**.
- The Bank did not serve the Notice of Sell to the 2nd Plaintiff, as guarantor, as required by **section 96(3)(h)** of the **Land Act**.
- The Notice to sell contains an erroneous figure of Kshs. 27,833,501.85 as the amount outstanding.
- The Notice to Sell did not contain the open market value or the forced sale value of the charged property as required by **section 97(2)** of the **Land Act**.

17. On the issue of service, it is the burden of the Bank to demonstrate that it has served the notices in the absence of an admission by the Plaintiffs (see **Nyagilo Ochieng and Another v Fanuel Ochieng and 2 Others [1995-1998] 2 EA 260**). The same position was summarized by the court in **Moses Kibiego Yator v Eco Bank Kenya Limited NKU E& L No. 426 of 2013 [2014] eKLR** as follows:

In instances where a chargor alleges that he did not receive the statutory notice, the burden shifts to the chargee, to demonstrate prima facie, that the statutory notice was served. If there is material to show that the notice was received or acknowledged, say, through an acknowledgement letter, that will clearly demonstrate that the notice was duly served and received. If the notice was served by way of registered post, the chargee ought to place before the court sufficient material to demonstrate prima facie, that the document was duly dispatched to the proper address of the chargee, and that in the ordinary course of events, the notice must have reached the chargee.

18. In order to discharge its burden, the Bank through the replying affidavit annexed a copy of the 90-day statutory notice dated 3rd May 2019 issued under **section 90** of the **Land Act** and the 40-day notice dated 12th September 2019 issued under **section 96** of the **Land Act**. A perusal of these notices shows they were addressed to the Company and the 2nd Plaintiff. They also indicate that they were sent by registered post. Although the Plaintiffs did not dispute that the first notice was sent and indeed received by them, the Bank did not provide any evidence to show that the second notice was served.

19. Since compliance with **section 96** of the **Land Act** is a mandatory requirement and precedes all subsequent steps taken by the Bank in selling the property, the proposed sale of the suit property cannot stand. I therefore find and hold that the Plaintiffs have established a prima facie case with a probability of success in respect of the issue.

20. The Plaintiffs have not denied that they are indebted to the Bank. If anything, prayer (d) of the motion under consideration taken together with the correspondence between the parties show that the Plaintiffs require indulgence to repay the debt. Since the charge is valid and the obligation to make payment on demand still stands, granting an injunction pending the hearing and determination of the suit would result in devaluation of the security relative to the debt which continues to accrue interest. In this regard, I am guided by what the Court of Appeal stated in **National Bank of Kenya v Shimmers Plaza Limited NRB CA Civil Appeal No. 26 of 2009 [2009] eKLR** as follows:

An injunction is an equitable and discretionary remedy. The duration of an order of injunction is at the sole discretion of the trial Judge and depends on the circumstances of each case. In this case, the duration of the injunction until the determination of the suit frustrated the statutory right of the bank to realize the security upon giving a notice which complies with the law. We venture to say that where the court is inclined to grant an interlocutory order restraining a mortgagee from exercising its statutory power of sale solely on the ground that the mortgagee has not issued a valid notice, then in our view, the order of injunction should be limited in duration until such time as the mortgagee shall give a fresh statutory notice in compliance with the law.

21. I shall therefore grant an injunction but only limited to the period necessary to comply with the law by issuing and serving upon the Plaintiffs the notice to sell under **section 96** of the **Land Act**. Since the Bank is required to follow all the other procedures before proceeding with the sale, it is not necessary to deal with the issue of valuation of the suit property which is a matter that was not even raised in the Plaint.

Disposition

22. I allow the Notice of Motion dated 17th April 2020 on the following terms:

(a) The Defendant be and is hereby restrained from exercising its statutory power of sale in respect of the property known as **LR No. LAIKIPIA/KALALU/425** until it issues and serves upon the Plaintiffs a fresh Notice to Sell under **section 96** of the **Land Act, 2012**.

(b) The defendant shall bear the costs of the application.

DATED and DELIVERED at NAIROBI this 26th day of NOVEMBER 2020.

D. S. MAJANJA

JUDGE

Court of Assistant: Mr M. Onyango

Mr Osoro instructed by D. B. Osoro and Company Advocates for the Plaintiffs.

Mr Karoki instructed by A. G. Kimani and Company Advocates for the Defendant.