



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL CASE NO. E291 OF 2020

BETWEEN

JOAN WANGUI KARANJA.....PLAINTIFF

AND

STANBIC BANK LIMITED.....DEFENDANT

RULING

Introduction

1. It is common ground that the Defendant (“the Bank”) advanced the Plaintiff Kshs. 25,550,000.00 to purchase a house; **LR. No. 330/1280 (Original No. 330/1071/10) situated within Hatheru Road, Lavington area in Nairobi City County** (“the suit property”). The amount advanced was secured by a legal charge dated 13th September 2017 over the suit property. The Bank has now threatened to sell the suit property causing the Plaintiff to commence this suit by the Complaint dated 5th August 2020.

2. The Plaintiff has moved the court by the Notice of Motion dated 5th August 2020 made, inter alia, under **Order 40** of the **Civil Procedure Rules** seeking orders restraining the Defendant from selling the suit property by private treaty or public auction pending the hearing and determination of the suit. She also seeks an order for valuation of the suit property by an independent valuer or by a valuer appointed by both parties to ascertain the market and forced sale value of the suit property and an order compelling the Bank to furnish her with a complete, true and accurate account of her loan account including various rates of interest applied to the loan facility.

3. The application is supported by the plaintiff’s affidavit and supplementary affidavit sworn on 5th August 2020 and 24th September 2020 respectively. The Bank has opposed the application through the replying affidavit of its Senior Legal Officer, Elisha Nyikuli, sworn on 8th September 2020.

4. The parties agreed to canvass the application by written submissions.

Plaintiff’s Case

5. The Plaintiff’s case as set out in her Complaint and deposition is that due to the slump in the property market arising from the COVID-19 pandemic and economic downturn, she faced various challenges as she was unable to procure a tenant for the suit property. Since the suit property was vacant from January to June 2020, she was unable to service the loan facility regularly and interest continued to accumulate. She deposes that she apprised the Bank of her situation and even proposed to the Bank to restructure the facility in order to allow her to recover from the losses she sustained. She stated that she received a notice dated 21st January 2020 demanding payment of Kshs. 461, 537.37 arrears despite the fact that the Bank had agreed to her proposals. She added that she also received a letter dated 11th June 2020 purporting to be a notice under **section 96(2)** of the **Land Act** demanding the entire balance of Kshs. 31,122,637.85 together with further interest in default of which the Bank would exercise its statutory power of sale.

6. The Plaintiff stated that in the process of exercising its power of sale, the Bank undertook a valuation of the market and forced sale value of the suit property which grossly undervalued the suit property. The gravamen of the Plaintiff’s claim in relation to the valuation of the suit property is that the Bank breached its duty of care to ensure that it is able to obtain the best reasonable price that can be obtained at the time

of sale.

7. In her deposition the Plaintiff produced a valuation report in respect of the suit property from Real Appraisal Limited dated 9th May 2017 commissioned by the Bank which showed the following values: Kshs. 40,000,000.00 as the market value, Kshs. 30,000,000.00 as the forced sale value and Kshs. 15,300,000.00 as the insurance value.

8. The Plaintiff complained that valuation of the suit property by the Bank did not reflect the true value and was an undervalue. She set out the following breaches in her Plaint:

a. Intentionally undervaluing the suit property so as to attract bidders to bid for the suit property during the auction at the detriment of the Plaintiff.

b. Failure to adhere to the Central Bank of Kenya directive of base interest rate as per the Kenya Banks Reference Rate Framework (KBRR) and overcharging interest.

c. Failure to regularly issue notices to the Plaintiff for the change in interest rates applied in the loan account from time to time.

9. In light of the matters pleaded in the Plaint, the Plaintiff seeks an order restraining the Bank from selling the suit property by public auction or public treaty, an order of valuation of the suit property by an independent valuer or a joint valuation by the parties and a complete and true account of her loan account reflecting the interest rates applied.

Defendant's Case

10. The Bank opposed the application on the basis that the Plaintiff defaulted in performance of her contractual obligations by failing to pay monthly instalments as a result of which her account was in arrears. Following her default, which she admitted, the Bank stated that it commenced the process of the realisation of its security by issuing a 90-day statutory notice dated 21st January 2020 which was sent to the Plaintiff by registered mail to her last known postal address and by email which was in any case admitted. Since the account remained in arrears despite the notice, the Bank, through its advocates, issued a 40-day redemption notice dated 11th June 2020 which the Plaintiff also acknowledged receipt.

11. The Bank also engaged Dominion Valuers to carry out a valuation of the suit property in accordance with **section 97(2)** of the **Land Act**. In its report dated 8th June 2020, Dominion Valuers submitted the following values for the property; Kshs. 35,000,000.00 as the open market value, Kshs. 28,000,000.00 as the mortgage value and Kshs. 25,000,000.00 as the forced sale value. The Bank therefore contended that it had discharged its obligation under **section 97(2)** of the **Land Act**.

Issues for determination

12. The principles guiding the exercise of this court's discretion are those settled in ***Giella v Cassman Brown [1973] EA 348***. The Plaintiff 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."

13. From the facts I have outlined above, the Plaintiff does not dispute that the Bank's Statutory Power of sale has arisen. She admits her indebtedness to the Bank and that she was served with the 90-day statutory notice under **section 90(1)** of the **Land Act** and the 40-day redemption notice under **section 96** of the **Land Act**. The Plaint is clear that the cause of action against the Bank is in respect of valuation of the suit property and the issue of interest rates applied to the Plaintiff's account. It is on these issues that the Plaintiff must establish a prima facie case with a probability of success.

Whether the suit property is grossly undervalued

14. The Plaintiff relies on **section 97** of the **Land Act** to submit that the Bank, as chargee, has a duty of care towards a chargor, failing which it would be liable for breach of duty of care. The section provides as follows:

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.

(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).

15. 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. This provision is reinforced by **Rule 11(b)(x)** of the **Auctioneers Rules** which requires that a professional valuation of the reserve price 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.

16. The Plaintiff's case is based on the comparison between the forced sale value of the suit property in 2017 assessed at Kshs. 30,000,000.00 by Real Appraisal Limited and that placed by Dominion Valuers Limited in 2020 at Kshs. 25,000,000.00. It therefore submits that due to this variation, an independent valuation is necessary. Counsel for the Plaintiff cited **Koileken Ole Kipolonka Orumos v Mellech Engineering & Construction Limited & 2 Others ML HCCC No. 545 of 2014 [2015] eKLR** where the court held that the purpose of carrying out a forced sale value before the auction reinforces the right of the chargor to have a reasonable value for his property. In the circumstances, the Plaintiff urged the court to hold that the Bank acted in breach of **section 97(2)** of the **Land Act**.

17. In response to the Plaintiff's case, the Bank submitted that the valuation by Dominion Valuers was in compliance with **section 97** of the **Land Act**. Counsel for the Bank submitted that the Plaintiff did not produce or make reference to her own valuation to support the complaint that the suit property was undervalued. He relied on the case of **Zum Zum Investment Limited v Habib Bank Limited MSA HC COMM No. 60 of 2013 [2014] eKLR** to argue that the actual price of the property will only emerge upon sale of the property and the Plaintiff cannot, without any evidence, anticipate that the property will be sold at a gross undervalue.

18. I find that the Bank complied with **section 97** of the **Land Act** which requires that the chargee conduct a valuation of the suit property within a year of the proposed sale. The Plaintiff has not complained that the valuer is unqualified or challenged the manner in which the valuation was prepared. A valuer is an expert and in order to cast doubt on the report, the plaintiff must produce cogent evidence upon which the court may conclude that the valuation does not reflect the true value of the property. As the Plaintiff has not detailed how the Bank has violated **section 97(2)** of the **Land Act** in its pleading, I would do no better than adopt what the court stated in **Palmy Company Limited v Consolidated Bank of Kenya Limited ML HCCC No. 527 of 2013 [2014] eKLR** that:

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.

19. I also find that the reference to a valuation report that was produced 3 years ago is insufficient to undermine a current and updated valuation. I therefore find and hold that the Plaintiff has not established a prima facie case with a probability of success on this issue. I also find that the Plaintiff has not established any basis for the appointment of an independent or joint valuer.

Whether the Bank charged exorbitant rates

20. The Plaintiff's case pleaded on the issue of interest is twofold. First, that the Bank failed to adhere to the Central Bank of Kenya directive of base interest rate as per the Kenya Banks Reference Rate Framework (KBRR). Second, that it failed to issue notices to the Plaintiff for the change in interest rates applied in the loan account from time to time.

21. The Plaintiff referred to the Charge and argued that the Bank was required to notify her of any changes in the rates applied to the loan and that the Bank also violated **section 44A** of the **Banking Act (Chapter 488 of the Laws of Kenya)**. She deponed that the Bank failed to inform her of such changes. She also complained that the Bank, without prior notice, unlawfully and illegally increased both the interest rate to 17% p.a hence increasing the monthly repayment resulting in arrears despite her continuing to pay the agreed instalments. Counsel relied on the case of **Michael Gitere and Another v Kenya Commercial Bank Ltd [2018] eKLR** where the court, referring to **section 84** of the **Land Act**, held that where the agreed rate is variable, the Bank must give the chargor at least 30 days' notice of reduction or increase of the rate of interest.

22. The Bank submitted that under Clause 2 of the Charge document, interest would be charged at the prevailing Central Bank Rate plus 4% that is 14% p.a. and upon default, a default rate would be charged at 10% above the prevailing Central Bank Rate. Counsel for the Bank submitted that it had provided the loan accounts statements and by reason of **section 176** of the **Evidence Act (Chapter 80 of the Laws of Kenya)** the statement of account is prima facie evidence of the entries and transactions recorded therein and that the same had not been challenged.

23. The Plaintiff bears the burden on showing on a prima facie basis that the interest charged on the loan account was unlawful or illegal. As regards the interest rate, the Plaintiff has not pleaded or shown that the rate charged contravenes the parties understanding in the charge document or the law. It is not enough for the Plaintiff to cite the legal provisions she relies on; she must also demonstrate out how the provisions have been contravened. Although the Plaintiff referred to the Kenya Banks Reference Rate Framework (KBRR), she did not endeavour explain what this framework is or show how it applies to her case.

24. I also note that the Plaintiff did not provide a statement of account in her supporting affidavit as a basis for her challenge on interest. It is the Bank that provided a statement and as correctly pointed out, **section 176** of the **Evidence Act** creates a presumption in favour of the Bank as follows:

176. A copy of any entry in a banker's book shall in all legal proceedings be received as prima facie evidence of such entry, and of the matters, transactions and accounts therein recorded.

25. The Plaintiff has not discharged the burden placed on her to show that the interest rate applied to the loan is illegal, unlawful or inapplicable. Likewise, she has to demonstrate that there was a change in interest rates which required the Bank to issue notices.

26. Unless it is shown that the unlawful and illegal interest defeats the chargor's right of redemption, the issue of interest would only affect the amount payable particularly in a case such as this where the Plaintiff has admitted that she is in default and has only raised the issue of interest for the first time in the suit. The settled principle applicable to this situation is that the court will not restrain the chargee from exercising its statutory power of sale merely on the basis of disputed accounts or interest (see *Mrao Limited v First American Bank of Kenya Limited and 2 Others (Supra)* and *Mohammed Khaled Khashoggi v Equity Bank Limited [2013] eKLR* and *Joseph Okoth Waudi v National Bank of Kenya CA NRB Civil Appeal No. 77 of 2004 [2006] eKLR*).

27. The Plaintiff seeks an order directing the Bank to provide statements of account. The statement has been provided in the replying affidavit. Further, the Plaintiff is entitled to an updated statement of account upon request from the Bank as this is her right as a consumer of financial services. There is no allegation that she has been denied any information on her account hence I refuse prayer (3) of the application.

Conclusion

28. The Plaintiff has failed to demonstrate that she has a prima facie case with a probability of success on the issues framed for determination. 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 three conditions to be fulfilled before an interim injunction set out in *Giella v Cassman Brown (Supra)* can be granted are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially and if the applicant does not establish *prima facie* case then irreparable injury and balance of convenience do not need consideration.

29. Since the Plaintiff has not established a prima facie case with a probability of success, the entire application fails.

Disposition

30. For the reasons I have set out above, the Notice of Motion dated 5th August 2020 is now dismissed with costs to the Defendant.

DATED and DELIVERED at NAIROBI this 20th day of NOVEMBER 2020.

D. S. MAJANJA

JUDGE

Court of Assistant: Mr M. Onyango

Mr Atego instructed by Khayesi Njambi and Khayesi Advocates for the Plaintiff.

Ms Rugendo instructed by Wainaina Ireri Advocates LLP for the Defendant.