REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 54 OF 2015

CATHERINE MUTHEU NDUNG'A.....PLAINTIFF

VERSUS

1. KENYA COMMERCIAL BANK LTD

2. NDUTUMI AUCTIONEERS.....DEFENDANTS

R U L I N G

1. There is before the court an application by the plaintiff dated the 21/4/2015 seeking an order of temporary injunction. It is grounded mainly on the grounds that there having been negotiated and concluded a lending contract between the parties, secured by a first legal charge executed between them, the defendant had moved to realize the security offered in a manner the plaintiff contended was unlawful owing to the fact that she had dutifully paid the agreed instalments save for the 8 months preceding the date of filing suit a default occasioned by loss of employment. The unlawful conduct the plaintiff seeks to forestall and restrain is alleged to be evidenced by failure to serve statutory notices under the Land Act.

2. The application was opposed by the defendant by an affidavit sworn by Peter Kazungu, the defendant's mortgage administrator. The gist of that Affidavit is to admit the lending agreement totaling a sum of Kshs.5, 400,000/=, the fact that there was a default occasioned by loss of employment to the plaintiff and an indulgence spanning from July 2013 to December 2014 to enable the plaintiff secure an alternative source of income but the plaintiff still persisted on her default thereby compelling the defendant to embark on realization of the security. It was then denied that the intended sale was neither unlawful nor illegal for failure to issue and serve statutory notices and for that purpose the lending agreement, as well as the statutory notices and certificate of posting were exhibited. Those annexture include a notice dated 22/9/2014, pursuant to Section 90 of the Land Act, Notice dated 30/01/2015 pursuant to Section 96 (2) & (3) of the same Act and Notification of Sale dated 26/03/2015 pursuant to Auctioneer Rules, 1997. Based on the fact of admitted indebtedness and evidence of issued and duly served statutory notices, the Respondent contended that the intended sale was lawful and in pursuit of an accrued statutory underpinned legal right. It is of critical note that there was never a rebuttal by the plaintiff of the assertions of compliance with the law in the replying affidavit.

3. Parties did file submissions pursuant to the directions by the court. The plaintiffs submissions are dated 23/6/2015 while those by the Respondent are dated 15/9/2015. From those submissions and the affidavits filed, it is not in doubt that the debt is not denied and the only issue for determination is whether, with the debt being admitted, had the defendant met the prerequisite of the law before seeking to realize the security. That to me is the only determination to resolve the question whether or not there is a prima facie case disclosed.

4. The chargee's obligation under the law intended to further secure the equity's darling, the right to redeem, is that it is bound and obligated to serve a notice of default requiring remedial steps which must lapse and if the default persist, then chargee is then again expected and obligated to give notice of intention to sell which is then followed by a notification of sale. My reading of the replying affidavit reveals to me that the requisite notices were indeed issued and duly served.

5. I am persuaded that Sections 90, 96 and 97 of the Land Act as well as Rule 15 of the Auctioneers Rules were duly complied with and therefore the plaintiff's contention and pleadings at paragraphs 7, 9 & 10 cannot be true. If not true as having been displaced by the plaintiff own admission of the debt in the affidavit in support and documents exhibited, then that plaint discloses no prima facie case. If there is no prima facie case disclosed then no injunction is due to issue in favour of the plaintiff. Even though the principles of grant for a temporary injunction are now well settled[1], a court of law will only endeavor to establish the reparation by damages and balance of convenience once prima facie cases established.

6. In **Yellow Horse Inns Limited v Nduachi Company Limited & 2 others [2017] eKLR** the court of appeal said of the three pillars:-

> **All the three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. So that if the applicant establishes a *prima facie* case, that alone will not avail him an injunction.**

> **The court must further be satisfied that the injury the applicant will suffer if an injunction is not granted, will be irreparable. Therefore, if damages recoverable in law are an adequate remedy and the respondent is capable of paying, no order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If a *prima facie* case is not established, then irreparable injury and balance of convenience need no consideration and the matter ends there. Only where there is doubt as to whether a *prima facie* case is made out or as to the adequacy of the remedies in damages that the question of balance of convenience would arise. It must follow from this that the existence of a *prima facie* case does not permit the applicant to "leap-frog" to an injunction directly without crossing the other second, and probably the third hurdles in between.**

7. While the decision says that the four pillars must be established before a court grants an injunction, the flip side is that where no prima facie case is disclosed there is no gain to be achieved by court considering the other two pillars. I do consider and deem presence of prima facie case as the foundation without which the other component, being superstructures, cannot stand.

8. Here I have found that no prima facie case has been established and therefore I do find that there is no basis to grant the application dated 21/4/2018 which hereby dismissed with costs to the Respondents.

Dated and delivered at Mombasa this 25th day of January 2019.

P J O OTIENO

JUDGE

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[1] **Giella V Cassman Brown & Co. Ltd** (1973) EA 358, **Mrao Ltd V First American Bank of Kenya Ltd & 2 others** (2003) KLR 125 and **Vivo Energy Kenya Ltd V Maloba Petrol Station** Civil Appeal No. 21 of 2014.