REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL SUIT NO. 18 OF 2018

SOLOMON MBILI NGOMO...APPLICANT

VERSUS

KENYA DEPOSIT INSURANCE CORPORATION

DALALI TRADERS...RESPONDENTS

RULING

Background

1. This is an application for temporary injunction. It is made by way of Notice of Motion dated the 16th August 2018. It is supported by an Affidavit sworn on same date by **SOLOMON MBILI NGOMO.** The specific order sought is:

> **"A temporary injunction restraining the Respondents either by themselves or through their agents and or servants from selling land parcel registration title number Muvuti/Kaani/1553 or transferring or in any way interfering with the current ownership pending the hearing and determination of this suit."**

Applicant's gravamen

2. The Applicant gave the background information that: On or about 6.5.2014, Hydrotima Limited, the Borrower, obtained a loan from Chase Bank which was in receivership and the Applicant guaranteed the said loan and charged the subject parcel of land. The Applicant had established his matrimonial home and lived there since 1984 and at the time of offering security he knew that the funds were being used to finance the business of the borrower. It was a term of the loan agreement that the Borrower will service the loan over a period of 60 months starting from 24/4/2015 to 24/03/2020 and in April 2016 the bank was placed under receivership thus the overdraft facility could not be enjoyed and the borrower could not service the loan.

3. The applicant was later informed by his friend that the suit property had been advertised for sale by public auction. The Respondent had through Dalali Traders arranged to dispose of the subject parcel of land by way of public auction on 29.8.2018 as advertised in the Daily Nation Newspaper of the 13.8.18 without issuing the requisite statutory notice and that the Respondent wished to sell the said parcel of land which is the Applicant's matrimonial home without the applicant exercising his equitable right of redemption.

4. According to the Applicant the court should determine:

a. **Whether the Respondent's right of statutory power of sale has accrued; and**

b. **Whether the conditions for issuance of an injunction have been met herein.**

5. The Applicant's case is three-fold. One; that the Respondent did not issue the requisite statutory notice notifying the Applicant of the intended sale of charged property by auction. The Applicant only learnt from the advertisement by Respondent of their intent to sell the charged property by public auction. The Applicant did not receive any notice to exercise the power of sale from Respondent. The Applicant's right to redeem the charged property within the term of the loan will be closed if the sale is allowed to continue.

6. Two; that the Applicant has established his matrimonial home on the land and will suffer irreparable harm if the intended auction is allowed to proceed.

7. From the foregoing, the Applicant urges this honourable court to allow the application for an order of injunction pending the determination

of the suit.

The Defendant's response

8. The Respondent filed submissions and Replying Affidavit sworn by **KEVIN KIMANI** on 25th September, 2018 in opposition to the application. The Defendant submits that it issued Hydratima Kenya Limited with various facilities that were secured by a charge over the suit property that was in the names of the applicant herein. They submit that the outstanding loan amount of Kshs. 10,546,929.15 necessitated the issuance of letters that were sent under certificate of posting and the same were annexed to the replying affidavit. Further that the company gave a proposal with respect to the outstanding amount that was accepted with a rider that the respondent would exercise its statutory power of sale in the event of default. The various correspondences are attached to the replying affidavit and the respondent submits that the borrower defaulted on the proposal wherein they instructed Accurate Valuers to conduct a valuation over the suit land wherein a valuation report was prepared. The Defendant in its Replying Affidavit filed in Court on 24th September, 2018 has tendered as exhibit on page 21 to 23 copy of the Statutory Notice sent to the Plaintiff and the borrowers through registered mail. They submit that a **Ninety (90) day statutory notice** was duly issued by the Defendant to the Plaintiff therefore it cannot be said that the Plaintiff was never served with the Statutory Notice. Further that the plaintiff/applicant had adequate time to redeem the suit property. They further submitted that the applicant has failed to disclose a material fact to court namely that he has defaulted on their own proposal for payments and thus has come to court with unclean hands and is undeserving of the equitable remedy of injunction.

9. Based on the foregoing, the Defendant is convinced that the Applicant has not met the threshold established in the case of **Giella Vs Cassman Brown (1973) EA 358** and in **Mrao Limited Vs First American bank Limited & 2 Others (2003) KLR. T**he Defendant submitted that since the remedy being sought by the Plaintiff is an equitable one, the Court should decline to exercise its discretion because the Applicant has been shown to be guilty of conduct which does not meet the approval of the Court of equity. They quoted the case of **Kyangaro v Kenya Commercial Bank Ltd and Another (2004) 1 KLR 126. T**he Defendant further submitted that the Plaintiff has not demonstrated to this Honourable Court that an award of damages would not be an adequate remedy because in giving out a property as security it becomes a commodity for sale. He argues that the Plaintiff has come to Court to frustrate the only recourse available to the bank in realizing the security to recover the debt. Counsel submits that the balance of convenience lies in favour of the defendant/ respondent and has cited the case of **Andrew M. Wanjohi v Equity Building Society and 7 others (2006) eKLR.** The Open market value of the property is indicated as Kshs 7m/- and the forced sale value is Kshs 5.25m/- while the loan arrears currently stand at Kshs 9,038,668.30/- which outstrips the value of the property and the bank shall suffer prejudice if the injunction sought is granted. In essence, they pray that the application should be dismissed with costs.

10. Further, the Defendant urged that, from the Statement of account tendered as on page 53 of the annexture in the Defendant's Replying Affidavit sworn by KEVIN KIMANI, it is evident that there has been default in the loan repayment to the detriment of the Defendant and the applicant has not disputed the said default in his pleadings as he has made a blanket application without making it known how he intends to settle the arrears or at least make a payment proposal. For the reasons set out in the above submissions, the Defendant urged the Honorable Court to dismiss the Plaintiff's application with costs.

Plaintiff's Submissions

11. It was submitted for the Plaintiff that a prima facie case has been made to warrant the reliefs sought in the application. The Learned Counsel sought reliance on the case of **David Ngugi Ngaari =*Vs*= Kenya Commercial Bank Limited [2015] eKLR** and **Mrao vs First American Bank of Kenya Ltd & 2 others k[2003] KLR 125** where the courts defined a prima facie case as:-

> "**In civil cases, 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 had apparently been infringed by the opposite party as to call for explanation or rebuttal form the latter."**

12. It was submitted that the Plaintiff had guaranteed the Defendant's borrower by offering the suit property as security and had hoped that the borrower namely Hydrotima Kenya limited would service the loan. However, it s the Plaintiff's case that the said borrower failed to service the loan which forced the Defendant to issue a statutory Notice with a view to realizing the security. The Plaintiff maintains that he was not served with the said notice pursuant to Section 96(2) of the Land Act within 40 days before the attempted sale of the security. The Plaintiff further averred that the suit property is his own matrimonial home and if it is sold, then he stands to suffer great harm as he has not even been allowed to exercise his equity of redemption over the said property. The case of Joseph Sire Oromo vs Housing Finance Company of Kenya [2008] eKLR where Warsame J (as he then was) held as follows:-

> "**Damages are not and cannot be substitute for the loss, which is occasioned by a clear breach of the law. In any case, the financial strength of a party is not always a factor to refuse an injunction. More so a party cannot be condemned to: take damages in lieu of his crystallized right which can be protected by an order of injunction."**

13. Finally it was submitted for the Plaintiff that the balance of convenience tilts in favour of the grant of an order of injunction in order to preserve the suit property pending the hearing and determination of the suit.

Analysis and Determination

14. The parties have filed elaborate submissions supported by several authorities. From the arguments thereof, there are matters which are not in dispute. One, the Applicant is the registered owner of the charged property and a guarantor of the Loan advanced to the Borrower, i.e. **M/S Hydrotima Kenya Limited.** The Applicant admits that, the Applicant faced financial difficulties after the respondent was placed under receivership and is in default of the repayment of the loans advanced to it by the Respondent. Similarly, it is not in dispute that the Applicant's property is scheduled to be sold upon the terms of the guarantee for loan and charge created thereof. Nobody has any quarrel

with the course taken by the Respondent, because in law the Lender has a right to proceed against a Guarantor on the guarantee. A guarantee constitutes a separate contract from the borrower's simple contract for loan and the liability of a Guarantor is separate from that of the Borrower; it arises upon the default by the Borrower to fulfil the terms of the contract for loan. The Guarantor is, therefore, sued and liable on the guarantee. Except, however, where the guarantee is also given in form of a charge on immovable property of the Guarantor, the guarantor will benefit from certain provisions of the law available to a chargor; I have in mind the Land Act and the Auctioneers Act. More specifically the provisions in section 90, 96 and 97 of the Land Act as well as rule 15 of the Auctioneers Rules. I will, however, discuss this aspect fully in the discourse that will ensue in the contested issue formulated below.

Issues for determination

15. The following are the issues that the court shall make a determination on namely:-

a. Whether the conditions for issuance of an injunction have been met herein; and

b. Whether the Respondent's right of statutory power of sale has accrued.

c. What is the appropriate relief

16. Injunctive relief, just like other limbs in law, has also grown to provide for situations which were not exactly foreseen before and courts are expected to examine the entire circumstances of the case in deciding whether or not to grant an injunction while they also seek for answers based on the traditional principles set out in the case of **Giella Vs. Cassman Brown [1973] EA 358** to wit:-

a) **Has the Applicant established a prima facie case with high chance of success?**

b) **Will the Applicant suffer irreparable damages unless an injunction is issued?** and

c) **Where does the balance of convenience lie?**

The case of **Nguruman Limited v Jan Bonde Nielsen and Another (2014) eKLR 589 that** the defendant has cited restates the above test.

17. I will apply the above test herein. The guide here is the case of **Mrao v First American Bank of Kenya Ltd & 2 Others [2003] KLR 125** which defined a prima facie case as follows;

> **"..in Civil cases, 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."**

18. Based on the material presented to the Court, and the court properly directing itself thereto, can it 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 Defendant? The Applicant has raised two pertinent issues. The first is that he was not served with the requisite notices under the law. And the second is that the charged property is of a unique nature as it contains his matrimonial home to which he has extreme sentimental attachment.

19. In **Julius Mainye Anyega vs. Eco Bank Limited [2014] eKLR** the court expressed itself as follows:

Property is matrimonial home

> **The suit property may be a matrimonial home. But what is startling is the Applicant's argument which, properly understood, suggest that matrimonial homes should never be sold under the Mortgagee's Statutory Power of sale. These statements have become quite common in applications for injunction to restrain a Mortgagee from exercising the statutory power of sale. I want to disabuse Mortgagors from what seems to be a misplaced posture especially by defaulters. The true position of the law on matrimonial properties is that a Mortgage will not be created on such property without first obtaining the consent of the spouse. Similarly, no sale of the matrimonial property will be carried through without giving the necessary notices to the spouse or spouses of the Mortgagor. These protections once availed will not prevent sale of a matrimonial home where the necessary consents have been obtained and all notices given to all parties with an interest in the matrimonial home, which is given as security for a loan or credit facility. And many courts have expressed themselves as clearly on the subject. I am content to cite the case of HCCC Number 82 of 2006 Maltex Commercial Supplies Limited & Another –vs- Euro Bank Limited (In Liquidation) that;**
>
> **"… Any property whether it is a matrimonial or spiritual house, which is offered as security for loan/overdraft is made on the understanding that the same stands the risk of being sold by the lender if default is made on the payment of the debt secured".**

20. In the case of **Maithya V. Housing Finance co. of Kenya & Another [2003] 1 EA 133 at 139** Honourable Nyamu, J. stated as follows:

> **"Charged properties are intended to acquire or are supposed to have a commercial value otherwise lenders would not accept them as securities. The sentiment of ownership which has been greatly treasured in this country over the years has in many**

situations given way to commercial considerations. Before lending, many lenders banks and mortgage houses are increasingly insisting on valuations being done so as to establish forced sale values and market values of the properties to constitute the securities for the borrowings or credit facilities…loss of the properties by sale is clearly contemplated by the parties even before the security is formalized".

21. The court in **Jimmy Wafula Simiyu vs. Fidelity Bank Ltd [2014] eKLR** held as follows regarding matrimonial property:

> **"It is quite arrogant for the Applicant to think that conversion of a Mortgaged property into a matrimonial home will provide some form of indomitable shield from realization of a security given in a Mortgage under the law. The law on creating Mortgage on and sale of matrimonial home only aims at ensuring the consent of the spouse or spouses is sought before such property is Mortgaged, and relevant notices are served on the spouse who had given consent to the Mortgage before the exercise of Mortgagee's statutory power of sale. The protection of a matrimonial home within the set-up of the law on mortgages and the Land Act is not, therefore, to be used as the spear by a defaulter on or as absolution of contractual obligations under a Mortgage. On this, see PART VII and specifically sections 79 and 96 of the Land Act. The argument by the Applicant that the suit property is a matrimonial home, has been used improperly and totally misplaced in this application and the less I say about it the better.**
>
> **The fact that the Mortgaged property is a matrimonial property will only become relevant if the Applicant is alleging lack of consent of the spouse in the creation of the Mortgage herein or notice on the spouse or spouses has not been accordingly issued as by law required. But where the right of Mortgagee's statutory power of sale has lawfully accrued, it will not be stopped or postponed because the Mortgaged property is a matrimonial home."**

22. Therefore, the fact that the charged property is a matrimonial home alone will not suffice as a ground for granting an injunction as long as the chargee has fully adhered to the law. Let me now examine the other issue cited by the Applicant namely that a notice was not served upon him as required by the law.

23. There is no doubt that the Applicant is a guarantor to the borrower. The guarantee was in a form of a charge over the suit property. As stated above, a guarantee is a separate and distinct contract from the borrower's contract. The guarantee is, therefore, enforceable as such. Except, however, the guarantor who has given his land as guarantee and a charge has been registered, he also enjoys the protections offered to a chargor under the Land Act. The principal debtor should be served with the requisite statutory notice to remedy any default within 90 days, and he should be fully informed of the acts needed to remedy the default and his right to apply for relief. The notice must fully comply with section 90(1) of the Land Act. The notice must be copied to the guarantor because the liability of the guarantor will arise upon default by the principal borrower. The Notice under section 90(1) of the Land Act was properly issued and liability on the guarantor attached. However, I understand the law to be that, after the borrower has failed to remedy the default in accordance with the notice issued under the law, the chargor, who is the guarantor, is entitled to a notice of not less than 40 days under section 96(2) of the Land Act before the chargee can sell the charged property. I should think that, the rationale of the position of the law I have postulated is that once a mortgage always a mortgage; the charge created on the suit land is a charge for all purposes and intents within the sense of the Land Act and such charge does not become of a different character because it has been created by and over the land of a guarantor of the borrower; it is a charge in favour of the lender. The notice under section 96(2) of the Land Act is mandatory, precedes and is quite apart from the Redemption Notice issued under rule 15 of the Auctioneers Act. Courts have rendered themselves explicitly on this obligation and I am content to cite some few cases. **Albert Mario Cordeiro & another vs Vishram Shamji [2015] e KLR** where the Court rendered itself thus:

Notice to sell charged property under Section 96(2) of the Land Act which provides as follows:-

> **"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 sale of the charged land until at least forty days have elapsed from the date of the service of the notice to sell."**

24. The requirements under section 96(2) of the Land Act are mandatory. Of importance, Section 89 of the Land Act provides expressly that equity of redemption will not be extinguished except in accordance with the provisions of the said Act. Therefore, exercise of Chargee's Statutory Power of Sale will only extinguish the Chargor's Equity of Redemption if it is strictly exercised in accordance with the Land Act. Section 96(2) of the Land Act is one of the provisions of the Land Act which reinforce the Chargors Equity of Redemption. I have seen the said notice to sell under section 96(2) of the Land Act on page 22 of the defendant's annexure. The statutory power of sale may therefore be exercisable, however the said notice is not marked at all and consequently has offended **Rule 9** of the *Oaths and Statutory Declarations Rules* which clearly detailed that Annexures to Affidavits should be sealed and stamped. Rule 9 reads:

> **"All exhibits to affidavits shall be securely sealed thereto under the seal of the Commissioner and shall be marked with serial letters of identification."**

Again there is no tangible evidence that the Applicant was properly served with the notice as no copy of certificate of postage was availed.

25. In this regard, I refer to the case of **<u>Abraham Mwangi v S. O. Omboo & Others</u> HCCC No. 1511 of 2002** as per the Ruling of **Hayanga J.** (as he then was) who had found that the exhibit itself must be marked and went on to quote **Order 41** of the *Rules of the Supreme Court of England* that dealt with forms of affidavits and exhibits. That Order divided exhibits into documents and non-documents. The Judge maintained that fly papers are misleading and fraught with uncertainty. He held:

> **"Exhibits to affidavits which are loose fly sheets for identification attached to them and do not bear Exhibit marks on them directly must be rejected. The danger is so great. These exhibits are therefore rejected and struck out from the record. That makes the affidavit incomplete hence also rejected. That being the case the application fails and is dismissed."**

For the foregoing reasons, I would therefore be unable to make a determination on the said notice, being that it is not possible to authenticate it. I would leave that for determination in the main suit where there will be ample time to tender the said document. In the circumstances, I find the prayer for injunction merited and which will be tempered with certain conditions.

26. It is noted that the borrower is yet to pay off the loan granted by the Respondent bank. It is also noted that the Plaintiff herein is mainly seeking to be allowed to exercise his equitable right of redemption of the suit property. As the main issue of concern by the Plaintiff is about the issuance of notice, this court will proceed to grant relief as appropriate and that the application dated 16/08/2018 is allowed in the following terms:-

> *(a)* ***The 1st Respondent shall render to the Applicant statements of account of the loan in issue in accordance with the stipulated terms of the loan agreement within 30 days from the date hereof and thereafter comply with the provisions of Section 96(2) of the Land Act by issuing the requisite notice to sell the suit property.***
>
> *(b)* ***A conditional temporary injunction restraining the proposed sale of the suit property is hereby issued pending the fulfilment of the condition in (a) above and that upon the fulfilment of the said condition the conditional temporary injunction shall stand vacated.***
>
> *(c)* ***Each party to bear their own costs.***

It is so ordered.

Dated and delivered in court at **Machakos** this **22nd** day of **January, 2019.**

D.K. KEMEI

JUDGE