



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CIVIL CASE NO. 41 OF 2018

IMARA STEEL MILLS LIMITED.....PLAINTIFF

- VERSUS-

GUARANTY TRUST BANK (K) LTD.....DEFENDANT

JUDGEMENT

Introduction

The Plaintiff in this matter instituted an Application contemporaneously with a Plaint both dated 30th October 2018. They inter alia sought conservatory reliefs against the Defendant exercising its statutory power of sale. The Defendant responded by an affidavit sworn by Charles Amanga on 2nd November 2018 and filed on the same day. The Defendant further filed its statement of Defence on the 14th December 2018 citing misrepresentation on the part of the Plaintiff for its claims that it had not been served with notices. The Defence filed another application supported by the affidavit of Charles Amanga both dated and filed on the 19th December 2018. The Defendant in this Application sought to have the court set aside the interim orders issued on the 30th October 2018. The Defendants filed written submissions on the 9th of January 2019. Despite having adequate opportunity to do so, the Plaintiff did not file any submissions in support of its case.

The Plaintiff's application dated 30th October 2018 sought for orders:

a. Spent;

b. Spent;

c. THAT upon hearing of this application inter partes, this Honourable Court be pleased to issue an injunction restraining the Respondent whether by itself, its agents and its servants from selling, dealing, interfering, alienating or disposing of all those parcels of land known as Title No. Kajiado/Kaputiei North/30162, Kajiado/Kaputiei North/30163, Isinya Area, Kajiado/Kaputiei North/29553 pending the hearing and determination of this suit.

d. THAT a declaration be issued that the alleged statutory notice is a nullity for being defective, for failure to be served to be served upon the Applicant;

e. THAT a declaration be issued that the 45 days Auctioneer Notice to sell upon the Applicant was a nullity as the Respondent has not served the Applicant with a 40 days' Notice as required by Section 96 (2) of the Land Act No. 6 of 2012;

f. THAT costs of this application be borne by the Defendant/Respondent.

The Defendant's Application dated 19th December 2018 sought for orders:

a. Spent;

b. Spent;

c. THAT this Honourable Court be pleased to set aside or vary its orders issued on the 30/10/2018;

d. THAT the costs of this application be in the cause.

The Plaintiff's Case

The Plaintiff, through its Director Lawrence Wanjohi Chigiti, averred that it received credit facilities from the defendant to the tune of Ksh. 350,172,733.09 cts and that the following land parcels: Title No. Kajiado/Kaputiei North/30162, Kajiado/Kaputiei North/30163, Isinya area, Kajiado/Kaputiei North/29553 (hereinafter the “*suit properties*”) were offered as security and legal charges created over them.

The Plaintiff further contended that the loan amount was to be repaid over a period of 70 months and that it had already repaid Ksh. 51,168,594.43/-. It went on to state that it was currently facing challenges some of which were occasioned by the long 2017 electioneering period as a result of which it has not been able to service the loan and was in arrears. The Plaintiff further stated that the Defendant did not issue it with a statutory notice in compliance with section 90 (1) and 90 (2) of the Land Act and further that the auctioneer did not give the Plaintiff the Notification of sale as required under the Auctioneers Act.

The Plaintiff contended that it had been caused immeasurable loss in business and embarrassment to its creditors and a doubt in its credibility following the advertisement that its assets would be auctioned. Further that the Plaintiff Company employed over 203 employees who were in danger of being rendered jobless should the intended sale proceed.

It was the Plaintiff’s case that if the sale were to go ahead, it shall suffer irreparable loss that cannot be compensated by way of an award of damages.

The Defendant’s Case

The Defendant’s case was presented through the affidavits of Charles Amanga, the debt recovery manager of the Defendant. It was averred that the Defendant offered the Plaintiff a security for Ksh. 350,172,733.09/-. That the Plaintiff was a habitual defaulter and failed to adhere terms of the facility and vide letter dated 09/01/2018 the defendant issued the Plaintiff with a demand for the outstanding arrears. Further that the Plaintiff failed to settle the arrears as a result of which the Defendant issued the Plaintiff with a final demand. It was contended that despite having been issued with a final demand, the Plaintiff failed to oblige to the same prompting the Defendant to issue the plaintiff with the statutory notice dated 7th February 2018.

According to the Defendant, the Statutory Notice was served on 21/03/2018 and the Plaintiff duly stamped the Defendant's copy with the Plaintiff's stamp. There was an affidavit by the process server sworn on 23rd March 2018 evidencing service of statutory notice upon the plaintiff. Additionally, the Plaintiff failed to regularize the default within three months as demanded in the Statutory Notice as a result of which the Defendant served the Plaintiff with the 40 days' notice to sell dated June 25th 2018. The 40 days' notice to sell was served to the Plaintiff's general Manager Mr. John Ngaruiya on 04/06/2018 who duly signed and stamped the notice. There is an affidavit of service sworn on 5th July 2018 evidencing that service was effected.

It was averred that the Defendant complied with Section 97 of the Land Act which requires that valuation be conducted before sell as evidenced by the valuation report through FAPCL group Ref: FAPLC/VAL/BM/136/2018. It was contended that the Defendant’s auctioneers Ms Integra Auctioneering (K) Company, served a notification of sale and 45 days’ redemption notice dated 25th August 2018 on the 28th August 2018 upon the Plaintiff by hand delivery and by registered post.

On the issue of the alleged service, the Defendant's position was that it indulged the Plaintiff on several occasions and the same is summarized in the Defendant's letter dated 13/08/2018 where the bank made the following observations:

“we wish to bring to your attention the below sequence of events which have not been honoured to date:

(i) Your letter dated 4 May 2018, you proposed the company will be depositing Kes 270,000 every day for 34 days in calendar month thus totalling to Kes 6,480,000 per month. We however note that this has not been honoured as from 1st of May 2018 to June 2018; the total amount received was Kes. 8,041,842 instead of Kshs. 12,960,000.

(ii) In your subsequent meeting with the bank on 10th July 2018, you again proposed to pay Kes 9,000,000 by end of July 2018 of which your letter dated 13th July 2018 is a confirmation of the same but only Kes 5,748,007 was received.

(iii) Our letter dated 17th August 2018, we advised you to reduce your arrears significantly and show commitment towards bringing the arrears down however this is yet to be done.

(iv) Your letter dated 7th August 2018, you are again proposing to be paying Kes 4,200,000 per month.

In view of the above and various discussions with our team we now demand that you clear the arrears which stand at Ksh. 31,787,859.67 as at 13th August 2018. This will show commitment on your part and allow the bank to review your request to reschedule the same.”

According to the Defendant, as at 25/10/2018. The Plaintiff’s loan account was in arrears of Ksh. 45,367,541.82 cts. Further, it was averred that the following facts emerge as uncontested: The Plaintiff was offered a loan facility of Ksh 350,172,733.09 cts; the suit properties were offered as security and the Plaintiff is in arrears.

Submissions by the Defence

The firm of Macharia-Mwangi & Njeru was on record for the Defendant and argued its submissions on behalf of its client citing the issues for determination as:

- i. Whether the Plaintiff was served with a proper statutory notice;**
- ii. Whether the Plaintiff was served with a proper 40 days' notice to sale;**
- iii. Whether the Plaintiff was served with the 45 days Redemption Notice and Notice to Sell by the Defendant's auctioneer;**
- iv. Whether valuation was carried;**
- v. Whether the orders sought by the plaintiff should be granted.**

On whether the Plaintiff was served with a proper statutory notice it was the Defendant's submission that the three months' statutory notice was issued and served upon the plaintiff and that the plaintiff was misleading the court when it alleged that it was not served. Further that the Defendant had a stamped copy of the statutory notice which was received on 21/03/2018 and the aforesaid affidavit of service by Samson Wambua.

As to whether the Plaintiff was served with a proper 40 days' notice to sell. It was the Defendant's submission that parties are bound by their pleadings and that the decision by the Plaintiff not to raise the issue of service of the 40 days' notice is a confirmation that they were served with the same. However, if the court is of the opinion that the question of whether there was service of the 40 days' notice to sell upon the Plaintiff was an issue for determination, the Defendant's answer was in the affirmative. The Defendant relied on the duly received and stamped copy of the 40 days' statutory notice and affidavit of service.

Urging on whether the Plaintiff was served with the 45 days Redemption Notice and Notice to sell by the Defendant's auctioneer Counsel for the Defendant stated that the Plaintiff was served with a proper 45 days' redemption notice and of sale. Referring to pages 248 – 252 of the Defendant/Respondent's Replying Affidavit where Mr. J. Karuria received the Redemption Notice and Notification of Sale on behalf of the Plaintiff. In addition to the hand delivery, the Notification and Redemption notices were served by way of registered post.

Turning to the main issue of whether the reliefs sought by the Plaintiff should be granted, the Defendant submitted that for the Plaintiff to be entitled to the orders they sought, they had to meet the principles set out in the **Giella vs Cassman Brown & Co. Ltd [1973] EA 358** case that:

- a. An applicant must show a prima facie case with probability of success;**
- b. An injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury;**
- c. If in doubt, the court will decide application on balance of convenience**

On whether the applicant had established a prima facie case with a probability of success, Counsel relied on the case of **Mrao Limited vs First American Bank of Kenya Limited and 2 Others (2003) eKLR** where the court observed thus:

“So what is prima facie case I would say that in civil cases it is a case which on the material presented to the court a tribunal proper directing itself will conclude that there exists a right which been apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”

It was submitted that based on the material presented by the Plaintiff, there is no right that has been infringed by the Respondent to have them be called upon to give an explanation. Though the Plaintiff denies service of the three months' statutory notice, 40 days' notice to sell and the auctioneer's notification of sale, the Defendant had tendered evidence to prove that the Plaintiff was served with the requisite notices. The Defence therefore urged the court to hold and find that the plaintiff had not established a *prima facie* case. Reliance was placed on the case of **Julius Kuria Nganga vs Wambui Kigamba [2017] eKLR**

Further reliance was placed on **Nguruman Ltd vs Jan Bonde Nielsen & 2 others (2014) eKLR** where the court of appeal authoritatively held that if a party fails to establish a prima facie case, there is no reason to deal with the other threshold principles.

Counsel went on to submit that guided by the aforementioned authorities, the court ought to hold and find that the plaintiff has not established a prima facie case and hence decline to grant the prayer for permanent injunction.

On whether the Plaintiff will suffer irreparable harm, it was submitted that it was not the Plaintiff's employees but the Plaintiff who has filed the present suit, that the relationship between the plaintiff and its employees is governed by the Employment Act and it is worth noting that this is not an employment matter as such the Defendant herein does not have any legal obligation to the alleged employees. Counsel placed reliance on **Elijah Kipng'eno Arap Bii vs Kenya Commercial Bank Limited [2001] eKLR** and **Koileken Ole Kipolonka Orumoi vs Mellech Engineering & Construction Ltd & 2 Others (2015) eKLR** urging the court to hold and find that if the orders sought are not granted, the plaintiff will not suffer loss that cannot be remedied by way of damages.

Regarding in whose favour the balance of convenience tilted, it was urged that the Plaintiff had not established and neither had it demonstrated that it will suffer irreparable loss. The plaintiff had not been servicing its loan and it would therefore be unfair for the court to grant the orders sought.

Counsel sought to rely on the case of **Samwel Gitau v Joyce Wanjiku (2014) eKLR** for the submission that the risk of granting the prayer for a temporary injunction is much greater that of not granting the same. The Plaintiff cannot have his cake and eat it. He either pays up or

the property is put up for auction. Further reliance was placed on **Daniel Kamau Mugambi vs Housing Finance Company of Kenya Ltd [2006] eKLR** and **Kyvango vs Kenya Commercial Bank Ltd & Ano. (2004) 1KLR** and the court was urged to hold and find that the conduct of the Plaintiff does not endear it to prayer for temporary injunction for to grant it would wreak havoc on the Defendant.

Addressing the Plaintiff's prayer that a declaration be issued that the alleged Statutory Notice is a nullity for being defective for failure to be served upon the plaintiff it was the Defendant's submission that the statutory notice was served upon the plaintiff and thus the plaintiff's contention that it was not served with the same is neither here nor there. It was further submitted that the only ground that the plaintiff had challenged the statutory notice on is service. Having demonstrated the Statutory Notice was served, the Defence urge the court to find and hold that a valid and proper Statutory Notice was served upon the Plaintiff.

Counsel went on to submit that the order seeking nullification of the statutory notice was not available at this juncture as it is trite law that courts should not grant interim reliefs which amount to final reliefs unless there are exceptional circumstances. Reliance was placed on **Olive Mwihaki Mugenda & Another vs Okiya Omtata Okoiti & 4 Others (2016) eKLR**.

As to whether valuation was carried out, it was submitted that Section 97(2) of the Land Act was complied with as evidenced by the valuation carried out by FAPCL group Ref: FAPLC/VAL/BM/136/2018.

Turning to the Application for dismissal of the interim orders issued on 30/10/2018, it was submitted that the plaintiff misled the court that the requisite notices were not issued and having demonstrated that they indeed were issued, the court ought to dismiss the Plaintiff's application dated 30/10/2018 and vacate the interim orders.

In conclusion the advocates for the Defendant submitted that the Plaintiff is in arrears which he has admitted, the Defendant served the Plaintiff with the Statutory Notice and Notice to Sell under the Land Act. The auctioneer served the Plaintiff with 45 days Redemption Notice and Notice to Sell as required under the auctioneer's rules. In short all the legal requirements were adhered to and therefore the Court ought to dismiss the Plaintiff's application dated 30/10/2018 with costs to the Defendant and vacate the interim orders.

Analysis and Determination

I have duly considered the Pleadings and Submissions as well as the evidence on the record by the respective parties'. I am with agreement with the Defence that the issues that arise for determination are as follows:

i. Whether the Defendant's attempt to exercise its Statutory Power of Sale was done in accordance with the law.

ii. Whether the orders sought by the Plaintiff ought to be granted.

To establish whether the Defendants conduct was proper, I will consider the issues raised by both parties as whether the Plaintiff was served with a proper statutory notice; 40 days' Notice to Sale; 45 days Redemption Notice and Notice to Sell by the Defendant's auctioneer and finally whether a proper valuation pursuant to Section 97 (2) of the Land Act was carried out.

The answers to these pertinent questions are easily discernible from a reading of the body of evidence on the record. Contrary to the assertions by the Plaintiff, it is clear that the Statutory Notice dated 7th February was served on the 21st March 2018 and the Plaintiff duly stamped the Defendant's copy with the its stamp. To further support this, there is an affidavit sworn by Samson Wambua, the process server, on 23rd March 2018. As such, this court declines to issue a declaration that the alleged statutory notice is a nullity for being defective and holds that the notice was properly served on the Plaintiff/Applicant.

Upon the lapse of the three months alluded to in the Statutory Notice, the Defendant served the Plaintiff with the 40 days' notice to sell dated June 25th 2018. This notice was served and received by the Plaintiff's general Manager Mr. John Ngaruiya on 4th June 2018 who duly signed and stamped the notice. Similarly, there is an affidavit of service sworn on 5th July 2018 by Samson Wambua evidencing that service was effected. This has not been opposed. Therefore, I decline to declare the 45 days Auctioneer Notice to sell upon the Applicant was a nullity and instead find and hold that the Plaintiff was properly served with the 40 days' Notice as required by Section 96 (2) of the Land Act No. 6 of 2012.

It is abundantly clear that the Defendant's auctioneers Ms Integra Auctioneering (K) Company, served a Notification of Sale and 45 days' redemption notice dated 25th August 2018 on the 28th August 2018 upon the Plaintiff by hand delivery and by registered post. In addition, as far as this court can tell and in the absence of any evidence to the contrary, this Court finds that the Defendant complied with Section 97 of the Land Act which requires that valuation be conducted. The valuation report by FAPCL group Ref: FAPLC/VAL/BM/136/2018 supports this conclusion.

Flowing from this, it is the courts position that the Defendant's attempt to exercise its Statutory Power of Sale was done in accordance with the law.

Finally, I shall now consider the issue of whether the Plaintiff/Applicants' case meets the threshold set out by law for the granting of injunctions and what orders the court ought to grant in both the Applications filed by the Plaintiff and the Defendant.

For guidance, I turn to **Order 40 Rule 1(a)** of the Civil Procedure Rules which provides:

"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."

Giella vs. Cassman Brown & Co. Ltd [1973] EA 358 establishes the principles for the granting of interlocutory injunctions. The court addressed itself as below:

"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."

Addressing itself on injunctions, the Court of Appeal in **Nguruman Ltd v. Jan Bonde Nielsen & 2 Others, [2014] eKLR** authoritatively pronounced itself as below:

"In an interlocutory injunction application, the applicant has to satisfy the triple requirements to: establish his case only at a prima facie level, demonstrate irreparable injury if a temporary injunction is not granted, and 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."

I am further persuaded by the Court of Appeal's decision in **Total Kenya Limited v David Njane t/a Argwings Twin Service Station & 2 others [2018] eKLR** where it reiterated the requirement that the three conditions for granting an injunction ought to be considered sequentially. In the main, the Court then said that the conditions for irreparable damage and balance of convenience ought not to be considered if a *prima facie* case has not been established. Counsel for the Defendant made the handy reference, which I am in agreement with, to **Mrao Ltd v. First American Bank of Kenya Ltd & 2 Others [2003] eKLR**, where **Bosire, JA** defined a *prima facie* case as follows:

"So what is a prima facie case" I would say that 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."

It is not in dispute that the Defendant advanced the Plaintiff a loan facility amounting to Ksh. 350,172,733.09. Further, there is no contention as to the *suit properties* and the legal charges created over them. The only issue raised by the Plaintiff is that the Defendant failed to serve it with the requisite notices. As I have already found and held that the Defendant properly issued out all the notices and demands required by the law in exercising its statutory power of sale, it is only logical that the Plaintiff has not given the court any credible reason neither has it shown that any right accrued to it has been apparently infringed by the Defendant. As such, I find and hold that the Plaintiff has failed to establish a *prima facie* case. Therefore, this Court need not burden itself with the other two limbs. The Court of Appeal's in **Nguruman (supra)** opined:

"... 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 ..."

Despite the foregoing, even if I was to consider the possibility of irreparable harm, I would still find in the negative. Once the Plaintiff used the *suit properties* as security, it ought to have known the risks that came with it. An award of damages would be sufficient to cover any harm occasioned on the Plaintiff. I am in agreement with Counsel for the Defendant where he placed reliance on **Elijah Kipng'eno Arap Bii vs Kenya Commercial Bank Limited [2001] eKLR** where the court stated:

"As I have said severally, once property is offered as security it by that very fact becomes a commodity for sale. And no commodity for sale whose loss cannot be compensated adequately in damages."

The Plaintiff has not demonstrated a *prima facie* case and neither has it shown that it stands to suffer any damage that cannot be compensated by way of damages. As a matter of fact, the Plaintiff's entire case falls flat on its face. It is noteworthy that the Plaintiff did not bother to file submissions in support of its case. There simply isn't any ground upon which its claim may be based. All due process was followed by the Defendant in attempting to exercise its statutory power of sale. Despite the Plaintiff's allegations of not being served, the Defendant has fully corroborated its case through the stamped received copies of the Statutory Notice, 40 days' Notice to sale, 45 days Redemption Notice and Notice to Sell by the Defendant's Auctioneers. The court has been shown and is fully satisfied with the affidavits of service and postage stamps that prove service both of which the Plaintiff has failed to disprove. The Defendant further availed a valuation of the *suit properties* in line with Section 97 (2) of the Land Act which valuation remained uncontested. Where does this leave us therefore? The Plaintiff's application dated 30th October 2018 is dismissed in its entirety for want of merit. In the upshot, the interim orders issued by this honourable

court on the 30th October 2018 are hereby set aside.

Having ruled as above, it follows therefore that the Plaintiff's cause of action in the substantive suit seeking a permanent injunction couched in similar terms as in their Application dated 30th October ultimately cannot succeed for the same reason as elucidated in the preceding paragraphs. The suit instituted by the Plaintiff by the Plaint dated 30th October 2018 is hereby dismissed. The Defendants shall have the Costs of the Suit.

Dated, Delivered and Signed at Kajiado this 25Th Day of February 2019

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R. NYAKUNDI

JUDGE

Representation

Mr. Liko for Maina for the Plaintiff –Present