REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CIVIL CASE NO 28 OF 2016

1. JOSHUA KAMAU WILLIE.....1ST PLAINTIFF

2. MARY NDUTA KAMAU.....2ND PLAINTIFF

VERSUS

1. UNAITAS SACCO SOCIETY LTD

2. INTEGRA AUCTIONEERS LTD.....DEFENDANTS

BRICKS HOLDINGS AND ENGINEERING LTD...INTERESTED PARTY

R U L I N G

1. Before me is the notice of motion dated 13th December 2016 which was filed by **Joshua Kamau Willie** and **Nduta Kamau (the Applicants)** contemporaneously with the suit against Unaitas Sacco Society Ltd, and Others (the Respondents). Expressed to be brought under the provisions of Order 40 Rules 1 and 2 of the Civil Procedure Rules, the motion seeks a temporary injunction to restrain the Respondents, by themselves, their agents, servants, nominees, officers or otherwise from issuing a notice of notification of sale, advertising for sale, selling, alienating, disposing, transferring or in any way dealing with or interfering with the 1st Applicant's property known as **LR No. 21096/228 [original 21096/215/10].** The grounds on the face of the motion are *inter alia* that the 1st Respondent has evinced an intention to sell by public auction the suit property, which action is illegal and in violation of the mandatory provisions of the Land Act in particular Sections 90, 96 and 97; that the 1st Respondent's statutory power of sale has not arisen and that there exists a dispute on the sums due.

2. The motion is supported by the affidavit of **Joshua Kamau Willie** who is described as the registered proprietor of the suit property . To the effect that at the 1st Applicant's request, the 1st Respondent extended a credit facility of Shs.30 million to the Interested party, **Bricks Holdings and Engineering Ltd,** which was secured by a charge in the said sum created over the Applicant's property described as (the suit property) on 30th October 2014. That the Applicants continued to honor their obligations pursuant to the charge until 2016 when an issue arose as to the sums due in respect of the facility. Subsequently the Applicants sought a restructuring and rescheduling of the loan to enable them to liquidate the debt. That without serving mandatory statutory notices on the Applicants, the 1st Respondent proceeded to advertise the suit property for sale.

3. The Applicants assert that the statutory power of sale has in the circumstances not arisen and the bank's actions are illegal. Stating further that the value of the suit property stands at KShs.50 million, the deponent contends that the outstanding loan is KShs. 22,000,000/=, the Applicant having already paid a considerable sum in liquidation of the debt and that the sale of the suit property below the stated value is a nullity and will occasion loss of a prime property. Moreover, that no recent valuation preceded the sale.

4. The 1st Respondent filed two affidavits sworn by the **Lemuel Mangla,** the Recovery Officer, and **Harriet Nyambok** the Legal Officer. Confirming the financial arrangements between the 1st Plaintiff and the 1st Respondent and the Interested Party, and the execution of the charge to secure a sum of KShs.30 million, the deponents contend that the 1st Applicant had defaulted in his obligations prior to and after January 2016. Pursuant to which, a statutory notice was issued on 20/1/16 under Section 90(2) of the Land Act and dispatched by registered mail to the Applicants' postal address. And that subsequently a 40 – day notice under Section 96(2) of the Land Act was served upon the 1st Applicant, the latter which is admitted by the Applicants' offer to the 1st Respondent dated 26th September 2016.

5. The deponents dispute the value attributed to the suit property by the 1st Applicant, citing the forced sale value as per the valuation report obtained by the 1st Respondent. Moreover, that in addition, the Applicants have not demonstrated that the suit property is matrimonial property.

6. The application was canvassed by way of oral submissions. The Applicants' submissions are comprised for the most part of a rehash of the Applicants' affidavit material, the Applicants reiterating the failure by the bank to serve a proper statutory notice and alleged undervaluation of the suit property, and that the Applicants stand to suffer irreparable loss if the 1st Respondent proceeds to exercise the power of sale. The Applicants relied on the timeless dicta in **Giella v Cassman Brown & Co. Ltd**. They submit to have brought their application within the principles in **Giella v Cassman Brown** and in addition, assert that the Applicants' right of redemption is threatened. That the Applicants will suffer irreparable damage if the Respondents proceed to realize the security.

7. The 1st Respondent for their part argue that the Applicant's case does not meet the threshold for the grant of an interlocutory injunction as enunciated in **Giella v Cassman Brown.** Placing reliance on the Court of Appeal decision in **Key Mark Investment v Family Bank [2018] e KLR** the 1st Respondent asserts that no injunction is available to an applicant who is in default.

8. The Respondents contend that the Applicants have not made out the claim that the statutory notices were not served on them. And that the denial has been controverted through the Respondent's annexures concerning the dispatch of the said notices to the chargor's last known address.

9. Further, that where a notice is found to be defective, the remedy is not an injunction but an order directing the Respondent to serve a compliant notice. Pointing to the Applicants' admissions of default in its obligations prior to and after January, 2016, the 1st Respondent argues that the chargee cannot in such circumstances be restrained in its exercise of the statutory power of sale. In the Respondents' view, no prima facie case has been made out and moreover, the value of the suit property is ascertainable, and thus no irreparable damage can be asserted. The Respondent further stated that the test in **Giella's Case** is applied sequentially.

10.Besides, the 1st Respondent submitted, the Applicants' debt will soon exceed the value of the charged property whose delayed realization will only prejudice its efforts to recover the outstanding debt. Whereas, the Applicant can be adequately compensated through damages. Thus, the 1st Respondent urged the court to dismiss the application.

11.The court has considered all the material canvassed in respect of the instant motion. The basic facts surrounding the motion are not in dispute. These include the extension of a loan facility in the sum of KShs.30m by the 1st Respondent to the Interested Party in the year 2014, which facility was secured by a charge created over the suit property by the 1st Applicant. There is no dispute as to the disbursement of the funds under the said arrangement and that pursuant to the terms of the charge, the 1st Applicant was to repay the loan sums through periodic installments. Quite evidently, the 2nd Applicant was not a party to the financial arrangements above and her role was limited to giving spousal consent, and which seems to be the basis of her inclusion as an applicant. The Applicants dispute that by January 2016 they had fallen into arrears and were unable to observe obligations to the 1st Respondent also dispute the service upon them of statutory notices under Section 90 and 96 of the Land Act.

12.The key prayer in the motion is one seeking an interlocutory injunction as envisaged in Order 40 Rule (1) of the Civil Procedure Rules. Both parties have cited the case of **Giella v Cassman Brown,** the *locus classicus* in so far as the grant of such temporary injunctions is concerned. In **Nguruman Ltd,** the Court of Appeal restated the principles in **Giella v Cassman Brown** and observed that the role of the judge is merely to consider whether the principles for the grant of an interlocutory injunction had been met and that the Court ought to be careful not to determine with finality any issues arising.

13. The Court further observed that:

> **"...Since the fundamentals about the implications of the interlocutory orders of injunctions are settled, at lease over four decades since Giella case, they could rather be questioned nor be elaborated in detailed research. Since those principles are already ..... by authoritative pronouncements in the precedents they may be conveniently noted in brief 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) demonstrated irreparable injury if a temporary injunction is not granted.**
>
> **c) allay any doubts as to (b) by showing that the balance of occurrence is in his favor."**

14. In addition, the Court stated that the three conditions apply separately as distinct and logical hurdles to be surmounted sequentially by the Applicant. That is to say, that the Applicant who establishes a *prima facie* case must further establish irreparable injury, being injury, for which damages recoverable could not be an adequate remedy. And that where the court is in doubt as to the adequacy of damages in compensating such injury, the court will consider the balance of convenience. Finally, where no *prima facie* case is established the court need not look into the question of irreparable loss or balance of convenience.

15. As to what constitutes a *prima facie* case, the Court of Appeal expressed itself as follows:-

> **"Recently, this court in Mrao Ltd. V. First American Bank of Kenya Ltd & 2 others [2003] KLR 125 fashioned a definition for *"prima facie case"* in civil cases in the following words**:
>
> **"In civil cases, 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. A *prima facie* case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard, which is higher than an arguable case."

We adopt that definition save to add the following conditions by way of explaining it. The party on whom the burden of proving a *prima facie* case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a *prima facie* case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a *prima facie* case. The applicant need not establish title it is enough if he can show that he has a fair and *bona fide* question to raise as to the existence of the right which he alleges. The standard of proof of that *prima facie* case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed."

16. With the foregoing principles in mind I will proceed to consider the two contested complaints which are key to the Applicants' case. The first relates to the alleged failure by the 1st Respondent to serve statutory notices under Sections 90, 96 and 97 of the Land Act. The second complaint was that the Auctioneers did not serve the notification of sale under the Auctioneers Act and that the Respondent has failed to render accounts.

17. Section 90 of the Land Act provides that:

(1) If a chargor is in default of any obligation, fails to pay interest or any other periodic payment or any part thereof due under anycharge or in the performance or observation of any covenant, express or implied, in any charge, and continues to be in default for one month, the chargee may serve on the chargor a notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be.

(2) The notice required by subsection (1) shall adequately inform the recipient of the following matters—

(a) the nature and extent of the default by the chargor;

(b) if the default consists of the non-payment of any money due under the charge, the amount that must be paid to rectify the default and the time, being not less than three months, by the end of which the payment in default must have been completed;

(c) if the default consists of the failure to perform or observe any covenant, express or implied, in the charge, the thing the chargor must do or desist from doing so as to rectify the default and the time, being not less than two months, by the end of which the default must have been rectified;

(d) the consequence that if the default is not rectified within the time specified in the notice, the chargee will proceed to exercise any of the remedies referred to in this section in accordance with the procedures provided for in this sub-part; and

(e) the right of the chargor in respect of certain remedies to apply to the court for relief against those remedies.

(3) If the chargor does not comply within ninety days after the date of service of the notice under, subsection (1), the chargee may— (a) sue the chargor for any money due and owing under the charge; (b) appoint a receiver of the income of the charged land; (c) lease the charged land, or if the charge is of a lease, sublease the land; (d) enter into possession of the charged land; or (e) sell the charged land;

(4) ……..

(5) The Cabinet Secretary shall, in consultation with the Commission, prescribe the form and content of a notice to be served under this section"

18. There can be no serious dispute at least from the Applicants own annexure **JKW 9a** and **9b** dated 16th and 20th September 2016, respectively that the 1st Applicant was by the said dates in default and therefore the 1st Respondent was entitled to commence the process envisaged under Section 90 and 96 of the Land Act. Besides, a dispute over sums payable cannot be used to deflect the exercise of the statutory power of sale which has properly arisen – see **Labelle International Ltd v Fidelity Commercial Bank and Another (2003) 2 EA 541** .

19. Clause 39 of the Charge Document provides *inter alia* that any notice required or authorized by law or by the charge **"shall be deemed to have been properly served on the chargor if delivered by hand or sent by registered post to... the chargor at the registered office… or last known place of abode of the chargor"** The Applicants deny receipt of the two notices under Section 90 and 96 of the Land Act through registered mail at their postal address.

20. A cursory look at the first notice and postage evidence as annexed to the replying affidavit of Harriet Nyambok as **"HN 5a "and "HN 5b"** puts paid the Applicants' denials. The notice under Section 90 (1) and 2 of the Land Act was clearly dispatched to the chargor. There

was no requirement to serve the notice on the 2nd Applicant who at any rate was not a party to the contract. Besides, the suit property is a commercial property which was being developed by the Interested Party. The fact of the 2nd Applicant giving spousal consent does not convert the property into a matrimonial property. The notice **'HN 5a'** on the face of it substantially complies with the provisions of Section 90(2) of the Land Act and it is not clear from the Applicants' material what particular issues of form the Applicants mere taking objection to. Similarly, the Applicants' assertion that the notification of sale under the Auctioneers Act was not served upon them is controverted by annexures **HN 7** to the Replying affidavit of **Harriet Nyambok** confirming the contrary.

21. However, with regard to the statutory notice under Section 96 of the Land Act, the position is not so clear: a copy of the notice attached to the affidavit of **Harriet Nyambok** as **HN 6,** and dated 11th May, 2016 is not accompanied by evidence of postage. The Respondents deposition that the Applicant's proposal **'HN 4'** seeking to settle arrears is evidence of receipt of the notice **'HN 6'** does not constitute conclusive evidence of service. The mode of service of notices was stipulated in clause 39 of the charge instrument and the 1st Respondent was obligated to comply therewith. In the circumstances, the court must accept the 1st Applicant's depositions that the notice under Section 96 of the Land Act was not served.

22. Further, regarding the contested valuation of the suit property, the duties owed by to the chargor by the chargee during the exercise of the statutory power of sale are set out in Section 97 of the Land Act which provides:

> **"(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 charger, any guarantor of the whole or any part of the sums advanced to the charger, 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 charger 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-fiveer centum below the market value shall not be taken to mean that the chargee has complied with the duty imposed by subsection (1).
>
> **(4) It shall not be a defence to proceedings against a chargee for breach of the duty imposed by subsection (1) that the chargee was acting as agent of or under a power of attorney from the charger or any former charger."**

23. The chargee must prior to exercising the power of sale ensure that a forced sale valuation is undertaken by a valuer and is under specific duty to *"obtain the best price reasonably obtainable at the time of sale."* **Annexure " HN 11 "** to the replying affidavit of **Harriet Nyambok** is a valuation report by **Kenstate Valuers Ltd** dated 27th June 2015 in respect of the valuation conducted pursuant to the bank's instructions. The report assigns to the suit property a market value of KShs.46.000,000/=, mortgage value of KShs.37,000,000/= and a forced sale value of Ksh.34,500,000/=.

24. The court has perused the entire valuation report and noted that the date inserted below the valuer's signature at page 10 reads 27th June 2016. The 1st Respondent has not attempted to explain the discrepancies in the dates. While it is true that the true or proper forced sale value of the property will only emerge at the auction, the advance valuation is intended to enable the chargee to "obtain the best price reasonably available at the time of auction." Thus, to be of any value, the valuation must be recent or proximate enough to the sale date. If indeed the valuation in this case was carried out a whole year and a half prior to the sale, it defeats the purpose of Section 97(1) of the Land Act.

25. On the question of irreparable damage, it is disingenuous for the Applicants to assert, without proof, and based only on the spousal consent by the 2nd Applicant, that the suit property, a commercial building developed with the loan advanced by the 1st Respondent is matrimonial property. The property was/is registered in the name of the 1st Applicant and the 2nd Applicant was not a party to the Charge Instrument. Besides, the moment a chargor places his property, matrimonial or other, in the hands of a financial institution as a security in exchange for a loan, such property becomes a ready commodity for sale upon his default. See **Christopher Muroki v Housing Finance Company of Kenya and Another [2006] e KLR** and **Andrew M. Wanjohi v Equity Building Society Ltd and Another [2006] e KLR.**

26. Secondly, as correctly observed by the 1st Respondent, the value of the suit property is undoubtedly ascertainable, and damages would be paid by the said Respondent if the case determines in the Applicant's favour. The 1st Applicant has evidently been in default since January 2016 and the debt continues to escalate. As demonstrated in the affidavit of **Harriet Nyambok**, the 1st Respondent was unable to secure the reserved price at the first auction in 2016 as the highest bid was KShs.30,000,000/=. As at 31st March 2017 the debt stood at KShs.27 million odd and there is no evidence of payment by the Applicant after that date.

27. The Court of Appeal stated in **Orion East Africa Ltd V Ecobank Ltd and Another [2015] e KLR** that:

> **"In an application for an interlocutory injunction, it is good practice for the trial court to look at the whole case not only the strength of the Applicant's case but also to the strength of the defence advanced by the Respondent then make an appropriate order."**

The court further stated that where a court finds fault with a forced sale valuation, the appropriate remedy is to direct that afresh valuation be undertaken. It is relevant in this case that the 1st Respondent is a membership body and its funds comprise of deposits made by its members and a delay in the realization of the charged property might prejudice the 1st Respondent's ability to recover the funds. See **John Kariuki t/a Jolester v Merchants v National Bank of Kenya Ltd [2006] 1 EA 96.**

28. The 1st Applicant is in default and the most proportionate remedy for the 1st Respondent's failure to serve the notice under Section 96 of the Land Act or to conduct a recent forced sale valuation is not an injunction against the said Respondent. See **National Bank of Kenya v Shimmers Plaza Ltd [2009] e KLR** and the case of **Labelle International Ltd.**

29. For all the foregoing reasons, the court is of the view that the 1st Applicant or the Applicants have neither made out a prima facie case with a probability of success, nor demonstrated that damages will not be an adequate remedy. While dismissing the prayer for an interlocutory injunction, I direct that the 1st Respondent shall not proceed with the exercise of its statutory power of sale in respect of the suit property until the following two conditions are met:

a) the 1st Respondent serves upon the 1st Applicant, in the manner stipulated under clause 39 of the Charge Instrument, an original statutory notice under Section 96 (2) of the Land Act which should be in the same terms as the copy exhibited in the affidavit of **Harriet Nyambok** as annexure **HN 6**.

b) The 1st Respondent procures a valuer other than **Kenstate Valuers Ltd** to undertake a fresh forced sale valuation of the suit property.

30. Prayer (3) of the motion has been overtaken by events as the 1st Respondent has rendered accounts being annexures **"HN 3a"** to the Replying affidavit of **Harriet Nyambok**. Prayer (4) cannot be granted in light of the facts of this case, more particularly that on the face of it, the Applicant(s) is in default.

31. The costs of the application will be borne by the Applicants in any event.

DELIVERED AND SIGNED AT KIAMBU THIS 30TH DAY OF APRIL 2019

.....

C. MEOLI

JUDGE

In the Presence of:

Mr. Njuguna for the Respondent

Respondent – No appearance

Court Assistant - Kevin