REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

COMMERCIAL SUIT NO. 9 OF 2018

BEN GITONGA MUIRURI MUNGAI.....PLAINTIFF

VERSUS

EQUITY BANK (KENYA) LIMITED.....DEFENDANT

R U L I N G

1. By his Notice of Motion dated 23rd February 2018 the plaintiff herein sought an order of temporary injunction to restrain the defendant from selling that property known as subdivision no. 13379 (original no. 334/5) Section 1 Mainland North registered in the plaintiff name but charged to the defendant as security for the payment of advances and financial accommodation and facilities offered and advanced to one Blackstone Investment Limited by the defendant.

2. The grounds set out to premise the application were that having offered the suit property as security, the plaintiff became aware that the borrower experienced difficulties in repayment of the facility and therefore there were negotiations for the restructure of the facility and another property was sold at Kshs.100,000,000/= towards the reduction of the indebtedness. The restructure was evidenced by a letter dated 19/10/2017 and a loan agreement dated 22/12/2017 capping the loan at Kshs.140,827,628 payable within 60 days at monthly instalments of Kshs.3,276,813.

3. The crux of the suit and the application is that despite the sale and restructure, the defendant have taken steps to realize the security by instructing Ms. Antique Auctioneers to demand payment of Kshs.223,805,886.88 or the security be sold.

4. It is added that while the property was valued and given a forced sale value of Kshs.178, 500, 000/= at the time the parties contracted, the notification of Sale has lowered that reserve price to Kshs.120,000,000/= The point raised is that prior to the advertisement for sale, the plaintiff had not been served with any valid statutory notice under Sections 90(1) & (2) as well as 96(2) Land Act. To the plaintiff the act of restructure subsumed any previously issued notices and the defendant was in law obligated to reissue fresh notices. The same grounds were then echoed in the Affidavit in support sworn by the plaintiff who then exhibited the legal charge between the parties, copy of the title, letters evidencing restructure, bank statement to show payments made, notification of sale and two valuation reports dated 2015 September and 2017 May.

5. On service with the Application the Defendant/Respondent filed a Replying Affidavit sworn by one KARIUKI KINGORI which in the main points out the fact that when the plaintiff failed to comply with the conditions of payment of Kshs.10,000,000/= by the court for the grant of injunction, the property was sold as scheduled on 28/2/2018 and the equity of redemption then stood extinguished. On the merits it was contended in the said Replying Affidavit that the application was unmerited because upon grant of the facility, the borrower defaulted almost immediately and the statutory notices were then duly served as well as the Notice of Sale and that both were sent by Certificates of posting. Copies of the notices and certificates of posting were all exhibited as annextures KK2, 2, 3 & 4.

6. On the restructure and need for fresh notices the defendant took the position that the same were done without diminution of the defendant's rights and without prejudice to the right to conclude the realisation process in the event of a default to comply with the terms of restructure. It was pointed out that it was an express term of the letter of offer for restructure that the repayment were to continue and be concluded within a contractual timeline which the plaintiff failed to honour.

7. On the grounds that the defendants seeks to recover unconscionable amounts from the plaintiff, the defendant made a specific rebuttal to the effect that a dispute as to the amount due is not a basis to grant an injunction and that there was nothing illegal or unlawful with the recovery as intended.

8. On conflicting valuation reports, the deponent of the Defendant's Replying Affidavit took the view that the bank, not being an expert on property valuation, relied on expert to return a value upon valuation and that it cannot be faulted for the professional conduct of another professional. In any event it was contended that the dispute is how much the property should be sold at and not whether or not the property

should be sold. On those assertions the defendant termed the application and indeed the suit meritless and sought that the same be dismissed with costs.

9. As intimated before, the application when presented to court under a certificate of urgency, interim orders were granted and made conditional that the plaintiff deposits a sum of Kenya Shillings Ten million towards reduction of the loan as well as settlement of auctioneers fees for the aborted auction.

10. That condition did not go well with the plaintiff who filed yet another Notice of Motion dated 28/2/2019 seeking that the condition be set aside and the sum of Kshs.10,000,000/= be substituted with a sum of Kshs.1,000,000/=. That application was not prosecuted on its own because when it came up for having on 8/3/2018 it was directed that status quo then prevailing be maintained. That position persisted till the 13/6/2018 when there was never any extension and the orders then lapsed. However on 15/11/2018, parties recorded a consent granting an interim injunction to the plaintiff on terms that he pays to the defendant the sum of Kshs.210,000/= per month with effect from 5/12/2018 pending the determination of the application dated 23/2/2018, with a default clause that if there would occur a default the injunction would lapse. That order effectively put to end the need to consider the notice of motion dated 28/2/2018 which I will thus not consider in this ruling.

11. Pursuant to the court directions given on the 11/4/2018, the plaintiff filed submissions on 9/8/2018 while the Defendant filed own submissions on the 18/9/2018. In their submissions the plaintiff does not press the complaint of failure to service statutory notices but instead bases his application on the effort of the negotiations leading to the restructure and the fact that the notices issued had inconsistencies regarding the sum owed and due for recovery. The plaintiff cited to court decision in **Isabella *Nyambura Gitau vs Consolidated Bank of Kenya Ltd [2017] eKLR***, ***Elizabeth Wambui Njuguna vs HFCK***, ***Koikeken Ole Kipolouka Orumoi vs Melleck Engineering & Construction Co. Ltd and Others [2015] eKLR*** for the proposition of law that failure to serve the statutory witness was not a mere irregularity but a breach of law disclosing a prima facie case and that notices should be consistent as to reveal the true state of affairs regarding the debt and state of default alleged which need to be remedied.

12. The decision in Kwanza Holdings Ltd vs Dubai Bank Ltd [2013] was cited for the proposition that land does not depreciate and that glaring disparity on valuation report may verge on malice ill-will or fraud. On damages being an adequate compensation and remedy in lieu of injunction the plaintiff cited to court the decision in ***Joseph Giro Musomia vs HFCK [2008] eKLR*** for the proposition of law that damages is not an automatic remedy where clear breach of the law is disclosed and proved.

13. Lastly the decisions in **James Kipruto Lagat vs Consolidated Bank Ltd [2016]** and ***Prof. David Musyimi Ndetei vs HFCK [2007]*** were also cited on what amounts to balance of convenience being in favour of the applicant. The copies of the decided case were indeed availed to court.

14. For the defendant submissions were offered to the effect that the plaintiff had not brought himself within the parameters of grant of a temporary injunction in that the three requirements, prima facie case, irreparable injury and balance of convenience to be satisfied in a sequential manner had not be met. For that proposition the decision in ***Nguruman Limited vs Jan Blonde Nielsan & 2 Others [2014] eKLR*** was cited to court.

15. On the more fundamental question on whether or not the statutory notices were issued and served, it was pointed out that indeed the same were duly issued and served by registered post and evidence of posted exhibited. The decisions in ***Elizabeth Wambui Njuguna vs HFCK [2006] eKLR*** and ***Fred Fairmax Mutali Mutsami vs Diamond Trust Bank Ltd [2018]*** were all cited for the proposition of the law that once a chargee shows evidence of posting the burden shifts to the charger to prove non-receipt of the notice.

16. On the unpleaded facts captured with submissions to the effect that the notices are invalid for showing different and conflicting figures of the debt, the defendant cited to court the decision in ***Cosmas Mrombo Moka vs Co-operative Bank of Kenya Ltd [2018] eKLR*** for the proposition of law that where there is a contact in which a debt attracts interests it is inevitable that the figure must change.

17. On the restructure having subsumed the prior notices and the need to issue fresh notices, the defendant cited to court the now well-known case in ***Mbuthia vs Jumba Credit Finance Corporation [1988] eKLR*** for the proposition of law that there is no sound policy reason why a chargee must issue a fresh notice every time a sale is suspended to accommodate the chargor.

18. On the ground that the sum sought to be recovered was unconscionable, unjust and unlawful, the defendant read an intention on the part of the plaintiff to have been hinting at the provisions of Section 44A of the Banking Act and cited to court the decision by the court in ***Nyali Construction vs Barclays Bank Ltd [2015]eKLR*** where it was said that a chargee is entitled in law to recover the principal and interest of up to the value of the principle and therefore that the demand by the defendant in the sum less than twice the principle cannot be terms unconscionable, unjust or unlawful.

19. On disparity on the reserve price indicated in the notices, the defendant sought to and did rely on the decision by the court in ***Patrick Kangethe Njuguna vs Co-operative Bank of Kenya Ltd & 4 Others(2017)eKLR*** for the proposition of the law that a sale at any price above 25% would be valid on the basis of Section 97(2) & (3) Land Act, 2012.

20. On whether or not an irreparable loss had been demonstrated, the defendant submitted and pushed the burden of such proof upon the plaintiff and contended that the said burden had not been discharged. Nguruman's case was once again cited for the proposition of the law that the injury that qualifies to be irreparable must be in the nature of substantial and demonstrable injury which cannot be adequately compensated by an award of damages. To the defendant once a property is offered as security for a loan it becomes a commodity for sale and any romantism or even expressed sentimental attachments over it become unhelpful to the chargor.

21. Indeed when parties attended court the submissions were highlighted without more and in fact the plaintiff narrowed down their case to the question whether or not the notices given prior had been subsumed in the restructure agreement and arrangements. In the advocates very brief submissions he was recovered to offer the following words:-

"All attempt was made to sell the property in 2017 after notices had been served pursuant to it one of the securities was sold at Kshs.100,00,000/= after which the security was structured by a letter of October 2017 and a fresh loan agreement executed in which it was agreed that the sum advanced was Kshs.140,000,000/= to be paid over a period of 60 months from January 2018. After that no notices were served but the defendant insists on relying on the notices earlier issued. We say that presents a prima facie case and the application should be allowed".

22. For the defendant equally, very short highlights were offered based

on the Replying Affidavit sworn by Kingo'ri Mwangi as well as the submissions and list of authorities cited. Two points were emphasised that; negotiations leading to accommodation did not necessitate fresh notices and that the letter on restructure was conditional but the plaintiff did not meet the condition by payment of the loan instalments agreed. It was added that clause 4 of the letter for restructure was a repeat of a condition in the letter of offer and that the default to fulfil the condition by payment of instalments has not been denied. To the defendant failure to pay the installments was an automatic trigger of the chargee's right to sell.

Analysis and determination

23. Being an application for a temporary injunction pending suit, this courts mandate is now well settled. It is to interrogate if the plaintiff/applicant has demonstrated a prima facie case that his rights under the contract have been breached or threatened with breach and that if the breach continues the resultant injury will be one incapable of compensation by an award of damages. If the two be established then the court need not consider the third requirement being the balance of convenience but if the court be in doubts, since not all case present clear cut situations, then the court ventures into weighing the balance of convenience.

24. On prima facie case, the plaintiff has raised four complaints being; failure to service statutory notices, the need to serve fresh notices once the restructure agreement was reached, the variation in the figure of the debt and the two different valuation reports one of which can be deemed intended to suppress the reserve price.

25. I have looked at the record and given regard to the submissions offered, and even at interlocutory stage and before making determinative finding on the merits of the suit, I am convinced that the requisite statutory notices were not only issued but the same were equally duly and sufficiently served since there is evidence by certificates of posting. If there was service thus, then it cannot be said that the allegation of lack of service can present a prima facie case.

26. Instead the plaintiff as the chargor has had his right duly protected and respected and it is his time to do his bit under the contract of lending; pay back the debt and in default cedes the interests in the property offered as security in terms of the same contract evidenced in the legal charge. In fact this ground must have been part of the wide net merely cast in case it be able to chance at catching anything but in this case the same was punctured by the evidence of service which the plaintiff opted not to challenge even though leave was granted to file a supplementary Affidavit which was never filed.

27. The next line of attack the right to exercise statutory power of sale and the only ground vigorously pursued was that once there was a restructure, all the previous statutory notices served were subsumed in the new arrangement and became spent never to form a basis of exercise of the power of sale. To that ground, I can see two streams of answers. The first is in the documents evidencing the contract between the parties. The straight answer is to be found at clause 26 of the instrument of legal charge where the parties agreed as follows:-

"The failure to exercise or delay in exercising a right or remedy provided by this Charge or by law does not constitute a waiver of the right or remedy or a waiver of other rights or remedies and the Chargor expressly agrees and covenants with the Bank that the Chargor shall not plead limitation under the Limitation of Actions Act (Chapter 22 of the Laws of Kenya) or any other similar enactment. No single or partial exercise of a right or remedy provided by this Charge or by law prevents the further exercise of the right or remedy or the exercise of another right or remedy. The rights and remedies provided by this Charge are cumulative and not exclusive of any rights or remedies provided by law".

28. That clause must be seen to be what it is- a covenant between the parties duly executed between them and binding on both with no liberty for either to just renege on the same. Not even the court has the mandate to excuse either of the parties from their fair share of obligations under the contract unless there be proved a vitiating factor.

29. Long after the charge was executed and registered and after there had been served statutory notices, the parties did negotiate a restructure of the facilities and agreed on a set of further terms by the letter of offer dated 19/10/2017. That letter equally further the agreement in the charge quoted above at clause 16. That Clause says:-

"No failure or delay by the Bank in exercising any right, power or privilege under this Letter shall impair the same or operate as a waiver for the same nor shall any single or partial exercise of any right, power or privilege preclude any further exercise of the same or the exercise of any other right, power or privilege. The rights and remedies provided in this Letter are cumulative and not exclusive of any rights and remedies provided by law".

30. These clauses and provisions are to this court standard terms on lending contracts with legal foundations and have been duly acknowledge and affirmed by the courts. I have in mind the well-known decision by the ***Court of Appeal in Mbuthia vs Jumba Credit Finance Corporation (supra)*** that the act of postponing a sale at the request or for the purposes of accommodating the chargor does not impose an obligation upon the chargee to start afresh all over again.

31. The last two grounds regarding the varying balances disclosed in the notices and the two differing valuation reports setting different reserve prices can be handled together. I do consider that by the terms of the charge, the debt owed by the plaintiff was to attract interest

calculated on daily basis and compounded on monthly rests (see clause 2 of the charge dated 21/01/2016). By that term alone, it is obvious that the balances would be changing on a daily basis whether or not payment is made. Can such be a basis to fault the notices as being defective? To the contrary the law under Section 90 (2), Land Act, demands of the chargee in issuing the statutory notices to provide adequate information concerning the default and the remedial action expected of the chargor. Those specific details to enable the chargee know what remedial steps are expected must of necessity be time conscious and can thus not be static or just stagnant. That ground is overly feeble and cannot establish a prima facie case.

32. Lastly on the reserve price disclosed by the two valuation reports the same can only become an issue if the sum so reserved was to be below 25% of the market value. That is what I make of the Provisions of Section 97(3). In that provision the law says:-

> **"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 charge 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 charge at an undervalue being less than twenty-five per centum below the market value shall not be taken to mean that the charge has complied with the duty imposed by subsection (1)".**

33. In this matter the plaintiff's complaint is that at the time of executing the charge in 2015 the property had been given a forced sale value of Kshs.178,500,000/= but when preparing to sell the same on account of default a new valuation conducted in the year 2017 returned a forced sale value of Kshs.120,000,000/=.

34. I have looked at both valuation reports and it is true the two reports give two different values. However that to this court does not present a good reason to grant an injunction even at this interim stage. It does not because it does not prima facie show a breach of duty imposed upon the chargee by the Land Act.

35. The later valuation report used as a basis to impute impropriety and breach of statutory duty does not amount to such even if viewed on the earlier report of 2015 because the value returned is well over 25% of the market value in both reports. This court has had a chance to consider similar scenario in ***Patrick Kangethe vs Co-operative Bank of Kenya Ltd & Others [2017] eKLR*** when the court rendered itself in the following words.

> **"My reading of sub-section 97(2) & (3) Land Act give me the understanding that once the valuation is undertaken, a chargee would only be deemed to have failed or breached its duty of care where the sale is at a price of not more than 25% of the given market value".**

36. The totality of the foregoing is that there is no prima facie case shown with any probability of success.

37. In my view even though the Court of Appeal in Ngurumeni's case said the three thresholds must be proved sequentially, I do hold that the existence of a prima facie case is the very foundation of all. The other two are just but substructures which cannot stand on their own without a superstructure.

38. Without a prima facie case shown and proved I see no basis to interrogate the prospects of an irreparable injury, incapable of remedy by damages just as I consider it unnecessary to consider the balance of convenience between the parties because I am in no doubt of the merits of the plaintiff's case. The inevitable consequence of the foregoing is that the application fails and I order the same dismissed with costs to the defendant.

Dated and delivered at Mombasa on this 12th day of April 2019.

P.J.O. OTIENO

JUDGE