**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL AND TAX DIVISION**

**HCCC NO. 23 OF 2015**

**GEOFFREY WAHOME MUOTIA.....PLAINTIFF**

**-VERSUS-**

**NATIONAL BANK OF KENYA.....DEFENDANT**

**RULING**

1. This ruling is in respect to the application dated 22nd January 2015 in which the applicant seeks the following orders:

***i. Spent***

***ii. Spent***

***iii. That pending the inter-partes hearing and determination of this suit; the defendant through themselves, their agents, employees, nominees, assigns, agents and specifically Garam Investments Auctioneers or any other persons or authority connected therewith be restrained by a temporary injunction order from advertising for sale or in any way offering sale, selling, disposing, leasing, occupying or in any way dealing with the alienating the proprietary rights in the plaintiff's charged property being land parcel No. L.R. NO. 209/12544, Upperhill, Nairobi.***

***iv. That pending the inter-partes hearing and determination of this suit, the court be pleased to issue an order of prohibition, prohibiting the defendant from continuing to refer for adverse listing or listing adversely the plaintiff's accounts or accounts related to the plaintiff in the Kenya Credit Reference Bureau or in any way clogging the plaintiff's access to credit facilities.***

***v. That the cost of this application be borne by the defendant.***

2. The application is supported by the applicant's affidavit sworn on 22nd January 2015 wherein he avers that through a charge registered sometime in 2014, he secured a loan of kshs 281,000,000/= in favour of the Nairobi Upperhill Hotel Limited with the aim of taking over amalgamated loan facilities with another bank. He further states that his attempts to have the loan given to him by the defendant taken over by another bank were frustrated by the defendant referred(CRB) his account to adverse listing in the Credit Reference Bureau thereby clogging his right to redeem his property.

3. He further states that the defendant thereafter issued notice to sell the suit property ostensibly under Section 96 of the Land Act thereby precipitating the filing of this suit.

4. The applicants case is that he was not served with a notice, under Section 90 of the Land Act, prior the intended sale and further, that the respondent did not undertake any forced sale valuation of the suit property as is required under Section 97 of the Land Act. In sum the applicant case was that:

*i. The default sum claimed is grossly overstated and inaccurate.*

*ii. The notices served under Section 90(2) (b) and Section 96 of the Land Act are fatally defective, unlawful and procedurally improper.*

*iii. The defendant has failed to comply with the provisions of Section 97 of the Land Act 2012 which is mandatory and the exercise of the power of sale is premature, and*

*iv. That the plaintiff's property is valued at kshs 550,000,000/- (kshs five hundred and fifty million the bank is proposing to sell it to receiver kshs 330,000,000/- at an undervalue (three hundred and thirty million).*

5. The respondent opposed the application through the replying affidavit of its Remedial Analyst, Mr. Morris Tiema, who avers that the credit facilities that are the subject of this case were granted to an entity known as Nairobi Upperhill Hotel Ltd and not the applicant herein on the terms and conditions set out in a letter dated 29th March 2014.

6. He states that at no time did the defendant engage with the plaintiff as he is not the holder of the accounts relating to the credit facilities and that he therefore lacks the legal capacity to purport to litigate for a separate entity in law.

7. He further avers that he is aware that the monies secured under the charge were not repaid and that in the circumstances, the defendant bank was at liberty to realize the security property by way of sale to recover the unpaid amount.

8. At the hearing of the application Mr. Mutua, learned counsel for the respondent submitted that the claim that notice of the intended sale was not served on the applicant was not a sufficient ground to stop the statutory notice of sale through the granting of the orders sought as the correct approach would, in such a case, be to require the defendant to issue fresh notices.

9. Counsel submitted statutory notices were duly served on the applicant and that the application was not merited as it had been shown that the plaintiff was in default of the loan repayments and that the respondent was therefore justified d to invoke its statutory power of sale.

**Analysis and determination**

10. I have considered the application herein, the respondent's response and the submissions made by the advocates on record. The main issue for determination is whether the applicant has made out a case to warrant the granting of an order of temporary injunction. The reasons advanced by the applicant in seeking the said orders for injunction can be summarized as follows:

***a. That notices served under Section 90(2) (b) and Section 96 of the Land Act are fatally defective, unlawful and procedurally improper.***

***b. That the defendant has failed to comply with the provisions of Section 97 of the Land Act 2012 which is mandatory and the exercise of the power of sale is premature, and***

***c. That the defendant was proposing to sell the suit property at a gross undervalue and without undertaking the forced sale valuation of the said property.***

***d. That the sum claimed by the defendant was grossly overstated and inaccurate.***

**Injunction**

11. The principles on which the courts will grant an injunction are well known. This Court restated those principles in ***NGURUMAN LIMITED V. JAN BONDE NIELSEN & 2 OTHERS, CA NO. 77 OF 2012***, together with the mode of their application 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) demonstrate irreparable injury if a temporary injunction is not granted, and***

***(c) ally 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." (Emphasis added).***

12. Having regard to the known principles of injunction as set out in the above cited case, I will now turn to consider if the application meets the threshold set therein. On prima facie case, it is well established that, in order to secure the injunctive relief sought, the applicant must first establish a prima facie case with a high chance of success. In this case, the applicant contends that he owns LR No. 209/12544, Upper hill, Nairobi (hereinafter "the suit property") that is under the threat of being irregularly and unlawfully sold by the defendant on account of failure to service a loan advanced to him by the defendant in which the suit property was used as a collateral. The defendant's case on the other hand is that it is entitled to exercise its statutory power of sale in light of the applicant's default in complying with the terms of the loan agreement.

13. In this case, it was not disputed that the respondent extended credit facilities to Nairobi UpperHill Hotel Ltd for which the suit property was offered as security. It was also not disputed that there was a default in the loan repayment thereby entitling the respondent to set in motion loan recovery process by issuing statutory notices of intention to sell the suit property so to recover the debt. The applicant however contends that the notices served on him under Section 90(2) (b) and Section 96 of the Land Act were fatally defective, unlawful and procedurally improper.

14. The question which then arises is whether he alleged improper service of notices in a proper ground for restraining the respondent, by way of temporary injunction, from selling the suit property. The answer to the above question can be found in the decision by the Court of Appeal in the case of **National Bank of Kenya Limited vs Shimmers Plaza Ltd [2009] eKLR** wherein the learned judges held as follows:

> ***"We venture to say that where the court is inclined to grant an interlocutory order restraining mortgagee from exercising its statutory power of sale solely on the ground that the mortgagee has not issued a valid notice, then in our view, the order of injunction should be limited in duration until such time as the mortgage shall give a fresh statutory notice in compliance with the law. We respectfully think that the learned judge did not exercise his discretion judicially in the circumstances of this case when he granted an order of injunction until the determination of the suit."***

15. I have carefully considered the applicant's claim and I note that even though the defendant served him with the Statutory Notice, the said notice did not comply with the provisions of sections 90 and 96 of the Land Act as both the notices from the plaintiff and the auctioneer were served on the applicant at the same time. On its part, the defendant maintained that the notices served on the applicant met all the legal requirements.

16. Section 90 of the Land Act, 2012 stipulates as follows:-

> ***90. (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 any charge 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;***
> >
> > ***(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 two months 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;***

17. My understanding of the above provision is that as long as the chargor remains indebted to the chargee, the monies must be paid failing which the latter is entitled to exercise its statutory power of sale. The chargee is however required to fully comply with the provisions of the Land Act especially in respect to issuance of the statutory notice to the chargor showing the nature and extent of the default, and if the default is of non-payment, the amount due to be paid and the consequences of the default. In the instant case, it was not disputed that the statutory notices were issued to the applicant. The main bone of contention is that the notices were irregularly issued. Taking a cue from the decision in the case of **National Bank of Kenya Limited vs Shimmers Plaza Ltd** (supra) I similarly find that irregularity in the notices is not a *carte blance* for issuance of orders restraining a chargee from exercising its statutory power of sale and I find that in circumstances where proper service of statutory notice is contested, such as this case, the order of injunction should be limited in duration until such time as the mortgagee shall give a fresh statutory notice in compliance with the law.

18. The applicant also contested the defendant's exercise of the statutory power of sale on the basis of non-compliance with section 97 of the Land Act. The defendant on the other hand stated that it had secured a valuation of the suit property as shown in the valuation report by Acumen Valuers Limited that was attached to the applicant's affidavit in support of the application. Section 97 of the Land Act stipulates as

follows:-

***Duty of chargee exercising power of sale***

***(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 chargor, any guarantor of the whole or any part of the sums advanced to the chargor, 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 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 chargee at an undervalue being less than twenty-five per 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 chargor or any former chargor.***

***(5) A chargee shall not be entitled to any compensation or indemnity from the chargor, any former chargor or any guarantor in respect of any liability arising from a breach of the duty imposed by subsection (1).***

***(6) The sale by a prescribed chargee of any community land occupied by a person shall conform to the law relating to community land save that such a sale shall not require any approval from a Community Land Committee.***

***(7) Any attempt by a chargee to exclude all or any of the provisions of this section in any charge instrument or any agreement collateral to a charge or in any other way shall be void.***

19. The importance of compliance of the above provision has been the subject of many court decisions. In the case of **John Mwenja Ngumba & Another vs National Industrial Credit (NIC) Limited & Another [2014] eKLR** it was held that the issue of whether or not the property therein had been sold at the proper price be determined at full trial.

20. In the present case, the applicant did not deny that there was a valuation report on the suit property. The contest was that the property had been undervalued. Courts have however held that undervaluation *per se* cannot form a ground for the issuance of orders of injunction since breach by the charge in selling the property at an undervalue can be remedied through a claim for damages. (See **Jashvantsing L. Solanki vs Diamond Trust Bank Ltd. [2014] eKLR)**.

21. My take is that even assuming that the defendant had not done a valuation of the suit property, that failure alone is cannot form a ground for issuance of orders to stop the sale as the defendant can be afforded an opportunity to comply with the provisions of the law on the valuation of the subject property, if they had not already done so.

22. On the ground that the amount of arrears claimed by the defendant was grossly overstated and inaccurate, the applicant appeared to suggest that an injunction should be issued so that proper accounts are taken in order to determine the actual sum due to the defendant. It has severally been held that a dispute of accounts is not a ground for granting an injunction. My humble view is that the proper approach that the applicant ought to have taken would have been to reconcile the accounts with the Defendant and pay what is due. In the instant case the applicant did not indicate that he had made any attempts to reconcile his accounts with the defendant. No material was placed before me to show that the parties herein have held any talks with a view to reaching a consensus on the actual sum due to the defendant. It does appear to this court that this is not something that is difficult to achieve even without a court order or that the defendant would suffer any prejudice if the court was to direct it to furnish the Plaintiff with the Statement of Accounts with a view to resolving this matter.

23. The Plaintiff also asserted that the defendant's decision to adversely list him with the CRB thwarted all his attempts to settle/pay back the loan and in this regard, the applicant sought orders prohibit the defendant from continuing to refer him for such adverse listing pending the hearing and determination of the suit. In other words, the applicant blamed his financial woes on the alleged adverse listing by the defendant. My finding is that the issue of adverse listing and the circumstances or the reasons why the applicant was listed with the CRB are substantive issues are not issues that this court can delve into at this interlocutory stage. I however hasten to observe that adverse listing ordinarily occurs following a default in loan repayment and in this case, it is not disputed that the applicant defaulted in such repayments. I am nonetheless of the humble view that the issue of whether the adverse listing was justified touches on the merits of the case and is thus an issue that may best be canvassed in a full trial.

24. Having considered the parties' affidavits, the written and oral submissions and the case law in support of their respective cases and having applied the principles of granting an interlocutory injunction pending the hearing and determination of the suit herein, this court is not satisfied that this is an appropriate case for it to exercise its discretion in favour of the Plaintiff herein.

25. The most glaring fact in this application is the undisputed fact that the applicant has defaulted in paying the loan advanced to him by the defendant. In effect therefore, the applicant Plaintiff has come to this court to seek an equitable relief of injunction when he has been in default and has not made good his accounts with the defendant. The applicant has come to this court with unclean hands. I note that the instant application was filed way back in January 2015. The applicant has not shown that it has made any efforts to settle his debt or to negotiate with the defendant on the terms of settlement.

26. The applicant cannot have his cake and eat it through this application by keeping the subject property and at the same time restraining the defendant from realizing its security. I find that the applicant has not established a prima facie case against the defendant so as to warrant the issuance of an order of interlocutory injunction. Considering the lapse of time since the filing of this suit and the amount of money advanced to the applicant, one can say that there is the likelihood that the outstanding amount could outstrip the value of the property thereby putting the defendant's interests in further jeopardy. In the case of Andrew **Muriuki Wanjohi vs Equity Building Society Limited & 2 others [2006] eKLR** the court observed as follows:-

> ***"… In my considered view, if the 1st and 2nd Defendants were restrained from selling off the property until the suit was heard and determined, there is a very real risk that the debt may outstrip the value of the property as the borrower has not made repayments for more than three years…"***

27. It is trite law that the court's discretionary power to grant an order for interlocutory injunction must be exercised judicially based on the law and evidence and that an applicant seeking such orders must satisfy the threshold set out in the famous case of **Giella vs Cassman Brown Company Limited** [1973] E.A. 358 in which it was held that:-

> ***"The conditions for the grant of an interlocutory injunction are now, I think, 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."***

28. Accordingly, having found that the Plaintiff has not made out a *prima facie* case with a probability of success, the court finds that the question of it suffering loss that cannot be compensated by way of damages if the interlocutory judgment is not granted does not arise and that the balance of convenience does not tilt in his favour.

29. My finding is that the defendant is at liberty to exercise its statutory power of sale provided that it fully complies with all the provisions of the law. For the avoidance of doubt, the defendant shall not exercise its statutory power of sale of the subject property until it re-issues a Statutory Notice and conducts a valuation of the said property. It is hereby directed to fully comply with the provisions of the law.

30. For the above reasons I find that the application dated 22nd January, 2015 is not merited and the same is hereby dismissed. The interim orders of injunction issued herein on 23rd January, 2015 are hereby vacated and/or set aside.

31. The costs of the application shall abide the outcome of the main suit.

It is so ordered.

**DATED, signed and DELIVERED in open court at NAIROBI this 31st day of May 2019**

**W. A. OKWANY**

**JUDGE**

**In the presence of:**

Mr. Gega for Kabugu for plaintiff.

Mr. Mutua for defendant/respondent

Court Assistant – Margaret