REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

HIGH COURT CIVIL DIVISION

CIVIL SUIT NO. 2 OF 2018

STARS & GARTERS RESTAURANT.....1ST PLAINTIFF/APPLICANT

ERIC M. MWASHIGADI.....2ND PLAINTIFF/APPLICANT

VERSUS

NATIONAL BANK OF KENYA LIMITED.....DEFENDANT/RESPONDENT

RULING

[Applicants' Notice of Motion Dated 7th March, 2018]

1. The 2nd Applicant/2nd Plaintiff Erick M. Mwashigadi and one Joseph Raphael Karanja are the registered owners of a parcel of land known as Land Portion Number 12899 (Original Number 589/2) situate in Malindi Town. The parcel of land shall henceforth be referred to as the suit property. The suit property was charged as security for a loan facility of Kshs.12,000,000 by the Respondent/Defendant, National Bank of Kenya Limited to the 1st Applicant/1st Plaintiff, Stars and Garters Restaurant owned and operated by a company known as Stars & Garters Investments Limited.

2. Before completing the payment of the loan, the 1st Applicant defaulted in meeting its financial obligations and the Respondent commenced the process of realizing its security. The applicants through the notice of motion dated 7th March, 2018 seek to stop that process by seeking orders as follows:-

> **"1. (spent);**
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> **2. That pending the hearing and determination of this application an order of injunction be and is hereby issued restraining the Defendant/Respondent whether by itself, its officers, employees, servants and/or agents or otherwise assignees and/or any person howsoever acting on its behalf and/or under its mandate and/or instructions from alienating, advertising for sale, offering for sale, selling, taking possession of, leasing, transferring, charging or otherwise in any manner whatsoever interfering with the property known as "L.R. NO. PORTION NO. 12899 (ORIGINAL NO. 589/2)";**
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> **3. That pending the hearing and determination of this suit an order of injunction be and is hereby issued restraining the Defendant/Respondent whether by itself, its officers, employees, servants and/or agents or otherwise assignees and/or any person howsoever acting on its behalf and/or under its mandate and/or instructions from alienating, advertising for sale, offering for sale, selling, taking possession of, leasing, transferring, charging or otherwise in any manner whatsoever interfering with the property known as "L.R. NO. PORTION NO. 12899 (ORIGINAL NO. 589/2)";**
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> **4. That in the alternative to Prayers 2 and 3 above the time for compliance and/or rectifying any default to redeem "L. R. NO. PORTION NO. 12899 (ORIGINAL NO. 589/2)" be extended for a period of 24 months or for such other period as the Honourable Court may determine pursuant to powers conferred on the Court under Section 104(2) as read with Section 90 of the Land Act, 2012;**
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> **5. That in the alternative to Prayers 2 and 3 above the Defendant/Respondent's statutory powers of sale be suspended and/or postponed for a period of 24 months or for such other period as the Honourable Court may determine to enable the Plaintiff/Applicants redeem "L. R. NO. PORTION NO. 12899 (ORIGINAL NO. 589/2)";**
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> **6. That this application be served upon the Defendant/Respondent and heard *inter partes* on such date as this Honourable Court may direct;**

7. That the costs of this application be awarded to the Plaintiffs/Applicants."

3. The application is supported by the grounds on its face and the supporting affidavit of the 2nd Applicant. The applicants' case is that they observed the terms of the mortgage/charge facility taken out and serviced the loan in accordance with the terms and tenor of the charge facility until 2016. The applicants aver that they have made efforts to repay the loan and have on several occasions approached the Respondent with proposals to reschedule payments to enable them comply. The applicants indicate that they have so far made payments for the months of January to September, 2018.

4. It is the applicants' case that there is a 45 days' notice issued to them by the Respondent's assigned auctioneer without first issuing to them the requisite statutory notice.

5. In addition, it is stated that the Respondent and/or the auctioneer deliberately misaddressed the notices in a bid to dispose of the property without the applicants' knowledge.

6. It is averred that the applicants on 3rd October, 2017 received though their postal address a copy of the Respondent's letter dated 13th April, 2016, the auctioneer's letters dated 6th June, 2017 and 12th June, 2017, notice to redeem and notification of sale dated 6th June, 2017, all addressed to a postal address, different from that given to the Respondent by the applicants. It is also averred that the applicants have not received any other communication from the Respondent.

7. It is the applicants' case that they are apprehensive that the property will be advertised for sale and or will be sold without due process and unless the orders sought are granted, the applicants will suffer irreparable loss and damage.

8. It is also averred that the Respondent has neglected and/or refused to comply with the mandatory requirements of the Land Act, 2012 and has failed to follow the due process laid down therein. Further, that the charge/mortgage instrument does not contain the terms and conditions of sale as required by Section 80 of the Land Act, 2012 and the same is therefore defective, null and void.

9. In addition, the applicants state that the statutory notice of sale fails to comply with the mandatory provisions of the law. The applicants aver that the sale ought not to be allowed for the reason that a sale by public auction will water down the market value of the property and it being the only source of income and sustenance for the 2nd Applicant, the sale, if allowed to procced, will deprive him of his daily bread.

10. The applicants further state that they have made requests to the Respondent to provide them with the statements of account but it has failed, neglected and/or refused to do so. The 2nd Applicant avers that he learnt verbally of the intended sale of the suit property by public auction scheduled for 8th March, 2018.

11. The application is opposed through the replying affidavit sworn on 18th June, 2018 by Elizabeth W. Mwangi who is the Manager in Charge of Credit Remedial in the Respondent's Collections and Recoveries Department. She avers that the application has been filed in a bid to restrain the Respondent from exercising its statutory right of sale over the suit property. She also avers that the application is defective, fatally flawed and bad in law and no substantive evidence or grounds have been adduced to warrant the issuance of the orders prayed for.

12. According to the Respondent, it was a contractual term in the charge and a statutory provision that it would realize its security over the suit property if the applicants defaulted in meeting their financial obligations. It is averred for the Respondent that the applicants grossly defaulted and as at 8th March, 2018 the outstanding loan debt stood at Ksh14,249,335.44.

13. The Respondent's case is that it addressed to the applicants a letter of demand dated 22nd January, 2016 demanding that the default be rectified. Further, that the applicants' loan account had been in default for a long period of time despite the Respondent's several demands and the applicants' promises to regularize the account.

14. The Respondent's position is that the three months statutory notice was served upon the applicants through a notice dated 13th April, 2016 and the said notice was never returned undelivered. The Respondent avers that upon expiry of three months a letter dated 11th August, 2016 together with a forty days statutory notice were served upon the applicants but the applicants did not rectify the default within forty days.

15. The Respondent avers that there is no dispute that the postal address and postal code used to deliver the said notices and demand letters are correct and the applicants have also admitted receiving the notices.

16. According to the Respondent, after the lapse of the statutory period, it was entitled to exercise its power of sale and it did so by instructing an auctioneer to sell the property through public auction. The Respondent states that the auctioneer served upon the applicants a forty five days redemption notice on 8th June, 2017. The Respondent states that the sale was to take place on 13th August, 2017 but failed to materialize. It is the Respondent's averment that failure to stage the sale, where proper notices were served, does not require service of fresh notices. It is the Respondent's position that the only requirement is the advertisement of the sale which was done on 12th February, 2018 and the auction scheduled for 8th March, 2018. Further, that a valuation of the suit property was carried out as required.

17. It is the Respondent's case that the applicants admit default and it has fulfilled its statutory and procedural requirements hence the applicants have not made out a *prima facie* case with probability of success. Further, that the applicants would not suffer irreparable harm or loss that cannot be compensated by an award of damages. Also, that the balance of convenience tilts in favour of the Respondent as there is a real risk that unless the security is realized, the debt shall continue to accrue and will outstrip the value of the security held rendering it inadequate. The Respondent therefore urges this court to dismiss the application.

18. The application was disposed of by way of written submissions highlighted in court on 1st November, 2018. The applicants submitted that the demand letters and notices were addressed to the registered owners of the charged property through P. O. Box 5736-80200 Kilifi instead of P. O. Box 5736-80200 Malindi. They therefore urged the court to find that there was no proper service of the statutory notices. The applicants submitted that the statutory notices were addressed to an address not found in the mortgage hence breaching the agreement between them and the Respondent.

19. The applicants pointed out that the notices indicated that the interest rate was Ksh23.3% and urge this court to interfere as held in **Margaret Njeri Muiruri v Bank of Baroda (Kenya) Limited [2014] eKLR** as this amounts to an unconscionable contract.

20. According to the applicants, the Respondent failed to comply with sections 84, 90 and 96 of the Land Act, 2012. Further, that the Respondent also breached Section 96(3)(c)of the Land Act as the spouse of the 2nd Applicant was never served with any notice. Reliance was placed on the decision in **Albert Maria Cordeiro** & **another v Vishram Shanji [2015] eKLR** in support of the proposition that failure to comply with statutory provisions gives rise to a *prima facie* case with high chances of success.

21. The applicants submitted that they became aware of the statutory notices on 3rd October, 2017 well after steps had been taken by the Respondent to realize the security and this was in complete contravention of the Land Act. They urge that the statutory power of sale did not crystalize in the circumstances and rely on the decision in **Patricia Achieng Onyango & another (suing as the legal representative of Dismas Juma Onyango Kamb) v Meridien Biao Bank Limited (In Liquidation) [2017] eKLR** to buttress this point.

22. The applicants urged that their case has met the threshold for grant of an injunction as per the principles established in **Giella v Cassman Brown [1973] EA 358.** They asserted that they have established a *prima facie* case as defined in the Court of Appeal case of **Alice Awino Okello v Trust Bank Ltd & another LLR No. 625 (CCK)** cited in **Kisimani Holdings Limited & another v Fidelity Bank Limited [2013] eKLR.**

23. They also urged this court to find that the lower risk of injustice lies with awarding the injunctive relief as held in **Ntima Housing Co-operative Society Ltd v Housing Finance Company of Kenya Ltd [2018] eKLR** and **Suleiman v Amboseli Resort Ltd [2004] eKLR**.

24. The Respondent strongly opposed the grant of injunctive relief to the applicants stating that they have not met the threshold set in the **Giella** case for grant of such remedy. They urged that the three principles established in that case are distinct hurdles which must be surmounted as was held in **Kenya Commercial Finance Co. Ltd v Afraha Education Society [2001] 1 EA 86**.

25. The Respondent asserted that the applicants obtained banking facilities and have admitted defaulting in payment and have therefore not established a *prima facie* case. Reliance is placed on the decisions in **Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] eKLR** and **Kyangavo v Kenya Commercial Bank Ltd & another [2004] eKLR** in support of this assertion.

26. It is the Respondent's position that the statutory notices were duly served and pre-auction valuation carried out hence it complied with the law. On this point, the Respondent urged the court to be guided by the decision in **Koileken Ole Kipolonka Orumoi v Mellech Engineering & Construction Limited & 2 others [2015] eKLR.**

27. It is also submitted that the applicants would not suffer irreparable loss that cannot be compensated by way of damages, the suit property having been valued and its monetary value ascertained. Further, that the Respondent is able to adequately compensate the applicants should the case eventually be decided in their favour. Reliance is placed on the decisions in **Ooko v Barclays Bank of Kenya Ltd [2002] eKLR** and **Sammy Japeth Kavuku v Equity Bank Ltd & another [2014 eKLR** in support of the said assertion.

28. The Respondent, in addition, submitted that the security provided by the beneficiary of a financial facility is meant to shield the lender from the risk of loss in the event of default and the lender therefore ought to be allowed to exercise the power of sale. The decisions in **Amos Wangeera Njoroge & 9 others v Serah Wamuyu Muriuki & another [2014] eKLR , Koileken Ole Kipolonka Orumoi (supra)** and **Milimani Motors (k) Ltd v Kenya Commercial Bank Ltd [2014]** are cited in support of this proposition.

29. It is submitted that the suit property was offered as security hence the issue of the sentimentality attached to the property ought not to arise as was held in **E.N.W. v P.W.M. & 3 others [2013] eKLR.**

30. The Respondent also submitted that the balance of convenience should tilt in its favour as allowing the stoppage of sale while the debt continues to accrue will result in the debt outstripping the value of the provided security. The court is urged to follow the decisions in **Andrew Muriuki Wanjohi v Equity Building Society Limited & 2 others [2016] eKLR** and **Argos Furnishers Limited v Ecobank Kenya Limited & another [2014] eKLR** and find that the balance of convenience tilts in favour of the Respondent in the circumstances of the case.

31. The power exercised by the court in an application seeking interlocutory injunctive orders is discretionary. The discretion is guided by the principles established in the **Giella** case. In the words of Spry, V.P., those principles are:-

> **"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."**

32. In **Amir Suleiman v Amboseli Resort Limited [2004] eKLR,** Ojwang, Ag. J (as he then was), in my view, elaborated on what "balance of convenience" means by stating that:-

"The Court in responding to prayers for interlocutory injunctive reliefs, should always opt for the *lower rather than the higher risk of injustice."*

33. In **Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR; Civil Appeal No. 77 of 2012 (Nairobi)** the Court of Appeal explained that all the three conditions are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. I beg to quote the Court of Appeal at length:-

"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.

It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or both that the question of balance of convenience would arise. The inconvenience to the applicant if interlocutory injunction is refused would be balanced and compared with that of the respondent, if it is granted.

On the second factor, that the applicant must establish that he *"might otherwise"* suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, *prima face*, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot *"adequately"* be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy."

34. In order to succeed the applicants are required to establish that they have a *prima facie* case and will suffer irreparable loss if injunctive orders are not granted. As pointed out by the Court of Appeal in **Nguruman Limited** (supra) **"[i]t is where there is doubt as to the adequacy of the respective remedies in damages available to either party or both that the question of balance of convenience would arise."** According to the Court of Appeal, the inconvenience to the applicant if interlocutory injunction is refused would be balanced and compared with that of the respondent, if it is granted.

35. Have the applicants established a prima facie case with probability of success? In **Mrao Ltd** (supra) a *prima facie* case was defined as **"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."**

36. The statutory notices and the demand documents according to the undisputed averment of the 2nd Applicant were received in October, 2017 way after the timelines stipulated in those notices had passed. The documents exhibited by the applicants and the Respondent bear the same postal address and code indicated in the mortgage facility documents save for the physical location which reads Kilifi instead of Malindi. This supports the applicants' case that they did not receive the documents on time. It needs not be stressed that time is of essence when it comes to statutory notices.

37. There is also a valid argument by the applicants that variance of interest by the Respondent required issuance of notice to the applicants as per the provisions of Section 84(1) of the Land Act and the agreement itself. There is an allegation of variance of interest without notice and this has not been rebutted by the Respondent. Without going into much detail, it becomes clear that the applicants have established a *prima facie* case with high probability of success.

38. The next question is whether the applicants have established that they will suffer irreparable loss if the sale is not stopped. There is an averment by the 2nd Applicant that the business operated on the property provided as security is his only source of income. He also attested that selling the property by way of public auction will water down the market value of the property. On this, I agree with the Respondent's submission that once the suit property was offered as security, the possibility of its sale in case of default in servicing the loan was a fact within the knowledge of the registered owners and the fact that the property is the only asset available to the owner is not a ground for stopping the sale. This position is supported by the decisions in **Koileken Ole Kipolonka Orumoi** (supra), **Milimani Motors (K) Ltd** (supra) and **E.N.W**. (supra) that once a property has been offered as security and the chargor has failed to service the loan facility, a disposal of the property is on the cards and the fact that it is the only property the chargor has is not a ground for issuing an injunctive order.

39. The applicants also gave the impression that the amount owed to the Respondent is in dispute. That is not a ground for stopping a sale. This was stated long ago in **Lalvuna & others v Civil Servant Housing Co. Ltd (1995) LLR 336 (CAK)**, as quoted in **James Juma Muchemi & Partners Limited v Barclays Bank Ltd [2011] eKLR**, where Kwach, J. A. stated that:-

> **"A court should not grant an injunction restraining a mortgagee from exercising its statutory power of sale solely on the ground that there is a dispute as to the amount due under the mortgage."**

40. In fact, in **Mrao Ltd** (supra), the Court of Appeal explained the principles for granting interlocutory injunctions in cases like the one before this court by stating that:-

> **"In recent times a tendency has developed in the Superior Court of treating applications by a mortgagor for a temporary injunction to restrain a mortgagee from exercising his statutory power of sale just like any application for injunction in an ordinary suit. The circumstances in which a mortgagee may be restrained from exercising his statutory power of sale are set out in Halsbury's Laws of England, Vol. 32 (4th edition) paragraph 725 as follows:-**
>
> **"725 When mortgagee may be restrained from exercising power of sale.**
>
> **The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has began a redemption action, or because the mortgagor objects to the manner in which the sale is being arranged. He will be restrained, however, if the mortgagor pays the amount claimed into court, that is, the amount which the mortgagee claims to be due to him, unless, on the terms of the mortgage, the claim is excessive."**

41. I take it that the legal principles set out in Halsbury's Laws of England as reproduced above will only be applicable where the process of disposing the security is in compliance with the law. I do not find any reason why the court would allow a mortgagee to realize security in contravention of the statutory provisions and terms of the mortgage.

42. The Respondent has indicated that it is capable of compensating the applicants should their case eventually succeed. The court no doubt takes notice of the fact that the Respondent is a financial institution licensed by the regulatory authorities to carry out the functions of a bank. It can therefore be implied that the Respondent is capable of meeting any damages that may awarded to the applicants should it be found that the sale of the suit property, if it proceeds, was erroneous. This is indeed a powerful argument that should tilt the balance of convenience in favour of the Respondent. However, there is the greater need to ensure compliance with the laws of the land. As already pointed out, the proposed sale is likely to contravene certain provisions of the Land Act, 2012. The statutory requirements and procedures safeguard both the chargor and chargee and ensure that the business environment remains safe, stable and predictable.

43. In my view, a chargor whose security is sold without compliance with the statutory provisions and the terms of the mortgage will suffer irreparable loss. Whereas it is true that a security offered to secure a loan can be sold where there is default in payment of the loan, it is also correct that a genuine and sincere mortgagor in taking a loan intends to pay the same. The loss of a property sold in breach of statutory provisions translates to irreparable loss. Once the property is sold in compliance with the law, it cannot be recovered from the purchaser who has bought it in a public auction. In such circumstances it cannot be said that money will be adequate compensation to the mortgagor. It is therefore find and hold that the applicants have established that they will suffer irreparable loss if injunctive orders are not issued.

44. The Respondent still has the security provided by the applicants. Its fear that interest on the loan may outstrip the value of the suit property will be taken care of by the orders to be issued. In the circumstances the balance of convenience tilts in favour of the applicants.

45. In conclusion, I find the applicants' application dated 7th March, 2018 merited. An order of injunction is therefore issued restraining the Respondent/Defendant whether by itself, its officers, employees, servants and/or agents or assignees and/or any person howsoever acting on its behalf and/or under its mandate and/or instructions from alienating, advertising for sale, offering for sale, selling, taking possession of, leasing, transferring, charging or otherwise in any manner interfering with the property known as L.R. No. Portion No. 12899 (Original 589/2) pending the hearing and determination of this suit. The stay order will remain in force only on condition that the applicants continue servicing the loan as per the loan agreement between them and the Respondent.

46. In case of any default by the applicants, the Respondent be at liberty to commence afresh and in accordance with the Land Act, 2012 and the loan agreement, the process of exercising its statutory power of sale. The applicants will, not later than 45 days from the date of the delivery of this ruling, list the matter before the Deputy Registrar for compliance with Order 11 of the Civil Procedure Rules, 2010 so that the same can be heard and determined on priority basis. The costs of this application shall abide the outcome of the suit.

Dated and Signed at Nairobi this 16th day of April, 2019

W. Korir,

Judge of the High Court

Dated, Countersigned and Delivered at Malindi this 23rd day of May 2019

R. Nyakundi,

Judge of the High Court