THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CIVIL SUIT NO. 22 OF 2019

PREMIER FLOUR MILLS LTD.....1ST APPLICANT

PREMIER COOKIES LTD.....2ND APPLICANT

TRIDENT INSURANCE COMPANY LTD.....3RD APPLICANT

VERSUS

STANDARD CHARTERED BANK KENYA LTD.....RESPONDENT

RULING

1. The Applicant filed this application for a temporary injunction citing the Constitution of Kenya, Section 3 and 3A of the Civil Procedure Act cap 21 laws of Kenya, Sections 97, 102, 103 and 104 of the Land Act, Order 40 rules 1, 2, 3 and 4; Order 51 Rule 1 of the Civil Procedure Rules and all other enabling provisions of the law. The prayers sought are as follows:

a. An injunction to restrain the Defendant by itself, its servants, auctioneers, receivers agents or advocates or any of them or otherwise from advertising for public auction or offering for sale by public auction or purporting to sell by public auction the 3rd Plaintiff's parcels of land being Land Reference Numbers LR NO's **19811, 19812, 19815, 19814, 19805, 19803, 19802, 19800, 19799, 19797, 19796, 19795, 19794, 19793, 19792, 19791, 19501, 19500, 19808, 19806, 19807 and 19810** located in Lukenya Area within Machakos county.

b. Compelling the Defendant to provide a current loan statement for the facilities to inform a court mandated independent audit and determination of the 1st and 2nd Plaintiff's true level of indebtedness by an auditor jointly appointed by the parties or the honorable court'

c. A court mandated independent valuation of the suit property be conducted by a registered valuer jointly appointed by the parties or by the honorable court pending the hearing and final determination of the main suit. There is also a prayer for costs of the application to be provided for.

2. The application is further supported by the affidavits of Shahid Lalji filed on 22nd and 30th July, 2019. The grounds of the application as disclosed in the notice of motion are as follows:

a. Between 2011 and 2015 the Defendant agreed to grant the 1st and 2nd Plaintiffs certain banking facilities including treasury facilities, overdraft facilities, term loans and Guarantees.

b. The plaintiff's properties being Land Reference Numbers LR NO's **19811, 19812, 19815, 19814, 19805, 19803, 19802, 19800, 19799, 19797, 19796, 19795, 19794, 19793, 19792, 19791, 19501, 19500, 19808, 19806, 19807 and 19810** located in Lukenya Area within Machakos county were registered as security for the loan and treasury facilities advanced to the 1st and 2nd Plaintiffs/applicants.

c. The defendants and its agents Hamilton Harrison and Matthews Advocates and Garam Investments Auctioneers, issued Statutory Notice and a notification for sale on 17th June, 2019 that indicated that the suit properties would be sold by Public Auction on 6th August, 2019 and the notice has been placed in the Daily Nation on 22nd July, 2019 and the continued advertisement will frustrate any efforts to sell the same via private treaty at a higher price.

d. The defendant has refused to accept any attempts to settle the debts thus frustrating the applicants' attempts to redeem its

securities.

e. Efforts to get a current loan statement has been frustrated by the defendant by a demand for Kshs 2,100,000/- for soft and hard copies of the statements.

f. The last valuation commissioned by the defendants on 16th July, 2018 grossly undervalued the property.

g. If the sale is allowed to proceed, the applicants shall be greatly prejudiced because the same will proceed without carrying out a proper valuation.

h. The Applicants are taking steps to make payment and that should these steps fail then a sale by private treaty would be better.

3. Vide undated affidavit filed on 30th July, 2019 and 1st August, 2019, the deponent who is the director of the applicants averred that he received the statements but the same are unable to open. He further averred that he has engaged an audit consultancy firm that would need 5 to 6 weeks to conduct verification and in addition and while awaiting the verification they have engaged some financiers who have upped an offer to US$ 11 million which is sufficient to clear the Defendant's claim.

4. In reply Josephine Warutere, a Senior Account Manager, Group Special Assets Management of the Respondent Company deposed that the plaintiffs failed to repay sums that were due under the facility letter dated 25th August, 2015 and the two facility letters dated 30th September, 2015 and by letters dated 14th August, 2017 where the advocates for the Defendant made a demand to which no response was made. Further that by letter dated 21st September, 2017 a demand for payment was made under Section 56 of the Land Registration Act, 2012 to the 3rd Plaintiff and another demand under Section 56 was made on 3rd November, 2017 whereupon the amounts due were indicated. It was her averment that the 1st plaintiff wrote to Hamilton Harrison and Matthews indicating the actions being taken to settle the due amount while the 2nd plaintiff admitted the amounts outstanding vide letter dated 5th February, 2018 and sought for restructuring whereas the 3rd Plaintiff made no payment and was in default. She averred that statutory notice under Section 90(1) of the Land Act was issued to the 3rd Plaintiff and no payment was made and hence Under Section 96 of the Land Act 2012 notices dated 30th August, 2018 were issued and then the 1st and 2nd plaintiffs made proposals for payment that were not agreeable to Hamilton Harrison and Matthews and in the meantime no payment was received from the 3rd plaintiff which forced the defendant to instruct Garam Auctioneers to put up the property for sale and the notification of sale was served in accordance with the Auctioneers Rules. She denied the failure of the defendant to provide a current valuation of the property and further maintained that the plaintiffs have never challenged the amounts due. With regard to the proposal, she averred that the plaintiffs are still indebted to the Defendant since the proposal is Kshs 487 million less than the outstanding debt. She denied that the defendant demanded Kshs 2.1 million to provide the loan statements and further that the 2nd plaintiff did not register any email addresses with the defendant and therefore no statements were provided via email as the same were sent via post. The deponent averred that if the auction is stopped, there are auctioneers fees of Kshs 1,617,062.50 which the defendant will be forced to pay; she added that the defendant has issued the requisite notices and is entitled to exercise its statutory power of sale.

5. The defendant filed grounds of opposition to the application dated 26th July, 2019. Learned counsel stated that the right to statutory power of sale has accrued and that the sale should not be stopped because of under valuation or because the amount owing is disputed as per the cases of **Zum Zum Investment Limited v Habib Bank Limited (2014) eKLR and Habib Bank A.C. Zurich v Pop in Kenya Limited & Others (1995) eKLR.** Counsel added that there is no obligation to exercise power of sale through private treaty as per **Francis Kalama Mulewa v Kenya Commercial Bank (2017) eKLR.** Learned counsel posited that there is a colossal amount of money owing and the balance of convenience is in favor of the defendant and that the charged properties are now commercial items to be sold once the right to sell accrues as per the case of **Al Jalal Enterprises Limited v Gulf African Bank Limited (2014) eKLR.**

6. The application was canvassed vide oral and written submissions. Learned counsel for the applicant submitted that there is a dispute as to the amount owed which implies that this honorable court ought to investigate. He argued that the valuation that was undertaken by the defendant is a gross undervalue. He relied on his written submissions and cited the case of **Giella v Cassman Brown (1973) EA 358** and argued that there was a prima facie case with a high likelihood of success. He prayed that the honorable court protects the right of the Applicant to have the suit determined on the merits and no prejudice will be suffered. The property was likely to be attached on the ground of an alleged debt which is in dispute. Sale of the Applicants property unless stopped would cause irreparable damage to the Applicant who has sentimental attachment to the property that houses factories.

7. In reply, the Respondent's Counsel opposed the application and submitted that there is a large amount owing and in this regard the right to sell has accrued. Further that the loss can be atoned for by way of damages since it can be quantified from the value of the property in the event that the Applicant is successful in the main suit and cited the case of **David Mburu Githere v Jamii Bora Bank Limited (2017) eKLR**.

8. I have carefully considered the Applicants application as well as the Respondents reply together with the affidavit evidence and the documents attached. I have also considered the written and oral submissions of Counsels as well as the authorities cited. The primary reply by the Respondent's Counsel to the Applicant's application is that it is incompetent because a dispute in value and challenge of the sums owed should not stop an auction. I have carefully considered the Respondents contentions and I agree with the submissions that an application to court in respect of remedies sought by a chargor and chargee is brought under the legal regime of the Land Act 2012 as well as to an extent the Auctioneers Act which provide the duties where the *chargee* exercises its power of sale namely:

(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.

9. I note that the applicant has not tabled an independent report to give his version of what should be the value of the property. However they have relied on a valuation that had been conducted way back in 2015 wherein the market value was placed at approximately Kshs 1.3 billion while the forced sale value was put at approximately Kshs 1.08 billion. The applicants however have not presented any latest valuation save that of the defendant which was carried out in the month of July 2019 prior to the date for the intended auction. Be that as it may, it would be premature to order a valuation without interrogating the persons who undertook the impugned valuation via cross-examination so as to be able to determine whether or not the valuation would be ordered and if it is found that the valuation was improper then this will aggravate any damages due for any wrongful sale. In this regard the plaintiffs will be at liberty to bring the issue during the trial of the case. The applicant is not prevented from conducting the valuation and he may present the said report as evidence during trial.

10. The Applicant has no documentary proof of the arrangements to inject the US $ 10 million and they have alleged that they have not received the true statement of the true level of indebtedness and the responses create impression of back and forth on the receipt of the same thus creating doubt as to whether the same was actually received and or conveyed. There are several correspondences between the defendant and the plaintiffs over the outstanding debt as well as the new financier intended to take over the plaintiff's businesses. There is mention by the plaintiffs of an offer by the said financier to the tune of 11 million US dollars to which the defendant was not opposed save only that the plaintiffs were to avail details of the said financier to be roped into negotiations. It seems the plaintiffs failed to do so and which forced the defendant to proceed to exercise its statutory power of sale. Already all the requisite notices have been issued culminating in the auction slated for the 6th August 2019. The plaintiffs are now challenging the said auction. This then leads me to establish whether the plaintiffs have met the threshold of a prima facie case as set out in the case of Giella Vs Cassman Brown (1973) E.A 358 so as to merit an order of temporary injunction. **"The settled principles therein are firstly that the applicant must show a prima facie case with probability of success at the trial. Secondly, an interlocutory injunction will not normally be granted unless the applicant can show an irreparable injury which cannot be adequately be compensated by damages**. **Thirdly, if the court is in doubt, it should decide the application on a balance of convenience''.**

11. Prima facie case was described in the case of **Mrao Ltd Vs First American Bank of Kenya Ltd & 2 Others (2003) KLR 125** to mean :-

"So what is a prima facie case…..In civil cases it is a case which on the material presented to the court or a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation on rebuttal from the latter."

12. Both the plaintiffs and defendant in their rival affidavits have blamed each other in this dispute. The court will need to hear the evidence so as to gauge the veracity or otherwise of the testimonies. At this stage it is incumbent upon the plaintiffs to show that they have a prima facie case with a probability of success. The plaintiffs have maintained that the defendant is out to harass them by auctioning their properties yet it has not supplied them with statements of account to enable them engage another institution to re-finance them and thereafter pay off the defendant's debt. Again the plaintiffs have averred that the defendant has undervalued the properties with the sole aim of ripping off the plaintiffs. The defendant through its accounts manager has availed all the correspondences relating to the claim and which leaves no doubt that indeed the plaintiffs are indebted to the defendant. Indeed there are several letters from the plaintiffs admitting the debt and seeking to be given time to offset the same. Right from the time the demands were made up to the issuance of the various statutory notices, the plaintiffs have not made any single payment even on a without prejudice basis. The defendant has availed all the statutory notices culminating in the action of putting up the properties for auction. Clearly the defendant did comply with the provisions of section 90(1) of the Land Act by serving a statutory notice to the plaintiffs.

The plaintiffs have alleged that the defendant did not conduct a proper valuation of the properties and that they undervalued the same to the prejudice of the plaintiffs as they did not comply with section 97(2) of the Land Act as regards duties imposed upon a chargee as follows:-

"A chargee shall before exercising the right of sale ensure that a forced sale valuation is undertaken by a valuer.''

The plaintiffs maintain that the price quoted by the defendant is too low yet the said properties had been valued in 2015 which put the market value at approximately Kshs 1.3 billion and the forced sale value at approximately Kshs 1.08 billion which is a far cry from the defendant's current valuation. The plaintiffs feel that they are likely to be short changed if this court does not intervene at this stage. On the other hand the defendant maintains that it duly acted pursuant to the provisions of section 96 of the Land Act in exercise of its statutory power of sale and its counsel has relied on the authority in **Zum Zum Investment Ltd V Habib Bank Ltd (2014) eKLR** where Kasango J held that a plaintiff who disputes a valuation must show that the defendant's valuer is not qualified or competent to carry out the valuation or that the same was carried out in consideration of irrelevant factors. The plaintiffs' allegation is yet to be established during the trial proper. In any case it is common knowledge that market forces keep on fluctuating depending on various circumstances such that the correct valuations on properties offered as security would be established during the main hearing when the witnesses will be cross examined. Further even if it turns out that there are variations in the values, an aggrieved party would easily be compensated as the figures are ascertainable and can be calculated. The plaintiffs have also raised an issue to the effect that they had approached a certain entity to re-finance them and possibly take over its businesses. This is akin to suggesting that the sale of the properties be by way of private treaty instead of a public auction. It seems the defendant was not agreeable. Indeed the arrangement for a sale by private treaty might sound attractive but then the discretion lies with the chargee to decide whether to allow the chargor to dispose the properties by private treaty. In the present case the defendant did not accept the plaintiff's overtures in trying to rope in some financier. In the case of **Stephen Kipkatam Kenduiywa t/a Kapchebet Farm v Sidian Bank Ltd & another (2017) eKLR** the court held that the chargee has discretion to allow the chargor to privately dispose of the property or it can proceed to sell it through its statutory power of sale as there would be no prejudice caused to the chargor who is at liberty to persuade a selected buyer to participate in the auction. In any event the plaintiffs have had sufficient time from 2017 to make payments but since none has been made I find that the defendants ought to be allowed to proceed with their exercise of statutory powers of sale pursuant to the terms of the loan agreement. In any event the plaintiffs appear not to deny the debt which has been pending as they had been requesting for more time to pay but however not paid a single cent for the last two years. The plaintiffs' request for account statements had been accepted by the defendant who waived photocopying charges and that the same information is now with the plaintiff. The plaintiffs' recent claim that they lack a password seems to be a lame excuse since they already have the documents stored in their flash disk and can be obtained by them using their own password as the flash disk is theirs. I find that the plaintiffs have not established a prima facie case with a probability of success at this stage.

13. As regards the issue of whether the plaintiffs will suffer irreparable harm, it is noted that the properties had been offered as security for various loans given by the defendant. It was very clear in the loan agreement that in the event of default the said properties would be sold. The defendant has already commenced the process of realizing the securities. The plaintiff's claim that they are likely to be thrown under the bus by the actions of the defendant can be taken care of by way of damages. In the case of **David Mburu Githere V Jamii Bora Bank Ltd (2017) eKLR** the court followed the decision of the Court of Appeal in **Riscillah Krobought Grant V Kenya Commercial Bank** where it held as follows:

> "Where a chargee had exercised its statutory power of sale and caused the property to be sold by public auction, the remedy of the chargor was a claim for damages if she would prove that there was improper or irregular exercise of the statutory power of sale."

The above position is anchored in section 99(4) of the Land Act 2012 which provides that any person who is aggrieved by unauthorized or irregular power of sale can be compensated by way of damages from the person exercising that power. It is noted that the defendant is a financial institution capable of paying damages if any as the plaintiffs have not shown that the bank is a person of straw.

14. As regards the issue of balance of convenience, I note that the debt in issue is to the tune of around Kshs 1.4 billion which has been outstanding since 2017 to date. The plaintiffs duly obtained the monies but have been unable to pay or service the loans despite the fact that they admit being in arrears. The defendant on the other hand parted with colossal amounts of money and has not received it back. Suffice to add that the said loans continue to attract interest and hence it is clear that the defendant is likely to be given the short end of the stick in the transaction. I find the balance of convenience tilts in favour of the defendant by declining the plaintiffs' application at this stage.

15. I agree with the Respondent's Counsel that there has to be compliance with the Land Act before the statutory right to sell can be exercised and this being an application for a temporary injunction to stop the sale, the court has to consider the facts and be cautious not to make a final decision on the facts alleged by the parties at the interim stage as the main trial is yet to be reached. This is supported by a series of decisions of the High Court See **Mwangangi Mutula Mutua & Others v Equity Bank & Others (2019) eKLR.**

16. What then are the grounds for stoppage of sale? The Kenyan Law is silent on the same. However I note that the applicant has indicated in his supporting affidavit that there is factory equipment that has sentimental value and it is not clear whether or not this equipment was subject to the mortgage. Its usage as security is governed by an entirely different law namely the Movable Property Act, 2017 which would mean that in addition to the Land Act, there would be need to ensure compliance with the same. All these will likely be canvassed during the trial.

17. With regard to the valuation, there is annexed to the application a valuation report that was commissioned on 16th July, 2018. The applicant has challenged the time period and in this regard has cited the case of **Koileken Ole Kipolonka Olumoi v Melech Engineering & Construction Limited & 2 Others (2015) eKLR**. As indicated above I will refrain from making a definitive determination on the fact without hearing the parties and I find that whether or not the sale was too near is a matter of fact to be determined from the evidence during trial. Nevertheless, a number of cases including **Zum Zum Investment Limited v Habib Bank Limited (2014) EKLR** have held that undervaluation is not a reason to stop the sale by auction and in any event there is a remedy under section 99. (4) of the Land Act that states as follows: -

> **"99. (4) A person prejudiced by an unauthorized, improper or irregular exercise of the power of sale shall have a remedy in damages against the person exercising that power"**

The plaintiffs therefore have a remedy if the main suit succeeds in the end.

18. In the result it is my finding that the plaintiffs' application dated 22nd July 2019 lacks merit. The same is dismissed with costs to the defendant. The parties are directed to proceed to take directions on the main suit with a view to setting it down for hearing on priority basis.

It is so ordered.

Dated and delivered at Machakos this 5th day of August, 2019.

D.K. Kemei

Judge