



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI LAW COURTS
CIVIL SUIT NO.430 OF 2018

SUNRISE SECURITY SERVICES LIMITED

CHRISTOPHER KARIUKI KAMUYU

MARY NYAKAIRO KAMUYU.....PLAINTIFF/APPLICANT

VERSUS

DIAMOND TRUST BANK KENYA LIMITED

STEPHEN KARANJA

T/A DALALI TRADERS AUCTIONEERS...DEFENDANTS/RESPONDENTS

RULING

1. Before this Court is the Notice of Motion dated 5th March 2018, by which **SUNRISE SECURITY SERVICES LIMITED** (the Plaintiff/Applicant) and **CHRISTOPHER KARIUKI KAMUYU** (the 2nd Plaintiff/Applicant) seek for Orders that:-

“1. SPENT

2. SPENT

3. The Defendants/Respondents whether by itself, its employees, servants, agents or auctioneers be temporarily restrained *“ex debito justitiae”* from advertising for sale, selling whether by public auction or private treaty, disposing or otherwise however completing any sale or howsoever interfering with the Plaintiff’s ownership or title to parcel of land comprised in L.R NO. DAGORETI/WAITHAKA/903-RIRUTA KABIRIA, NAIROBI COUNTY pending the hearing and determination of the suit herein.

4. The costs of this application be in favour of the Plaintiffs/Applicants.

2. The Application was premised upon **Article 40** of the **Constitution of Kenya 2010**, **Sections 85(1), 97(2) 98(5), 103(1) (b) and 104 of the land Act, Chapter 280**, laws of Kenya, **Section 1A, 3A and 63(c) and (e)** of the **Civil Procedure Act, Chapter 21**, laws of Kenya and **Order 40 Rules 1,2 and 4 and Order 51 Rule 1** of the **Civil Procedure Rules, 2010**. The Application was supported by the Affidavit dated 5th March 2018 sworn by the 2nd Plaintiff/Applicant.

3. The Defendant/Respondents being **DIAMOND TRUST BANK KENYA LIMITED** (the 1st Defendant/ Respondent) and **STEPHEN KARANJA T/A DALALI AUCTIONEERS LIMITED** (the 2nd Defendant/ Respondent) both opposed the Application and relied on the Replying Affidavit dated 19th June 2018, sworn by **LWANGA MWANGI** a Debt Recovery Officer with the 1st Defendant/Respondent (the Bank). Pursuant to directions given by the court the application was canvassed by way of written submissions. Both parties filed their written submissions on 28th March 2018.

BACKGROUND

4. Pursuant to a letter of Offer dated **29th February 2015**, the 1st Defendant/Respondent advanced to the 1st Plaintiff/Applicant an overdraft facility amounting to **Kshs.3,000,000/=**. This overdraft facility was secured by a charge dated **5th March 2015** over **LR NO.Dagoretti/Waithaka/903** (herein after referred to as **“the charged property”**), as well as a Deed of Guarantee executed by the 2nd Plaintiff/Applicant. The Plaintiff/Applicant debited its account above the allowed limit and as a result the Bank issued a statutory notice on **23rd May 2017**.

5. Upon receipt of the statutory notice the Plaintiff/Applicant made commitments to pay the outstanding amount but failed to honour these commitments. The Bank then issued a 90 day notification of sale dated **22nd August 2017**, pursuant to **Section 96** of the **Land Act**. Upon failing to receive any response to the 90 day notice the Bank instructed the 2nd Defendant/Respondent (the auctioneers) to issue the requisite redemption notice and proceed to sell the charged property by public auction. The Auctioneers accordingly issued the 45 day Redemption Notice dated **7th October 2017**. The sale by public Auction was advertised in the Daily Nation with the sale being scheduled to take place on **13th December 2017**.

6. On **7th December 2017** the Plaintiffs Advocates wrote to the Bank a letter in which they acknowledged the debt and made a professional undertaking. They requested that the auction be cancelled. The Defendants obliged and cancelled the auction of **13th December 2018**. Despite this cancellation the Plaintiff/Applicants still failed to clear the debt and the bank proceeded to advertise the property a second time claiming that they were owed a sum of **Kshs.3,156,243.22** which sum continued to accrue interest. This second sale by public auction was scheduled for **7th March 2018**.

7. At this point the Plaintiff/Applicants filed the present application seeking injunctive orders to restrain the sale of the charged property on the basis that the Defendant bank is seeking to rely on an outdated Valuation Report **commissioned** in **February 2015** which grossly undervalued the property. The Plaintiff's claim that this Valuation Report prepared over three (3) years ago returned a value on charged property of **Kshs.8,000,000/=** with a forced sale value of **Kshs. 5,600,000/=**. The Plaintiff/Applicants aver that they commissioned a fresh valuation by **Regent Valuers International (K) Ltd**, whose report returned an open market value of **Kshs.21,200,000/=** with a forced sale Value of **Kshs.15,850,000**.

8. The Plaintiff/Applicants further contend that on **7th December 2017** at a meeting attended by the 2nd Plaintiff in the offices of the Defendant Bank, it was agreed by the parties that the 2nd Plaintiff would apply for a renewal of the **“working overdraft limit”** and would pay the over flow of **Kshs.550,000/=** upon which the auction scheduled for **13th December 2017** would be cancelled. That the 2nd Plaintiff on behalf of the 1st Plaintiff did apply for a renewal of the **“working overdraft limit”** and did deposit with the Bank the sum of **Kshs.550,000/=** on **8th December 2017**. The Plaintiff/Applicants claim that in further performance of their obligation to the Bank they deposited a further sum of **Kshs.85,000/=** during the months of January and February 2018.

9. The Plaintiffs deny that their overdraft facility is non-performing and claim they have an Insurance cover which is valid until **7th April 2018**. They therefore contend that the move by the 1st Defendant/ Respondent to re-advertise the charged property for sale by public auction on **7th March 2018** runs contra to their agreements in the meeting of **7th December 2018**, and is prejudicial to the Plaintiff/Applicants. That the 1st Defendant has breached its fiduciary duties to the Plaintiff/applicants and their actions are unconscionable and malicious and are designed to give the 1st Defendant an unfair advantage of the Plaintiff. The Plaintiff/Applicants plead that unless the orders sought in this application are granted they stand to suffer grave loss and damage without the possibility of being adequately compensated.

ANALYSIS AND DETERMINATION

10. I have carefully considered the submissions filed by both parties in this matter as well as the relevant statute and case law. The Plaintiff/Applicants are seeking injunctive orders to restrain the sale of the charged property. The celebrated case of **GIELLA –VS- CASSMAN BROWN [1993] E.A** set out the principles for the grant of temporary injunctions as follows:-

“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.”

PRIMA FACIE CASE

11. The first question that would arise is whether the Applicants have shown a prima facie case with a probability of success. The Court of Appeal in the case of **MRAO LTD –VS- FIRST AMERICAN BANK OF KENYA LTD [2003]eKLR** defined a prima facie case as follows:-

“So what is a prima facie case? I would say that it is a case which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has permanently been infringed by the opposite party as to call for an explanation or rebuttal from the latter...a prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right...” [own emphasis]

12. The fact of the overdraft facility is not denied by the Plaintiff act all. The Plaintiffs failed to repay the facility as required. Clause 3 of the letter of officer clearly stated that:-

“The facility is payable on demand...”

Upon default the Bank's right to exercise its statutory power of sale crystallized. The Plaintiff does not challenge the legality of the Notices issued. The first scheduled auction was cancelled at the instance of the Plaintiff. By the letter dated 7th December 2017, Counsel for the Plaintiffs admitted the debt and committed to paying the outstanding sum within 21 days. The said letter at the last paragraph read as follows:-

“We would like to prevail upon you to put off the auction aforementioned for a period of at least twenty one (21) days within which we are certain our client shall have received and remitted the amount owing to yourselves as well as the auctioneer's fees. For your comfort we are willing to give our professional undertaking to your lawyers to secure the said payments. Kindly indulge us and our client...”

The letter is a clear and outright committal to pay. No question was raised at all regarding the amount due.

13. The Plaintiff/Applicants only challenge to the proposed sale by auction is the allegation that the Defendants have failed to comply with **Section 97(2)** of the **Land Act** in that the Valuation sought to be relied upon was not recent and in any event was 3 years old, leading to an undervalue of the charged property. The Plaintiff submit that it would be prejudicial to themselves if the sale was allowed to proceed.

14. **Section 97** of the **Land Act 2012** provides as follows:-

“97(1) A charge who exercises a power to sell the charged land, including the exercise of the power to sell in pursuance of an order of a court, owes a duty of care to the charger, any guarantor of the whole or any part of the sums advanced to the charger, any charge under a subsequent charge or under a lien to obtain the best price reasonably obtainable at the time of sale.

(2) A charge shall, before exercising the right of sale, ensure that a forced sale valuation is undertaken by a valuer.”

The use of the word **“shall”** in this Section makes this a mandatory provision.

15. The Defendants countered this allegation by stating that they have obtained a valuation of the suit property from **Messrs Chriscal Real Estates** which report dated 25th May 2018 gave a market value of **Kshs.9million** for the suit property and a forced sale value of **Kshs.6,750,000/=**. This is a recent report.

16. The Plaintiffs however challenge this report by citing a Valuation Report commissioned by themselves and prepared by **Regent Valuers International (K) Limited** which Report dated 5th March 2018 returned a current open Market Value of **Kshs.21,200,000/=** and a Forced Sale Value of **Kshs.15,850,000/=**. There is indeed great variance between the two valuation Reports. However the mere fact of a variation in the Valuation Reports commissioned by the opposing parties does not amount to sufficient ground for the grant of an interlocutory injunction nor does such variation amount to proof that there has been an undervalue of the suit property by the Defendant/ Respondent.

17. The position is that the court is faced with two competing valuation reports, both prepared by experts in the field. Both reports are fairly recent. Indeed the report commissioned by the Applicant was prepared barely a month after the valuation report commissioned by the Respondent. What exists is really a divergence of opinion between the two experts.

18. In the case of **ZUM ZUM INVESTMENT LIMITED –VS- HABIB BANK LIMITED [2014]eKLR Hon Lady Justice Mary Kasango** held thus:-

“21) The Defendant carried out valuation of the suit property and availed the report by Tysons Limited dated 24th April 2013. That report contains both the open market value of the property being Kshs.390,000,000/= and the forced sale value of Kshs.372,000,000/=. The Defendant in my view complied with Section 97(2) of the Land Act by undertaking the forced sale valuation of the suit property. Once the Defendant has undertaken a forced sale valuation, the burden shifts to the Plaintiff to prove that the value arrived at by the Defendant's valuer was not the best price reasonably obtainable at the time...

“....27. In my view, the Plaintiff has not demonstrated satisfactorily why this court should disregard the Defendant's valuation report and only rely on the Plaintiff's valuation reports. It is not sufficient for the Plaintiff to merely claim that the intended selling price is not the best price obtainable at the time by producing a counter-valuation report. The Plaintiff must satisfactorily demonstrate why the valuation report that the defendant intends to rely on in disposing of the suit property does not give the best price obtainable at the material time. The Plaintiff needs to show, for instance, that the Defendant's valuer is not qualified or competent to carry out the valuation, or that the valuation was carried out in consideration of irrelevant factors or that the valuation was done way before the time of the intended sale. The Plaintiff has not raised any of such grounds.” [own emphasis]

19. Similarly in the case of **PALMY HOLDINGS LIMITED –VS- CONSOLIDATED BANK OF KENYA [2014]eKLR** it was held as follows:-

“The Defendant says that the valuation report by the Applicant is an overly exaggeration whilst the Applicant says the one by the Defendant is a gross under-valuation of the suit premises. The onus of establishing on prima facie basis, that the Applicant's right has been infringed by the Defendant by failing to discharge the duty of care under Section 97(1) of the land Act lies on the Applicant. Other than the report by Prudential Valuers, there is nothing on record to support the claims by the Applicant or to discredit the valuation by Kenstate Valuers. The court needs cogent evidence and material in order to say that prima facie, there has been an undervaluation of the suit property which is an infringement of Section 97(2) of the

Land Act by the Defendant as to entitle the court to call for an explanation or rebuttal from the Defendant. That approach is necessary to prevent defaulters from filing valuation reports with value way beyond the open market value just to obtain an injunction. Needless to state that having an arguable point, as is the case here, is not sufficient to establish a prima facie case for the grant of an injunction especially in cases of exercise of the power of sale by a chargee who has shown that the Applicant has defaulted and continue to be in default. It be known that, as long as it is lawfully exercised, the Statutory Power of Sale is not a favour that the chargee extends to the chargor or an infringement on the right of or a foreclosure of the chargor's equity of redemption; it is a statutory remedy which is inextricably tied to the right of the charge to recover its money which is properly guaranteed under Article 40 of the Constitution.”[own emphasis]

20. The Applicant herein has not tendered any or credible evidence to challenge the qualifications of the valuer commissioned by the Respondent nor have they effectively discredited the report prepared by that Valuer. I am satisfied that notwithstanding the variation in the two valuation reports the Applicant has properly complied with **Section 97** of the **Land Act**.

21. In **BRADE GATE HOLDINGS & ANOTHER –VS- JAMII BORA BANK LIMITED [2014]eKLR**, Hon Justice Jairus Ngaah observed that:-

But the question that still lingers is this: assuming the Applicants are right that the Respondent is in breach of its duty of care towards the applicants even as it seeks to exercise its statutory power of sale, what is the remedy available to the Applicants. I found the answer to this question in Section 99(4) of the Land Act. It 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.

I understand this provision to imply that if it turns out, as the Applicants allege, that the Respondent has not complied with the provisions of Sections 97 of the Land Act and disposed of the property below the prescribed lower limit to the detriment of the applicants, the latter will have their remedy in damages. I suppose that if their valuation report passes the test of time, it will be an important component in calculation of damages that the applicants may be awarded.

In the ultimate I do not find any merit in the applicant's motion dated 15th January 2018. It is dismissed with costs.

22. The mere fact that the value returned by the Respondent Valuer is not agreeable to the Applicant does not mean that there has been non-compliance with **Section 97**. The Applicant had a duty to prove that the value of the property given in the Report commissioned by the Defendant Bank was below the market value. The Plaintiff herein has not discharged this burden.

23. Accordingly I find no merit in this application and I decline to grant the interlocutory orders sought. The present application is dismissed with costs to the Defendant/Respondent.

Dated in **Nairobi** this **25th** day of **October 2019**.

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Justice Maureen A. Odera