



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 49 OF 2018

JAMPEN ENTERPRISES LIMITED.....PLAINTIFF

-VERSUS-

NIC BANK KENYA PLC.....1ST DEFENDANT

LEAKEY'S AUCTIONEERS.....2ND DEFENDANT

RULING

1. This ruling is in respect of an application dated 21st June 2018 brought by way of Notice of Motion by the plaintiff/applicant seeking for orders that:

1. *Spent*

2. **That pending the final disposal of this suit, the Plaintiff /Applicant be granted a temporary injunction barring the Defendant/Respondent from interfering, selling, alienating, wasting and/or otherwise disposing of property known as L.R. No. MN/Section 1/14810(C.R. NO. 43860) BAMBURI AREA, MOMBASA CITY.**

3. **That the costs of the Application be provided for.**

2. The application is based on the grounds on the body of the motion, the supporting affidavit sworn on the 21st June 2018 sworn by **Mr. Peter Gachuru Ndichu**, the Managing director to the plaintiff and Supplementary Affidavit by the same deponent. He states that on the 11th June 2018 the 2nd Defendant under the instructions of the 1st Defendant advertised for sale through public auction all that property known as **L.R. No. MN/Section 1/14810(C.R. NO. 43860) BAMBURI AREA, MOMBASA**, registered in the Plaintiffs name, which advertisement is termed illegal and void *ab initio* because the Plaintiff was not in default and had never been served with any statutory notice.

3. In opposition to the Applicant's Notice Motion herein, the 1st Defendant filed a Replying Affidavit sworn by **Mr. Stephen Atinya**, the 1st Defendant's Senior Legal manager, on the 27th November 2018.

4. He, Mr Atinya, deposed that the plaintiff applied for and was granted Credit Facilities by the 1st Defendant, being a loan facility pursuant, to the terms of the letter of offer dated 5th February 2015, which terms were accepted by the directors of the Plaintiff. To secure repayment of said credit facilities advanced, a charge dated 7th April 2015 was created and registered on the 10th April 2015 over the plaintiff's property (the suit property) to secure up to a maximum of **Kshs. 88,000,000.00** plus interest. The Plaintiff has however defaulted in the repayment of the loan.

5. Faced with blatant default by the Plaintiff, the 1st Defendant instructed the law firm of Wamae & Allen Advocates to issue the necessary statutory notices to the Plaintiff as well as borrowers. The Plaintiff was served with the requisite notices as required under the land Act and the Auctioneers Rules 1997 by way of registered post as well as personally on the plaintiffs authorized agent. No papers were filed on behalf of the 2nd defendant

6. When the application came before me for hearing, parties agreed to canvass it by way of written submissions. The plaintiff's submissions were dated 18th October 2018 and filed the next day while those by the 1st defendant were dated and filed on the 14th October 2018.

ANALYSIS AND DETERMINATION

7. I have very carefully considered the Notice of Motion herein, the affidavits in support and the Replying affidavit filed in opposition. I have also considered the written submissions by both counsel in support of their opposing positions. The issue arising therefrom for consideration and determination is; *whether on the evidence and material placed before court, the plaintiff has satisfied the conditions upon which a temporary injunction can be granted?*

8. In an application for an interlocutory injunction the onus is on the applicant to satisfy the court that it should grant an injunction. An injunction, being a discretionary remedy is granted on the basis of evidence and sound legal principles and this court will refrain from venturing into the merits of the main suit case.

9. In the Case of *Hosea Kiplagat & 6 Others....Vs...National Environment Management Authority & 2 Others (2015) eKLR*, the court (Ombwayo j) held that:-

“At the interlocutory stage the Court should not venture into making definitive findings of fact or law and particularly where the affidavits filed are contradictory as the court cannot believe or disbelieve the statements made on oath of either party without in effect trying the case”.

10. The principles to be considered before a temporary injunction pending suit remain those established in the celebrated case of *Giella Vs Cassman Brown and Co .Ltd (1973) E A 358*. Those principles are:-

1. *The Plaintiff must establish that he has a prima facie case with high chances of success.*
2. *That the Plaintiff would suffer irreparable loss that cannot be compensated by an award of damages.*
3. *If the court is in doubt, it will decide on a balance of convenience.*

11. The position above was further reiterated by the Court of Appeal in *Nguruman Ltd v. Jan Bonde Nielsen & 2 Others, [2014] eKLR* where the opinion was rendered that:-

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to:

1. **Establish his case only at a prima facie level,**
2. **Demonstrate irreparable injury if a temporary injunction is not granted, and**
3. **Allay any doubts as to (b) by showing that the balance of convenience is in his favour.**

12. Guided by the law as established, I will first examine whether the Applicants have established a prima facie case. If I find in the affirmative, I shall then consider the requirement of whether they are likely to suffer irreparable harm not capable of being compensated by an award of damages, and finally, if I remain in doubt, I will then consider in whose favour the balance of convenience tilted. If however I find that no prima facie case exist then there would be no need to consider the other parameter because without a prima facie case the court cannot grant an injunction for the sake of it.

13. In *Mrao Ltd v. First American Bank of Kenya Ltd& 2 Others [2003] eKLR*, Bosire, JA sought to define a prima facie case and said:

“So what is a prima facie case? I would say that in civil cases it is 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 as to call for an explanation or rebuttal from the latter.”

14. The Court of Appeal deliberating what amounted to a *prima facie* case in *Nguruman (Supra)* made the following comments:

“We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right, which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right, which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant’s case is more likely than not to ultimately succeed.”

15. In applying the principles to this matter, I have given regard to what is asserted at paragraph 15 of the Defendant Replying Affidavit. It is averred that a valuation was indeed carried out by Dominion Valuers Limited and they issued a valuation report dated 27th March 2018. A copy of the said Valuation report was annexed and marked “SA-7”. The Plaintiff did not controvert this allegations and the annexed valuation report which was not challenged. Consequently, it is the finding of this Court that the 1st Defendant was not in violation of Section 97(2) of the Land Act No. 26 of 2012 as alleged by the plaintiff as the fulcrum of the suit. On a prima facie basis the Plaintiff has failed to prove there was violation of Section 97(2) of the Land Act No. 26 of 2012.

16. On the second issue regarding service of statutory notices, I note that the 1st Defendant has produced copies of the posted statutory

notices. There is even a certificate of service over immovable properties sworn by the 2nd Defendant on the 20th April 2018 and copies are annexed as SA 6 (c) which again the Plaintiff has not controverted.

17. There was a third issue regarding the postal address employed to serve notices upon the plaintiff. It was conceded as an error regarding the Plaintiff postal address and code captured in the charge document erroneously as being Nairobi instead of Kikuyu. That error was indeed corrected on the certificate of posting exhibited for each the statutory notices as the destination on the certificates of posting is correctly indicated as Kikuyu and not Nairobi. That again does not reveal an infraction that would establish a prima facie case in favour of the plaintiff.

18. Consequently, I find that lack of service of statutory notices upon the Plaintiff has been disproved by the evidence in the replying affidavit. Once the 1st Defendant produced those notices and certificates of posting, the evidentiary burden shifted to the Plaintiff.

19. If indeed the plaintiff intended to assert and prove that even if shown to have been dispatched, the notices were never delivered, it ought to have made inquiries through the Post Master General in order to confirm whether those notices were ever delivered or returned to the sender. In this regard I make reference to the decision *Mbsa High Court Civil Commercial & Admiralty Division Case No. 31 of 2013 Fredrick A. Makumbi –Vs- Kenya Commercial Bank Limited* in which the Court cited with approval the decision in *Maithya –Vs- Housing Finance Corporation of Kenya HCCC No. 1129 of 2002* where it was held-

“It is the Plaintiff who alleged that he was not served with the Statutory Notice. Once the Defendant provided evidence of that service the burden of proof shifted to the Plaintiff. This shifting of burden of proof is based on the rule that “he who asserts must prove.” See the book of Principles of Evidence by Alan Taylor 2nd Edition. The onus was on the Plaintiff to prove non-service of the Plaintiff. In view of the fact that the Plaintiff failed to prove the same the Plaintiff has failed to satisfy that burden. It is obvious that the Plaintiff could have obtained information from the Post Master General on whether the said notice was posted and the whereabouts of it. The Plaintiff did not on prima facie basis do so.”

20. The Plaintiff has therefore failed in all the ground of attack on the defendants;’ right to sell. Having so failed to prove that it had a prima facie case, this Court will not consider the other conditions to be met as per *Giella Vs Cassman Brown (supra)*.

21. In the end I find no merit in the Plaintiff’s Notice of Motion dated 21st June 2018 and the same is hereby dismissed with costs.

Dated and signed at Mombasa this 29th day of November 2019.

P J O Otieno

Judge

Delivered and signed at Mombasa this 29th day of November 2019

Dorah Chepkwony

Judge