



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL NO. 116 OF 2019

RICHARD WAWERU THUKU.....PLAINTIFF

VERSUS

SBM BANK (K) LIMITED.....1ST DEFENDANT

STEPHEN KARANJA T/A DALALI TRADERS AUCTIONEERS.....2ND DEFENDANT

RULING

1. The application before me is a Notice of Motion dated 15th May 2019. By that application Richard Waweru Thuku, the plaintiff, seeks an interlocutory injunction to stop SBM Bank (K) Limited from selling the plaintiff's charged property in exercise of its statutory power of sale.

2. It is not denied that the defendant Bank granted a financial facility to an entity known as Reene Investments Limited. The plaintiff provided his property L.R. Nairobi/Block 82/2221 (the property) as security for these facilities. The plaintiff also guaranteed Reene Investments Ltd facilities with the defendant Bank.

3. There are two issues the plaintiff raised by his application. The first is that the plaintiff alleges to have over paid the facilities offered to Reene Investment Ltd. The second issue is that the plaintiff alleges that the defendant Bank had devalued the charged property.

4. The application is opposed by the defendant Bank.

ANALYSIS

5. The principles of granting an injunction have been restated many times over. In the case **Robert Mugo Wa Karanja v Ecobank (Kenya) Limited & another [2019] eKLR** those principles were restated as follows:

*"The conditions for consideration further in granting an injunction is now well settled in the case of **Giella vs Cassman Brown & Company Limited (1973) E A 358**, where the court expressed itself on the condition's that a party must satisfy for the court to grant an interlocutory injunction:-*

"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.”

6. In order to prove that the loan has repaid the plaintiff relied on his exhibit marked as ‘RWT2’. That exhibit is bank statements of Reene Investments Ltd. The account entitled short term loan does not seem to run consecutively because on some pages the defendant Bank reflected entries of years not running consecutively – for example entries of 2015, 2017, 2015, 2017, 2016, 2018 and 2016 – in that order. It is for that reason the plaintiff deponed that it has engaged the defendant Bank with a view to getting a proper account and with a view to get explanation of how the amount had escalated to Ksh 52,616,603.

7. The plaintiff also exhibited two valuations. One of April 2018 which valued the property at Ksh 60 million at market value and ksh 45 million value for forced sale. The second valuation is dated April 2019 which valued the property at Ksh 45 million open market value and Ksh 34 million as the forced sale value of the property. The plaintiff termed those two valuations as conflicting.

8. The defendant Bank through the affidavit of Kevin Kimani the defendant’s manager-legal services responded to the plaintiff’s affidavit evidence. In response the defendant stated that Reene Investments Ltd was granted a facility of ksh 15 million in July 2011. Further by letter dated 24th June 2014 the defendant Bank advanced Reene Investments Ltd Ksh 32,500,000 for the purpose of restructuring the outstanding facilities. That facility was secured by a charge over the property and guarantees of the directors of Reene Investments Ltd. The defendant further stated that the restructuring facility was not sufficient to clear the outstanding amount in the account of ksh 29,380,306.70 plus incidentals associated with restructuring. That the amount above the Ksh 32,500,000 is what accumulated interest of the amount of Ksh 14,420,965/= . That interest also accrued because the directors of Reene Investments Ltd delayed in signing the letter of offer.

9. The defendant provided bank statements which showed that there was default on the part of Reene Investments now to the tune of Ksh 54,318,532.32. That this is because the repayments of the facility have been erratic.

10. The defendant on sending the redemption notice to the plaintiff, the plaintiff responded by his letter dated 2nd August 2018 and thereby made proposals. This is what the plaintiff stated by his said letter.

“RE:LOAN FACILITY

We refer to our loan facility and our various meetings with you regarding the same.

As we stated in our meetings we did run into arrears due to circumstances beyond our control as we were seriously affected by the electioneering period in the country. We have subsequently received a notice of intention to advertise and dispose of the property for which you are holding as security.

We wish to request the bank to bear with us since we have started recovering from the adverse effect and given us more time to settle this facility.

We wish to make the following proposal

1. We will pay ksh 4.5million by the 15th August, 2018.

2. We will subsequently remit Ksh 3 Million inn the month of September 2018 and clear the balance in the next 12 months.

We also wish to draw your attention of a second loan account of Ksh 13.2 Million which we did not know it existed as we thought during the restructuring of the facility, the entire amount was restructured. We kindly request that all the penalties on this account be waived and the accounts

be amalgamated into one.

In view of the above we will be sincerely grateful if the proposal is approved.

Thank you

Yours faithfully

For: Renee Investments Ltd

RICHARD W. THUKU

MANAGING DIRECTOR

11. The defendant also stated that the contention of conflicting valuations of the property was without merit. Further the defendant stated it was amenable to joint valuation of the property.

12. Bearing in mind the documents annexed to the defendant Bank's replying affidavit I form the view that the plaintiff was less than candid when he stated he had over paid the amount due to the Bank. The defendant Bank attached Bank statements showing otherwise. It follows that on a prima facie basis the defendant Bank has shown that Reene Investments Limited is indebted to the Bank which debt was secured by the property and its director's guarantees.

13. Having found there is evidence of that indebtedness the plaintiff needs to be reminded that the jurisprudence of our courts is that an injunction will not be granted where there is a dispute of amount due. In this regard attention is drawn to two cases, cited in the case **Jim Kennedy Kiriro Njeru v Equity Bank (K) Limited (2019) eKLR** thus:

“Priscillah Krobought Grant vs. Kenya Commercial Finance Co. Ltd. and 2 Others, Court of Appeal at Nairobi, Civil Application No. Nai 227 of 1995 (108/95 V.R) (unreported), the court stated as follows: -

“Finally, it will bear repetition, we think if we were to state that a court does not normally grant an injunction to restrain a mortgagee from exercising its statutory power of sale solely on the grounds that there is a dispute as to the amount due under the mortgage – see Barmal Kanji Shah & Another Vs. Shah Depar Devji (1965) E. A. 91, 32 Halsbury's Laws of England (4th Edition) paragraph 725 and Uhuru Highways Development Ltd. Vs. Central Bank Kenya and 2 Others, Civil Application No. Nai 140 of 1995 (unreported) per Kwach J. A.”

The circumstances in which a mortgagee or charge 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 which says: -

“725. When mortgagees may be restrained from exercising power of sales—

“The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has begun a redemption action, or because the mortgagor objects to the manner in which the sale is 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.”

14. It is my finding that the plaintiff has failed to show a prima facie case with probability of success and having so failed the court need not proceed to consider the other principles of granting an injunction as was stated by the court of appeal in the case **Lucy Wangui Gachara v Minudi Okemba Lore (2015) eKLR** thus:

“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.”

CONCLUSION

15. The plaintiff’s application is without merit and it fails. Having failed costs of the same will be awarded to the defendant.

16. It pleases me to grant the following order:

a. The Notice of Motion application dated 15th May 2019 is dismissed with costs to the defendant.

b. The interim injunction order extended from time to time is hereby vacated

DATED and SIGNED at NAIROBI this 28th day of November 2019.

MARY KASANGO

JUDGE

Ruling Read in Open Court in the presence of:

Sophie..... **COURT ASSISTANT**

..... **FOR THE PLAINTIFF**

..... **FOR THE 1ST DEFENDANT**

..... **FOR THE 2ND DEFENDANT**