



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT VOI
CIVIL & COMMERCIAL DIVISION
CIVIL SUIT NO 3 OF 2017

ANDYMAC PALACE LIMITED.....PLAINTIFF

VERSUS

EQUITY BANK (K) LIMITED.....DEFENDANT

RULING

INTRODUCTION

1. On 15th May 2017, the Plaintiff filed a Notice of Motion application dated 12th May 2017 under Certificate of Urgency. The same was brought pursuant to the provisions of Sections 1A, 3A, 63 (e) of the Civil Procedure Act, Order 40 Rules 1, 2, 3, 4, 5 of the Rules made thereunder. Prayers Nos (1) and (3) of the said application were spent. It sought the following remaining orders:-

1. Spent.

2. THAT this Honourable Court be pleased to grant to the plaintiff/applicant an injunction restraining the defendant/respondent by itself, agents, servants or otherwise howsoever from selling and or (sic) disposing by public auction or otherwise the property known as Voi Municipality Block 1/403 pending the hearing and disposal of the suit filed herein.

3. Spent.

4. THAT there be an order for the costs of this application

2. Sitting at High Court of Kenya Mombasa as the Duty Judge, on 16th May 2015, Thande J granted the aforesaid orders:-

1. The applicant to pay the sum representative of 5 months arrears within 7 days.

2. Applicant to pay newspaper advertisement fee as well as auctioneers fees within 7 days.

3. Mention on 24.5.17 to confirm.

4. Status quo to be maintained which as at 16th May 2017 at 4.20 pm was that the sale of the

suit property had not taken place.

5. Application to be served upon the Respondent forthwith.

THE PLAINTIFF'S CASE

3. Patience Manga Mwaluma, a director of the Plaintiff swore Supporting and Further Affidavits on 12th May 2017 and 21st August 2017 respectively in support of the Plaintiff's present application. The Plaintiff's Written Submissions were dated and filed on 14th September 2017.

4. It averred that it was the registered owner of Voi Municipality Block 1/403(hereinafter referred to as "the subject property") which was charged to the Defendant. Its case was that on 8th May 2017, it learnt that the subject property had been advertised by M/S Keysian Auctioneers in the Daily Nation.

5. It pointed out that the Defendant issued a Notice demanding for the payment of the entire debt within a ninety (90)days period instead of a demand of the arrears only. It added that the Defendant informed it that it would not benefit from the amendment to the Banking Act that was signed into law on 24th August 2016 on the levying of interest the result of which the debt had now been affected by the interest that was unlawfully levied.

6. It was its contention that the forty (45) days' Notification of Sale by the Auctioneers was undated and that it was manifest that there were infractions of the law and procedure in the realisation of the subject property as security which would prejudice its right of redemption. It added that there was non-conformity with the relevant laws or impropriety in the Defendant's documents.

7. It was therefore its argument that the purported sale of the subject property, which was a prime asset and its standing as a reputable business institution would cause it irreparable damage which could not be adequately redressed in damages.

THE DEFENDANT'S CASE

8. In opposition to the said application, on 10th July 2017, Nicodemus Kivuva, the Defendant's Credit Manager swore a Replying Affidavit. The said Replying Affidavit and a Notice of Preliminary Objection that was dated 10th July 2017 were both filed on 24th July 2017. The Defendant's Written Submissions and List and Bundle of Documents were both dated 22nd September 2017 and filed on 25th September 2017.

9. In its Grounds of Opposition, it had contended:-

1. THAT this Honourable Court lacked jurisdiction to issue the orders that had been sought in the Plaintiff's application.

2. THAT the suit was brought to this Honourable Court in clear disregard of the express provisions of the law and was thus an abuse of the due process of this Honourable Court.

10. Its case was that it advanced the Plaintiff a loan facility in the sum of Kshs 5,520,000/= that was payable in thirty six (36) monthly installments at an effective rate of twenty (20%) per cent per annum and that although the Banking (Amendment) Act No 25 of 2016 commenced operation from 14th September 2016, any interest accrued prior to the commencement of the said Act was in tandem with the law.

11. It stated that the Plaintiff defaulted in payment of the loan and it issued a Demand Notice in accordance with Section 90 of the Land Act No 6 of 2012 requiring it to rectify the default within three (3) months and indicated all the provisions of the said provision of the law.

12. It pointed out that it issued the Plaintiff with another Notice under Section 96 of the Land Act indicating that it would dispose of the subject property on 29th June 2017 but that the Plaintiff still did not pay the outstanding amount. It was then that it instructed M/S Keysian Auctioneers to issue the forty five (45) days Notification of Sale which was duly advertised in the Daily Newspaper of 8th May 2017. It was its contention that the Redemption Notice had given the Plaintiff at least forty (40) days before it could exercise its statutory power of sale.

13. It therefore urged this court to dismiss the Plaintiff's present application as the intended sale had been preceded by a proper and valid process.

LEGAL ANALYSIS

14. It did appear to this court that the issues that had been placed before it were:-

1. Whether or not this court had jurisdiction to hear and determine this matter;

2. Whether or not the Plaintiff had established a *prima facie* case warranting the granting of an injunction pending the hearing and determination of the case herein.

15. As the issue of jurisdiction of this court went into the root of this matter and was raised as a preliminary issue, this court deemed it fit to hear the same first as it had the potential of ousting its jurisdiction court to hear and determine the application herein. The issue of injunction was addressed separately.

I. JURISDICTION

16. The Defendant referred this court to the case of **Mercy Kirito Mutegi vs Beatrice Nkatha Nyaga & 2 Others [2013] eKLR** where the Court of Appeal rendered itself as follows:-

“We are alive that jurisdiction for a court of law is everything and without it a court of law will as a matter of course down its tools.”

17. It was emphatic that Section 165(5) of the Constitution of Kenya 2010 ousted the jurisdiction of the High Court to hear and determine matters that fall within the jurisdiction of the Employment and Labour relations Act and the Environment and Land Court. In particular, it submitted that Section 13 of the Environment and Land Court Act empowered the Environment Land Court only to hear and determine disputes relating to public, private and community land, choses in action or other instruments granting any enforceable interests in land and any other dispute relating to land.

18. It was therefore its argument that because the dispute before this court arose out of such contract or instrument granting enforceable interest in land, this court had no jurisdiction to hear and determine this matter.

19. On its part, the Plaintiff submitted that the Defendant's arguments on this issue was a misconception as this was more of a commercial matter as opposed to a contest over land rights or any of the matters contemplated under Section 162(23)(b)(sic) of the Constitution of Kenya or Section 13 of the Environment and Land Court Act, 2011.

20. Article 165(5)(b) of the Constitution of Kenya, 2010 specifically states as follows:-

“The High Court shall not have jurisdiction in respect of matters... falling within the jurisdiction of the courts contemplated in Article 162(2).”

21. Article 162(2) (b) of the Constitution of Kenya provides as follows:-

“Parliament shall establish courts with the status of the High Court to hear and determine

disputes relating to...the environment and the use and occupation of, and title to land.”

22. Pursuant to the provisions of Article 162(3) of the Constitution of Kenya that provides that Parliament shall determine and contemplate the jurisdiction and functions of the said courts, the Environment and Land Court Act Cap 12A (Laws of Kenya) was enacted.

23. Section 13 of the Environment and Land Court Act stipulates as follows:-

1. The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.

2. In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes—

(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

(b) relating to compulsory acquisition of land;

(c) relating to land administration and management;

(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

(e) any dispute relating to environment and land.

24. This court associated itself with the sentiments that were expressed in the case of **East African Railway Corp vs. Anthony Sefu [1973] EA 237 which** Odunga J also agreed with when deciding the case of **Republic v Chairman, National Land Commission & 2 others ex-parte Peter Njore Wakaba & Macharia Kinyanjui [2016] eKLR**, where it was held that:-

“It is, a well established principle that no statute shall be so construed as to oust or restrict the jurisdiction of the Superior Courts, in the absence of clear and unambiguous language to that effect.”

25. In dismissing a Preliminary objection in which it had been contended that the High Court did not have jurisdiction to hear and determine the matter in view of the provisions of Article 165(5) of the Constitution of Kenya, in the case of **Suzanne Achieng Butler & 4 others v Redhill Heights Investments Limited & Another [2016] eKLR**, Joel Ngugi J rendered himself as follows:-

“In my view, therefore, it appears clear that the parties intended that their contract involved two distinct parts – one for the sale of land and, the other, for the construction of townhouses and ancillary infrastructure.It is, finally, my finding that the Land Acquisition Price having been paid (as it is undisputed from the pleadings), and the title to the properties having been registered in the name of the Plaintiffs, there is no dispute as to ownership of land – the only contest being whether there has been a breach of the Construction Contract between the parties, and if so which party is in breach and what the consequences for the breach are. Consequently, it is my finding and holding that the dispute between the Plaintiffs and the Defendants that is presented to court is a dispute that is not primarily about land. I therefore hold that this Court has jurisdiction to hear the suit.”

26. While this court agreed with the Defendant that the Environment and Land Court also has jurisdiction to hear and determine matters relating to contracts relating to land, the jurisdiction of the High Court to hear and determine a dispute that was purely a commercial transaction relating to a financial transaction

was not ousted. Indeed, there was no dispute relating to the title, use or occupation of land between the parties that would have given the Environment and Land Court exclusive jurisdiction to deal with the case.

27. In the premises foregoing, this court was not persuaded to find that it lacked jurisdiction to hear and determine this matter. To the contrary, it had power and jurisdiction to render its decision herein. There was therefore no merit in the Defendant's Preliminary Objection herein.

II. INJUNCTION

28. A perusal of the documentation that was adduced by the parties herein showed that all the requisite notices were annexed both in the Plaintiff's Supporting Affidavit and the Defendant's Replying Affidavit. The Plaintiff furnished this court with the Notice to Sell dated 29th June 2016 that it had been issued with by the Defendant herein. The same was issued pursuant to the provisions of Section 96 of the Land Act and was demanding the entire outstanding sum of Ksh 3,916,262.65DR.

29. The Plaintiff also adduced in evidence the Defendant's Notice dated 15th September 2016 in which the Defendant had demanded that it clears the outstanding arrears so that it could start enjoying the new rates like all other customers. It also presented a forty five (45) days' Notice from M/S Keysian Auctioneers. The same was undated.

30. On its part, the Defendant annexed a Demand Notice dated 18th December 2015 issued under the provisions of Section 90 of the Land Act demanding that the Plaintiff remit the sum of Kshs 474,369.15 being the outstanding arrears as of that date. In addition to the Demand Notice of 29th June 2016 giving the Plaintiff three (3) months to settle the entire sum of Kshs 3,916,292.65 DR , the Defendant annexed another Demand Notice dated 28th October 2016 under Section 96 of the Land Act calling for the said sum of Ksh 3,916,292.65 DR and giving a further forty (40) days failing which it would realise the security.

31. Notably, the forty five (45) days' Notification of Sale by the Auctioneers the Defendant annexed to its Replying Affidavit was dated 22nd February 2017. However, a copy of the exact same Notice that the Plaintiff had annexed to its Supporting Affidavit was undated. This court could not ignore the contrasting Notifications of sale relating to the date because the same formed an important part of the process not to fetter the Plaintiff's right of redemption. Notably, It was not clear to this court which of the two (2) parties was being untruthful relating to the forty five (45) days' Notification of Sale by M/S Keysian Auctioneers.

32. Having said so, this court noted that the Plaintiff did not appear to deny that it received the Notification of Sale that was issued by M/S Keysian. What it seemed to be saying was that it was never served with the Demand Notice dated 18th December 2015 issued under Section 90 of the Land Act demanding for the arrears in the sum of 474,369.15. It in fact contended that the Defendant did not establish that service was effected.

33. A perusal of the Defendant's Demand Notices show that the same were in accordance with the law. In fact, they gave ample time to the Plaintiff to settle the arrears and outstanding amounts. However, this court noted that the Defendant did not provide proof to demonstrate how service of the Demand Notices that it sent to the Plaintiff and in particular the Demand Notice of 18th December 2015 was effected. As the Demand Notices showed that service was effected by registered mail, nothing would have been easier than for the Defendant to have furnished this court with copies of certificates of postage to prove service.

34. In the case of **Moses Kibiego Yator vs Eco Bank Kenya Limited [2014] eKLR**, Munyao J gave the plaintiff therein benefit of doubt in similar circumstances and rendered himself as follows:-

“... but I am unable to see the certificate of postage of the Postal Code via which the letter was sent. It could be very well that it was sent to the wrong postal address and benefit of such

doubt must be given to the Plaintiff. In instances where a chargor alleges that he did not receive the statutory notices, the burden shifts to the chargee, to demonstrate prima facie, that the statutory notice was served...”

35. In light of the Plaintiff’s assertions, this court was hesitant to conclude with certainty that the Defendant had fully complied with the requirements of service of the said Notice under Section 90 of the Land Act upon the Plaintiff or that its statutory power of sale had crystallised. In the absence of proof of the initial Notice under Section 90 of the Land Act upon the Plaintiff herein, it followed that all subsequent Notices were invalidated.

36. It is important to point out that save for lack of proof of the said Demand Notice, this court did not find the Plaintiff to have demonstrated that it had established a *prima facie* case warranting the issuance of the injunction pending hearing of the case. Its assertions that the Defendant had failed and/or refused to vary its interest in line with the Banking (Amendment) Act was not entirely true for the reason that in its letter of 15th September 2016, the Defendant had requested it to clear its arrears so that it could start enjoying new interest rates like other customers.

37. Indeed, the Plaintiff had not presented any documentation before this court to demonstrate that it was necessary to interrogate if there was wrong application of interest in view of the Banking (Amendment) Act necessitating the granting of an injunction pending the hearing and determination of the said question in a full trial.

38. The Plaintiff had clearly admitted to having been indebted to the Defendant in its letter of 15th January 2017 in which it was requesting the Defendant to restructure the loan. The Plaintiff was therefore unlikely to suffer any loss that would not be adequately compensated by damages if the injunction it had sought was not granted.

39. Notably, it did not meet the threshold of being granted an injunction in line with the holding in the case of case **Giella v Cassman Brown (1973) EA 360** where it was held as follows:-

“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.”

40. It was also undeserving of the equitable relief of an injunction as it had failed to comply with the order of Thande J of 16th May 2015 to deposit the five (5) months’ arrears within seven (7) days of her order. It had unclean hands and appeared to rely on technicalities to extricate itself from the situation it had found itself in.

41. While dealing with the maxim of clean hands in the case of **Francis Munyoki Kilonzo & Another vs Vincent Mutua Mutiso [2013] eKLR** that was relied upon by the Defendant herein, Mutende J rendered herself as follows:-

“An applicant seeking such orders must come to court with clean hands. The maxim of equity on the principle of equity is expressed as follows-

“No one is entitled to the aid of a court of equity when that deed has become necessary through his or her own fault...a court of equity shall not assist a person in extricating himself or herself from extricating himself or herself from the circumstances that he or she has created...”

42. Having said so, upon considering the Affidavit evidence, Written Submissions and case law that was relied upon by the parties herein, this court was of the considered view that an injunction could only be

granted pending the issuance of fresh notices particularly because there was no evidence that the Defendant's statutory right of sale had crystallised for failure to prove service of the Demand Notice of 18th December 2015. Permitting the Defendant to dispose of the Plaintiff's subject property without proof of service of the Demand Notice of 18th December 2015 would be fettering the Plaintiff's right of redemption of the property which was only extinguishable if it did not repay the outstanding monies due and owing to the Defendant before the subject property was disposed of.

43. In considering whether or not to grant an injunction where there was no proof of service of requisite notice, in the case of **National Bank of Kenya Limited vs Shimmers Plaza Limited [2009] eKLR**, the Court of Appeal rendered itself as follows:-

“We venture to say that where the court is inclined to grant an interlocutory order restraining a mortgagee from exercising its statutory power of sale solely on the ground that the mortgagee has not issued a valid notice, then in our view, the order of injunction should be limited in duration until such time as the mortgagee shall give a fresh statutory notice in compliance with the law.”

DISPOSITION

44. Accordingly, this court found that as there was no proof of proper service of the Notice under Section 90 of the Land Act, the Plaintiff's Notice of Motion application dated 12th May 2017 and filed on 15th January 2017 is hereby allowed in the following terms:-

a. A temporary injunction be and is hereby granted in favour of the Plaintiff herein pending the issuance of fresh Notices under the Land Act and Notification of Sale under the Auctioneers Rules, 1997 by the Defendant and Auctioneers respectively, which respective notices shall take legal effect upon the Plaintiff not complying with the same.

b. As the Plaintiff had admitted being indebted to the Defendant, there shall be no order as to costs.

45. For the avoidance of doubt, the Defendant's Preliminary Objection that was dated 10th July 2017 and filed on 24th July 2017 was not merited and the same is hereby dismissed.

46. It is so ordered.

DATED and DELIVERED at VOI this 23rd day of January 2018

J. KAMAU

JUDGE