



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NO. 46 OF 2017

LAKE NAKURU LODGE LIMITED.....APPLICANT

V E R S U S

THE KENYA DEPOSIT INSURANCE CORPORATION.....RESPONDENT

RULING

1. The plaintiff in this case is a Limited Company engaged in hotel business. It took out a credit facility with Chase Bank (k) Ltd, now in receivership. The plaintiff claims that it received a demand notice and notification of sale dated 29th August, 2017 for the loan securities. They dispute the demanded amount of **Kshs. 75,346,605.67/=**. They seek orders that the Bank supplies them with an accurate account in accordance with **Section 44 of the Banking Act** and a permanent injunction to restrain the defendant from auctioning the securities.

2. Pending the hearing and determination of the suit aforesaid, the Plaintiff filed a Notice of Motion dated 1st November, 2017 seeking orders that:-

(i) Spent -

(ii) Spent -

(iii) Pending hearing and determination of this application the Honourable court be pleased to issue an interim injunction restraining the Defendant/Respondent by itself, its agents, servants and/ or employees from selling by public auction and/or private treaty and/or dealing in any manner whatsoever with the plaintiff's securities known as Title No. Giglil/Gilgil Block 1/2835 (Kekopey), Giglil/Gilgil Block 1/2846 (Kekopey), Giglil/Gilgil Block 1/2847 (Kekopey) and Giglil/Gilgil Block 1/2849 (Kekopey) Lake Elementaita Area- Kekopey.

(iv) The costs of this application be provided for.

3. The application is brought on grounds that the defendant/respondent has advertized the securities for sale by public auction; that the respondent's exercise of power of sale was illegal and unlawful as it was in breach of **Section 91 (2), 96(2), 97(3) (b) of 98 (2) of the Land Act, 2012** and that the outstanding sum demanded was in dispute.

4. The application is supported by the affidavit of **Samuel Waruru Kimotho** a director of the plaintiff company. His averments amplify the grounds upon which the application is brought. The summary of his averments are that the applicant sought an overdraft facility of Kshs. 20,000,000/- from Chase Bank in July 2015. That the Bank consolidated the said overdraft with other existing liabilities and the loan was offered at Kshs. 58,695, 400/- which loan was secured with **Gilgil/Gilgil Block 1/2835,2846,2847 and 2849**. The applicant further deponed that there arose a dispute over the amount disbursed and that the Bank was placed under receivership before the dispute was resolved. That the Bank issued him a statement of account dated 4th July, 2017 indicating the disbursed amount to be Kshs. 58,695,400 disbursed on 18th November 2015 which amount was stated to have accrued interest bringing the amount to Kshs. 73,692,656.07/=. He deponed that penalties and interest charged were illegal and unlawful as they were based on an amount not actually disbursed.

5. In further averments, the applicant states that they have sought accurate accounts from the Bank to no avail and that the properties have been undervalued by the respondent. They exhibit two valuation reports with wide discrepancies in respect of each of the securities listed. They impugn the statutory notice of sale published by Antique Auction as being inaccurate in the description of the properties.

6. The application is not opposed. When it was first filed on 16th November, 2017 under certificate of urgency, the Court directed that it be served upon the respondents for *inter partes* hearing. By the return date of 4th December, 2018, the respondents had not entered appearance. There was proof through an affidavit of service that they had been served on 3rd November, 2017 and subsequently on 6th

February, 2018. Directions were subsequently sworn for the application to proceed by way of written submissions. The applicant filed submissions on 6th December, 2018.

7. I have considered the applicant's Notice of Motion the affidavit in support and the submissions. As stated earlier the application is unopposed. The court is however duty bound to consider the application to confirm if the orders are merited.

8. From the above the only issue in this application is whether the applicant has satisfied the court that he the injunction is merited. In deciding the application are guided by the **principles in Giella VS Cassman Brown (1973) E.A 358.**

Whether the applicant has established a prima facie case.

9. What constitutes a *prima facie* case was explained in the case of **Mrao Ltd Vs- First American Bank of Kenya Ltd & 2 others (2003) KLR 125** in the following terms:-

“In civil cases, a prima facie case is a case in which on the material presented to court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or an arguable case. It is sufficient to raise issues but the evidence must show infringement of a right and the probability or success of the Applicant's case upon trial. That a clearly is a standard, which is higher than an arguable case”.

10. The applicant submits that he has a prima facie case. Firstly, he faults the respondent for not having given an accurate account of the loan, interest and charges to demonstrate what the applicant owes. He submits that there was a discrepancy on the disbursed amount. He has exhibited the letter offer for Kshs.58,695,4000/- and the statement reflecting a credit balance of Kshs. 74,257,634.52 which amount he disputes as being based on an unlawful interest rate and penalties which the respondent has failed to explain.

11. With respect to the statutory notice, the applicant submits that the same was not in compliance with **Section 90 (1) and (2) of the Land Act 2012 Section 90(1)** provides:-

“If a chargor is in default of any obligation, fails to pay interest or any other periodic payment or any other part thereof due under any charge or in the performance or observation of any covenant, express or implied, in any charge, and continues to be in default for one month, the chargor may serve on the chargor a notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be.”

90(2) the notice required by subsection (1) shall adequately inform the recipient of the following matters:-

(a) The nature and extend of the default by the charger;

(b) If the default consists of the non-payment of any money due under the charge, the amount that must be paid to rectify the default and the time, being not less than three months, by the end of which the payment in default must have been completed.

12. It is the applicant's case that they have not been informed of the nature and extent of the default and have not also received the 3 months' notice as required by **Section 90 (2) and Section 96 (2) of the Land Act.** The applicant's assertion not having been controverted by the respondent must be taken to be true. He has displayed the statement and letter of offer bearing the discrepancies aforesaid. It was also upon the respondent to demonstrate that they had complied with the law on statutory notices, and that the amount demanded being the loan amount and interest charged was in accordance with the law. They chose not to respond. I am persuaded that the applicant has demonstrated that he has a prima facie case to warrant the grant of an injunction so that the compliance or otherwise can be tested at trial. **See Albert Mario Gordeiro & Another vs. Vishran Shaniji (2015) EKLK.**

Whether the applicant will suffer irreparable harm.

13. It is a legal principle that once the chargor puts up their property as security, that property is open for sale in case of default. An applicant cannot therefore, plead that they would suffer irreparable harm if the said property was sold. In the present case however, applicant has demonstrated that no proper notices were served showing the extent of default and giving notice of intended sale. As held in the case of **Manasah Denga vs. Ecobank Kenya Ltd [2015] eKLR**, the sale of a person's property is not a matter to be taken casually as it deprives a party of the right to property through an illegal process and would expose them to suffer loss or irreparable harm. The applicant's position is that he will suffer irreparable harm if the properties were auctioned. They state that the properties have not only been undervalued but that there was no proper notice issued other than the auctioneer's advertisements. This position has not been controverted by the respondents and in the absence of material to the contrary, I find that the applicant succeeds in this criteria.

Balance of convenience.

14. From my consideration of the material presented by the applicant, I am persuaded that the balance of convenience favours the grant of an injunction.

15. In the final analysis, I allow the application in terms that:-

(i) Pending the hearing and determination of this suit an interim injunction shall issue restraining the Defendant/Respondent by itself, its agent, servants and/or employees from selling by public auction and/or private treaty dealing in any manner whatsoever with the

Plaintiff's securities known as **Title No. Gilgil/Gigil Block 1/2835 (Kekopey), Gilgil/Gigil Block 1/2846 (Kekopey), Gilgil/Gigil Block 1/2837 (Kekopey and Gilgil/Gigil Block 1/2849 (kekopey) Lake Elementaita Area-kekopey**

16. The applicant shall also have the costs of this application.

Orders accordingly.

Ruling signed at Garsen on 20th day of July 2018.

R. LAGAT KORIR

JUDGE

Ruling delivered dated and Counter signed at Nakuru this 31st day of July, 2018.

A.K NDUNGU

JUDGE

In the presence of

.....CA

.....for applicant

.....for respondent