



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL CASE NO. 13 OF 2013**

**ANWAR MOHAMED BAYUSUF LTD.....PLAINTIFF**

**VERSUS**

**DIAMOND INDUSTRIES LIMITED.....DEFENDANT**

**RULING**

1. The suit filed by the plaintiff against the defendant now embodied in the amended plaint dated the 18/12/2017 is for an injunction and a declaration of illegality of an intended sale together with damages, both special and general, on the basis that the defendant breached the agreement between the parties by unilateral alteration of terms of the agreement to the detriment of the plaintiff.

2. Based on such pleadings, the plaintiff now seeks by the Notice Of Motion dated 10/5/2016 but filed on 10/5/2017 an order for a temporary injunction pending the hearing and determination of the suit. The gravamen of the application is that there has not been compliance with Sections 90 and 96 of the Land Act because the Notice shown to have been issued and dated 8/11/2016 was never addressed to the plaintiff's correct address hence did not reach it. It is also alleged that the house is the matrimonial home to the deponent of the Affidavit in support to which he attaches sentimental values and lastly that the plaintiff had paid a sum of some Kshs.71,000,000/=, after the sale of one of the securities provided, while this suit was pending The plaintiff equally pointed out that there was no evidence of delivery of the notice shown to have been issued.

3. On notice under Section 90 it was pointed out that circumstances of it had changed as one of the assets had been sold, payment made and therefore the sum due also altered. Counsel then referred court to the decision in MARIO ALBERT KODERO VS VISHRAM SHAMJI for the proposition of the law that in such circumstances afresh notice ought to issue. Finally counsel submitted that the debt had reached the duplum rule status and the remedy available to the bank was to sue and not sale pursuant to statutory power of sale. For those reasons it was contended that unless the orders were granted the plaintiff was exposed to suffer great prejudice and urged that the application be allowed as prayed, the subject matter of the suit be preserved and the plaintiff given his day in court.

4. In opposition to the application Ms Mburu advocate relied on the Replying Affidavit sworn by Elizabeth Hinga and Lwanga Mwangi and the documents exhibited thereto as annexure, together with the written submissions.

5. Those affidavits exhibit notices dated 3/9/2012 under section 90 as well as that dated 8/11/2016 under Section 96(2). To counsel the first notice was duly issued and served as shown by the certificate of posting. However, the sale so initiated was stalled by the court order issued on 22/2/2013 which however lapsed on 22/2/2014 as dictated by Order 40 Rule 3(2) Civil Procedure Rules. However during the pendency of the suit and the order, parties engaged into negotiations leading to the sale of one of the securities by consent. However the default persisted culminating in the defendant issuing fresh notice under Section 96(2) and Rule 15 of the auctioneer rules. These notices were however not shown to have been served but counsel contended that even then the court can only grant an order to enable the notices be served in accordance with the law. She relied on the decision in **National Bank of Kenya Ltd vs Simmers Plaza Ltd [2009] eKLR** for the proposition that in such event, only a limited injunction ought to be granted.

6. On the assertion that there is sentimental value to the property by the deponent of the Affidavit, counsel submitted that cannot be a reason to grant an injunction just like failure to take account cannot be a basis for an injunction. Reliance was placed on the provisions of Section 97, Land Act, for that submission.

7. On accounts the counsel pointed out that the same has been undertaken and the sum of Kshs.174,974,218/= found to be due and payable hence there can be no evidence of overpayment. On the balance of convenience, counsel submitted that the same tilted in favour of the application being denied and therefore prayed for its dismissal.

8. In his responding submissions Ms. Anaya advocate underscored the admission by the defendant on lack of evidence of service which resulted on the plaintiff being ordered to pay auctioneers fees. On the length of injunction to be issued, counsel submitted that to be in the

domain of courts discretion influence by the facts of each case. On Section 97, counsel submitted that an award of damages cannot be a basis to refuse a deserved injunction where an impropriety is demonstrated by the bank.

### **Issues for determination, analyses thereof and determination**

9. From the reading of the application and the responses filed thereto, together with the submissions offered the only issue for determination is whether or not the plaintiff is entitled to the equitable relief in the Order of temporary injunction pending determination of the suit or at all. That question has ingredients which include answering the questions whether there is a prima facie case disclosed with prospects of success, whether damages would be an adequate remedy and when the court is in doubt on the two questions, then its employees the scales of balance of convenience.

### **Is there a prima facie case?**

10. Since the enactment of Land Act, 2013, the protection on the Equity's darling, *the right to redeem*, has been bolstered. The law now demands of the chargee to not only serve a notice of default under section 90, giving the nature of default and remedial steps to be taken within a statutory timeline and only upon the lapse of the time line is the chargee entitled to take the next step of issuing further notices under Section 96 and Rule 15 Auctioneers Rules. The law not only mandates issuance of notices but also service of same. Here the counsel for the Defendant candidly and readily accepted, as the profession expects of her, that there was no evidence of service of the notices under Section 96(2) Land Act.

11. With such concession it is only just and fair to conclude that the notice was never served. If not served then the right to proceed with the auction has not accrued<sup>[1]</sup> and if yet to accrue then any attempt to proceed with realization would be contra the statute and any resultant sale would be null and void. If an action is contrary to the statute or indeed any law it is against the public interest that all and sundry must comply with the law and nothing more would reveal a cause of action than the need to pursue observant of the law. I do find that on the admission of lack of evidence of service the plaintiff has demonstrated a prima facie case with prospects of success.

12. That to me is the foundation upon which every application for injunction must be grounded. It is the foundation because if it was not, then at whim and upon caprice a court could give an injunction on no basis at all. If that were to happen then the purpose of injunction and indeed any judicial order, to protect a right, would have been lost sight of and the dignity of the court would be at stake.

13. However, even where the court is satisfied that there is a prima facie case disclosed it still has to consider whether failure to grant an injunction would result into an injury incapable of repair by an award of damages. This second test is not an absolute test that every time damages is demonstrated to be adequate no injunction issues. Rather the test is that, normally where damages are an adequate remedy, injunction should not issue. However ability to pay damages should not be the *carte blanche* for a legal right to be violated. In MARGARET WANJIRU t/a PEGGY PHONES VS PETER KAMAU t/a KAWANDARA GENERAL STORES & 2 OTHERS [2015] eKLR. The court said:-

**“On whether or not damages would be an adequate remedy, I am of the view that to deny a citizen guaranteed legal constitutional right is an extreme and harsh step that must be frowned upon. Frowned upon for it portends a situation where so long as one is endowed of financial muscle, he would offend and trod upon others rights and always demonstrate ability to pay. That would fly on the face of the constitutional dictate against discrimination and equality before the law. It shall open a window by which the financially strong would flout the law with abandon so long as they can pay damages. That has the inevitable prospects of a lawless society where monetary power and other ignoble considerations rather than civility and obedience to the rule of law would reign supreme.**

**It is not difficult to imagine the extent of anarchy and dissent that would then ensue with resultant disruption of smooth operation of orderly and legitimate commerce. Such is the scenarios all civilized societies seek to obviate by surrendering to the dictates of the rule of law and due process. In any event the defendant having failed to justify their actions as lawful, there is no material upon which I can base a finding that damages would be an adequate remedy”.**

14. The upshot is that I do find and hold that the plaintiff is entitled to an order of temporary injunction on account of failure by the defendant to comply with law under Section 96 Land Act.

15. However that default does not disentitle the defendant to their statutory right of sale. They are entitled to that right which is additionally contractual but underpinned in a statute provided the bank complies with the law.

16. For now and noting the developments and change of circumstances that have taken place since the notice of default was issued on 3/9/2012, I do direct that the process starts afresh and fresh notices be issued in compliance with the law. I therefore allow the application in terms of prayer 3 in the notice of motion dated 10/5/2016 with costs, but to the extent that the order shall subsist and continue till the defendant shall have issued and served valid and compliant notices under the law.

17. For purposes of active case management, with the age of the matter being kept in mind, I further direct that the parties file all outstanding statements and documents, if any, within 30 days from today and to attend court on 6/12/2018 for case conference.

Dated and delivered at **Mombasa** this **26th** day of **October 2018**.

**P.J.O. OTIENO**

**JUDGE**

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[1] In Nyagilo ochieng & Another Vs Fanuel Ochieng & 2 other the court of appeal said:-

“In the absence of proof of such posting we are constrained to hold that the sale by auction was void.”