**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL & TAX DIVISION**

**CIVIL CASE NO.E 104 OF 2018**

**RUPINDER SINGH SEHMI.....1ST PLAINTIFF**

**TRAVEL ASSOCIATES LIMITED.....2ND PLAINTIFF**

**VERSUS**

**STANDARD CHARTERED BANK KENYA LIMITED....1ST DEFENDANT**

**VALLEY AUCTIONEERS.....2ND DEFENDANT**

**R U L I N G**

Before this Court is the Notice of Motion dated **5th October 2018** in which the Plaintiff/Applicants sought the following Orders:-

**1. SPENT**

**2. SPENT**

**"3. THAT upon inter partes hearing this Honourable Court be pleased to grant a temporary injunction restraining the 1st Respondent/Defendant, by itself its appointed receivers, servants, auctioneers and specifically the 2nd Respondent/Defendant Valley Auctioneers, agents or advocates from advertising or offering for sale, or selling, or purporting to sell, or in any other way alienating transferring or from howsoever disposing of the said property known as LAND REFERENCE NUMBER 7785/311 (ORIGINAL NUMBER 7785/10/309) in Runda Grove, Old Runda Estate, Nairobi pending the hearing of this application and suit or any time thereby purportedly in exercise of the 2nd Respondent/Defendants impugned notification of sale on the 9th October 2018.**

**3. THAT the costs of this application be provided for".**

The application was premised upon **Order 51 r 1 of the Civil Procedure Rules 2010, Sections 1A, 1B, 3A and 63(c) of the Civil Procedure Act**, the inherent power of the Court and all enabling provisions of the law, and was supported by the undated affidavit of **RUPINDER SINGH SEHMI** (the 1st Plaintiff/Applicant herein.

The Respondents on their part opposed the application and placed reliance on the Replying Affidavit sworn by one **ERICK IFUNYA,** the Account Manager – Group Special Asset Management with **STANDARD CHARTERED BANK LIMITED** (the 1st Defendant/Respondent).

Due to the urgency of the matter and the impending sale the matter was argued orally before the Court on **8th October 2018.** This court did deliver an **"Ex tempore"** ruling on that date and as promised then is here the full reasoned ruling.

**BACKGROUND**

The 1st Plaintiff/Applicant is a Managing Director and shareholder in the 2nd Plaintiff/Applicant Company, a limited liability company dealing in tours and travel. The 1st Plaintiff/Applicant is also the registered proprietor of the parcel of land known as **LR NUMBER 7785/311 (Original Number 7785/101309)** (hereinafter referred to as the "**suit property"**) situated in the Runda Area of Nairobi.

By way of a charge dated **8th September 2014** the 1st Plaintiff agreed to create a legal charge over the suit property in order to secure the principal amount of USD 836,000/= and kshs.56,000,000/= which was advanced by the 1st Respondent bank to the 2nd Plaintiff/Applicant. As things transpired the Plaintiff/Applicants fell into arrears in servicing the loan facility. As a result the 1st Respondent in exercise of its statutory right of sale, instructed the 2nd Respondent to sell by public auction the suit property. The 2nd Respondent in compliance with those instructions scheduled a Public auction for **Wednesday 10th October 2018 at 10.00 a.m**. On **5th October 2018**, the Plaintiff/Applicants filed this present application. **MR KISINGA** Advocate urged the application on behalf of the Plaintiff/applicants while **MR FRAZER S.C** appeared for the Respondents.

For the Plaintiff/Applicant counsel submitted that the intended sale by auction of the suit property would be unlawful as no statutory notices in line with **Sections 90 and 96 of the Land Act** had been served upon the Plaintiffs, and that there was no proof of service upon the Plaintiff/Applicant of any such statutory notices. Counsel placed reliance on the case of **UHURU POWER LTD –VS- DIAMOND TRUST BANK (K) LTD 2016 eKLR**. It was further submitted that the said statutory notices even if served (which is denied) were defective as they did not seek to have the Plaintiff/Applicant make good the outstanding arrears.

It was further submitted that the Respondent Bank levied improper and erroneous charges on the loan account and that no statement had been annexed to justify the figures cited outstanding. **Mr. Kisinga** further submitted that the 2nd Respondent Valley Auctioneers failed to serve his clients with the mandatory 45 day notice and the notice exhibited in court was disputed by the Plaintiff/applicant.

Finally counsel urged that the 1st Plaintiff/Applicant were in discussion with I & M Bank Ltd with a view to having the latter take over their loan. It was argued that the Respondent Bank had agreed to a 30 day holdover to enable the said negotiations to proceed. However in breach of that undertaking the 1st Respondent proceeded to instruct the 2nd Respondent to advertise the suit property for sale.

**Mr. Frazer** for the Respondents opposed the application. Counsel submitted that the Plaintiff/Applicant has acknowledged their indebtedness to the Respondent Bank and have in their plaint expressed their willingness to continue paying off the loan. Counsel objected to the submission made by **Mr. Kisinga** regarding service of the statutory notices on the basis that there was no denial of service in the Plaint or the Supporting Affidavit. In any event counsel maintains that the requisite statutory notices were issued between **5th April 2016 to 5th May 2017.** The Section 96 notice matured on **15th June 2017** and the Plaintiff/Applicant has had more than 15 months to make good the loan.

Counsel concedes to having knowledge of the Plaintiff/Applicant's negotiations with I & M Bank with a view to the latter to taking over the loan, but clarifies that the Plaintiff/Applicant was willing to a 30 day holdover on any action only on condition that there existed a concrete proposal for the takeover. As it was I & M made no such commitment. The 2nd Respondent had already advertised the suit property for sale and had expended close to Kshs.700,000/= in the process.

**ANALYSIS AND DETERMINATION**

The principles governing the grant of an interlocutory injunction are well known and are set out in the case of **GIELLA -VS- CASMAN BROWN & CO. LTD [1973] E.A. 358** as follows:-

> **"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 any doubt, it will decide an application on the balance of convenience".**

The question therefore is whether in this case the above threshold has been met in this case. The definition of what constitutes a **"prima facie"** is to be found in **MRAO LTD - VS- FIRST AMERICAN BANK OF KENYA LTD & 2 OTHERS [2003] KLR 123** where it was held

> **"A prima facie case in a civil application includes but is not confined to a genuine and arguable case. 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".**

In **NGURUMAN LIMITED –VS- JAN BONDE NIELSEN & 2 OTHERS Civil Appeal No.77 of 2012,** the Court of Appeal clarified that at the interlocutory stage, a Court is **not** required to examine closely the merits or otherwise of the Plaintiffs case. In that case it was held

> **"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…"**

With the above authorities in mind I have given careful consideration to this application, the grounds raised in support thereof, the affidavits on record, together with the annextures thereto, as well as the rival submissions made by both counsel. I find that two main issues emerge for the consideration of the Court:-

> **(i) Was the Plaintiff/Applicant properly served with the requisite statutory notices?**
>
> **(ii) Is the intended sale by public auction lawful?**

**(i) QUESTION OF SERVICE**

Mr Kisinga for the Plaintiff/Applicant insists that no statutory notice were served on his clients before the proposed sale of the suit property was advertised. Counsel also submits that the 2nd Respondent did not serve the Plaintiff/Applicant with the 45 day notice as required by the **Auctioneers Act.**

On his part **Mr. Frazer** for the Respondent submits that this question of service was not raised at all in either the Plaint, the application or the supporting affidavit, that in raising the issue while on his feet submitting on the motion, counsel for the Plaintiff/Applicant is raising matters which are outside of the pleadings filed in court thereby causing prejudice to the Respondent who has not been accorded an opportunity to respond to those allegations.

It is trite law that a party will be bound by its pleadings. In the Nigerian Case **DETOUN OLADEJI (AG) LTD –VRS- NIGERIA BREWERIES PLC SC 91/2002,** the Supreme Court of Nigeria stated:-

> **"..it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any one of the parties which does support the averment in the pleadings or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded."**

Likewise **IEBC –VRS- STEPHEN MUTINDA MULE & 3 OTHERS [2014] eKLR** a decision of the Malawian Court of Appeal in **MALAWI RAILWAYS LTD –VS- NYASULU [1998]** was cited with approval, wherein it was held

> **"As the parties are adversaries it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings…for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise different or a fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The Court itself is bound by the pleadings of the parties as they are themselves…"**

I have carefully perused the pleadings filed by the Plaintiff/Applicant. Nowhere has allegation been made that there was a failure by the Respondents to serve the Plaintiff/Applicants the requisite statutory notices. Counsel has only raised this allegation while on his feet submitting upon the motion. The Respondent having had no notice of this particular allegation obviously did not respond to the same in their Replying Affidavit. For the Court to entertain this allegation at this late stage would be prejudicial to the Respondent and would be tantamount to allowing the Plaintiff/Applicant to steal a match. The Plaintiff/Applicant must be bound by the pleadings which they have filed before the court.

Even if this Court were to admit the submission on lack of service, the Respondent through their Replying Affidavit dated **8th October 2018** has sufficiently countered those allegations. There is evidence of 3 notices sent to the 1st Plaintiff/Applicant by way of registered post.

- On 5th April 2016 – The notice under Section 56 of the Land Registration Act.
- On 23rd August 2016 – notice under Section 90 of the Land Act.
- On 5th May 2017 – notice under Section 96 of the land Act.

All these notices were sent to the 1st Plaintiff/Applicant by way of Registered Post. Indeed by a letter dated **6th March 2017** the 1st Plaintiff/Applicant through their lawyer **RAMESH SHARMA** wrote to **Hamilton Harrison and Mathews Advocates** acting for the 1st Respondent bank under the reference

"**RE: CHARGE OF PROPERTY**

**LR NO.7785/311 TO STANDARD CHARTERED BANK LIMITED – NOTICE TO SELL UNDER SECTION 96 OF THE LAND ACT LR 7785/311 (ORIGINAL NO.77/85/10/309"**

By this letter the 1st Plaintiff/Applicants advocate effectively acknowledged receipt of the statutory notice under **Section 96 of the Land Act.** The 1st Plaintiff/Applicant cannot now turn around and purport to deny receipt of such notice. After the final notice was sent on **5th May 2017**, the bank was in compliance with the statutory requirements and were at liberty to proceed with the sale of the suit property. The Plaintiff/Applicant has adduced no evidence to show that the arrears being claimed were ever paid.

On **11th July 2018** the 2nd Respondent Valley Auctioneers did send to the Plaintiff/Applicant by registered post the 45 day notice required by law. The Plaintiff/Applicants allegation that no Statutory notices were served upon him is clearly untrue and the submissions made by counsel denying service of said Statutory notices is nothing but an afterthought and a desperate last minute attempt to scuttle the sale of the suit property.

Counsel for the Plaintiff/Applicant submits that the 1st Respondent broke their word that they would withhold any action for 30 days pending negotiations by the Plaintiff/Applicants with I & M Bank, with a view to the latter taking over the loan. As evidenced by the annextures, there has been correspondence between the parties over this matter. In this correspondence the Plaintiff/Applicant admits its indebtedness to the 1st Respondent Bank. Counsel for the Plaintiff/Applicant submits that the said correspondence was on a "**without prejudice**" basis. However none of the annexed letters is marked "**without prejudice**". The court cannot be invited to imply that the correspondence was on a

"**without prejudice"** basis when that was not clearly indicated by the parties. The correspondence was between the advocates to the parties who undoubtedly were aware of the necessity of clearly marking their letters "**without prejudice**" if this was the intention.

Regarding the negotiations with I & M Bank in their letter dated **30th June 2017** counsel for the Respondent wrote to counsel for the Plaintiff/Applicants in the following terms.

**"The instructions we have received from the Bank is that it will only halt the sale process against an undertaking from I & M Bank to take over the existing facilities together with the legal fees that have been clear**."

This letter is clear and unambiguous – the bank was only ready to withhold action against a concrete undertaking by I & M Bank that they were committed to taking over the outstanding loan facility together with the legal fees. The 1st Respondent **did not** undertake to withhold action as the Plaintiff/Applicant negotiated a takeover with me & M Bank. As it transpired I & M Bank made no such undertaking. In the letter produced by the Plaintiff/Applicant dated **1st October 2018** I & M Bank stated only that they were considering the request for a takeover and would revert to the Plaintiff/Applicant upon further analysis. No concrete commitment was made by I & M Bank to take over the loan facility. It would be unreasonable to expect the Bank to withhold action on the basis of merely "**a hope and a prayer",** yet in the meantime interest continues to accrue. This ground of the application has no basis and is hereby dismissed.

Finally counsel for Plaintiff/applicant submits that his client disputes the amounts being claimed by the 1st Respondent bank. As stated earlier the Plaintiff/Applicant has already admitted its indebtedness to the bank. A dispute over figures is not sufficient grounds upon which to grant the injunction sought.

Halsbury's Laws of England Vol 32 (4th Edition) Paragraph 725 provides:-

> **"The mortgagor will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor or has begun a redemption action, or because the mortgagor objects to the manner in which the sale is being arranged. He will be restrained, however, if the mortgagor pays the amount claimed into Court, that is, the amount which the mortgagor claims to be due to him, unless, on the terms of the mortgagor the claim is excessive."**

On the whole and based on the foregoing my finding is that the Plaintiff/Applicant has failed to establish a prima facie case. The threshold in **Giella –Vs- Casman Brown** has not been met.

Accordingly I do hereby decline to grant the temporary injunction sought in Prayer 3 of the Notice of Motion dated **5th October 2018**. The present application is dismissed in its entirety with costs to the Respondents.

**Dated in Nairobi this 12th day of October, 2018.**

**.....**

**Justice Maureen A. Odero**

**Ruling delivered at the Nairobi High Court this 19th day of October, 2018.**

**.....**

**JUDGE**