



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION

HCCC NO. 346 OF 2016

PATRICK JAMES MBOGO.....1ST PLAINTIFF

JOSEPHINE MUKAMI MBOGO.....2ND PLAINTIFF

VERSUS

BANK OF AFRICA KENYA LIMITED.....DEFENDANT

RULING

1. The Motion before Court is dated 24th August, 2016 and seeks the following orders:-

1. *Spent.*

2. *Spent*

3. THAT an order for injunction do issue restraining the Defendant by itself, its servants, agents or any one of them from interfering with property known as KAJIADO/KITENGELA/22515,KAJIADO/KITENGELA/22516 and KAJIADO/KITENGELA/22517 either by sale, offering for sale, auction, sale by private treaty, transfer or disposal by any means whatsoever and howsoever pending the hearing and final determination of the suit herein.

4. THAT a permanent injunction do issue forthwith restraining the Defendant whether by itself, its employees, servants, agents or auctioneers from auctioning the Plaintiffs property as has been advertised in the Daily Nation Newspapers dated 22nd August, 2016 pending the hearing and determination of the case.

5. THAT an order do issue directing the Defendant to provide properly reconciled accounts hereto and to remove all amounts levied illegally to wit; compounded interest, penalties, collection fees inter alia.

6. Any other consequential order.

7. Costs of this application to be paid by the Defendant.

2. The Application was filed simultaneously with the presentation of the Plaint of 24th August 2016. The Plaint (40 paragraphs) may be unnecessarily lengthy but in a sum tells the following story. The 1st and

2nd Plaintiffs are customers of Bank of Africa Kenya Limited (**the Defendant or Bank**).

3. Through a Letter of Offer dated 13th December 2011, the Bank offered the Plaintiffs a Banking facility of Ksh.70 million against the following securities:-

i. A first legal charge over properties Kajiado/Kitengela/22515, Kajiado/Kitengela/22516 and Kajiado/Kitengela/22517 for Ksh.45,000,000/= (Kenya Shillings Forty Five Million registered in the name of Plaintiffs.

ii. Deed rental assignment over all properties Kajiado/Kitengela 22515,22516 and Kajiado/Kitengela/22517 in favour of the Bank.

iii. A further legal charge over properties Kajiado/Kitengela/22515,22516, Kajiado/Kitengela/22517 for Kshs.25,000,000/= (Kenya Shillings Twenty Five Million registered in the name of Plaintiffs.

4. Interest was to be calculated on a floating basis at 17% pa.

5. That sometime in 2014-2015, the Plaintiffs fell into arrears and have thereafter sought restructuring of the facility. They aver that notwithstanding promises to do so, the Bank has reneged on its word to accede to the request for restructure.

6. The Plaintiffs also complain that the Bank has unlawfully and without notification increased the rate of interest from 17% to 25%.

7. It is the Plaintiffs case that they have entered an arrangement with Paramount Bank to take over the facility but the Defendant Bank has refused to provide Loan Statements and other supporting Documents to facilitate the takeover.

8. The Bank's attempt to realize the charged properties has been criticized and the Plaintiffs aver that they have not been served with the requisite Statutory Notices and were only served with the Auctioneers Notice.

9. The Plaintiffs seek the following Prayers:-

a. THAT an Order for injunction do issue restraining the Defendant by itself, its servants, agents or any of them from interfering with property known as Kajiado/Kitengela/22515, Kajiado/Kitengela/22516, Kajiado/Kitengela/22517 either by sale, offering for sale, auction, sale by private treaty, transfer or disposal by any means whatsoever and howsoever.

b. THAT an order do issue directing the Defendant to provide properly reconciled accounts hereto and to remove all amounts levied illegally to wit; compounded interest, penalties and collection fees.

c. A declaration that all interest and penalties compounded on this account are illegal and an order directing the Defendant to discount all the amounts levied illegally.

d. A permanent order directed at the Defendant restraining it, its servants and/or agents permanently from loading illegal interest, penalties and other miscellaneous charges into the Plaintiff's loan account.

e. A declaration that the actions of the Defendant amount to clogging the Plaintiffs equity of redemption and the same are illegal and/or inequitable and the Defendant is barred from furtherance of such illegal actions.

f. Costs and interest.

g. Any other relief this Honourable Court deems fit to grant.

10. The Principles upon which a Court may grant an Interlocutory Injunction are well settled in the case of **GIELLA VS. CASSMAN BROWN** [1973] EA 358 which sets them out as follows:-

a. An Applicant must show a prima facie case with a probability of success.

b. An Interlocutory Injunction will not normally be granted unless the Applicant might otherwise suffer irreparable loss which would not be adequately be compensated by an award of damages.

c. If the Court is in doubt, it will decide an application on the balance of convenience.

11. At the outset, the Court will consider whether the Plaintiffs have established a Prima facie case with a Probability of success. But in doing so, the Court needs to be cautious so as not to make findings which are final in nature and which could embarrass the Trial Court.

12. The Court has looked at the Pleadings herein, the Application and response and the submissions by Counsel.

13. It is not in dispute that the Bank offered a Banking facility to the Plaintiffs by way of a letter dated 13th December 2011. The facility comprised of a sum of Kshs.70,000,000/= to be applied as follows:-

a. Kshs.45,000,000/= to offset an existing loan with the Bank.

b. Kshs.25,000,000/= to be used to finance completion of the Construction of a Residential Development on the suit premises.

14. Amongst the Securities taken were Legal Charges over properties Kajiado/Kitengela/22515,22516,22517 for a total sum of Kshs.70,000,000 (Kenya Shillings seventy million).

15. The Plaintiff's action is predicated on the following grievances:-

a. That the Bank has charged unlawful interest.

b. The Bank has refused and failed to furnish them with Accounts.

c. The Bank intends to proceed with realization on the basis of undervaluation of the charged properties.

d. The Bank has attempted to enforce its Statutory Power of Sale without issuing the Notices required by Statute.

Let me consider each of these in turn.

16. There is concession by the Bank that as at 13th September 2016 it charged an Interest rate of 22.5%. The Letter of Offer of 13th December, 2011 read together with the charge documents is the Contract between the Plaintiffs and the Bank. Clause 5 of the Letter of Offer provides for interest as follows:-

a). TL Facility interest will be calculated on a floating rate basis at a percentage rate per annum equal to the aggregate of the margin of 1.5% per annum ("the margin") below the KES Base Rate (currently at 24% p.a) totaling to 22.5% p.a.

17. The Bank explains that as at 13th December 2011 the base rate was 24% and so the applicable interest rate was at 22.5% p.a. This is not faulted by the Plaintiffs. And when the Plaintiffs Claim that interest charged at one time was 25% p.a, they do not demonstrate that it was worked out in contravention of Clause 5 above or the Law then existing. It is not enough for them to allege that the Interest rate charged was unlawful without demonstrating how it breached the Contract or Statute.

18. The Affidavit in Support of the Application sworn by the 1st Plaintiff shows that after they fell into arrears some negotiations commenced between them and the Bank. Attached to his Affidavit are some Letters exchanged pursuant to those negotiations. The Letter of 22nd June 2006 by the Plaintiffs illustrates that they had made proposals on how to repay the arrears. Other letters in this category are those of 4th May 2016, 29th April, 2016 and 1st April, 2016. In none of them do the Plaintiffs complain that the Bank has not kept them abreast with the accounts. Similarly no complaint is raised on the issue of interest.

19. The Plaintiffs admit receiving the Auctioneers Notice. The Bank asserts that it had also served the Plaintiffs with a Statutory Notice dated 15th April, 2015 and delivered by way of Registered Post on 16th April 2015. This would be pursuant to Section 90 of the Land Act 2012. A copy of a Certificate of posting is shown to Court in proof thereof.

20. There is then a second Notice as is required under Section 96(2) of The Land Act. The Bank, through its Advocates Coulson Harney, issued this Notice on 8th March, 2016 and served it by way of registered post on 9th March, 2016. A copy of Certificate of posting was shown to the Court as an attachment to the Replying Affidavit of Samuel Irungu sworn on 21st December 2016. Both Certificates of posting are dated and this Court is unable to understand the Plaintiffs Advocate argument that they are not.

21. It would seem that the Notices required by the Land Act were served and it is not surprising that in the meetings that the Plaintiffs held with the Bank after the dates of these Letters, the issue of non-service of Statutory Notices was not raised.

22. I turn to the last issue. The Law (Section 97(2) Land Act) places an obligation on a Chargee intending to exercise its Power of Sale to obtain a forced Sale Valuation of the property undertaken by a Valuer. The Bank herein intends to exercise that Power and instructed Transcountry Valuers Limited to value the charged properties on 17th February 2016. The Valuers returned the following report,

a. Forced Sale valueKsh.86,250,000

b. Open market value.....Ksh.115,000,000

23. The Plaintiffs assert that this is a undervaluation. To support this assertion, the Plaintiffs rely on two valuations. A Valuation by NW Realite Ltd returned a Open Market value of Ksh.200,000,000/= and forced Sale value of Kshs.150,000,000/=. This is a Valuation of 8th January 2014. Secondly, a Letter of 22nd August 2016 from Neo Westend Valuers Limited returning an Open market Value of Kshs.150,000,000/=.

24. There are 3 different valuations, although one was undertaken two years before the others. What would be the solution to this matter? Undoubtedly the Bank's right to exercise its Power of Sale has accrued. The Law is that a recent Valuation needs to be carried out before a Sale is conducted. All the valuations are now more than a year old. If this Court shall allow the Bank to proceed with realization then it would be fair that a Joint Valuation be undertaken before the Bank exercises its Power of Sale. This is because of the substantial variations between the three Valuations.

25. The Court has found that there is an admission that the Plaintiffs are in arrears, in other words, that they owe the Bank money that is due. There is evidence that the Statutory Notices required by Law have been served. Even if there is a legitimate dispute as to how much exactly is owing, the admitted amount is substantial and there cannot be valid ground to restrain the Chargee from exercising its Statutory Power

of Sale (see many authorities on this including the early decision in **Bharmal Kanji Shah & another vs. Shan Depar Revji** [1965]91.

26. This Court is unable to find merit in the Motion of 24th August 2016 and does therefore dismiss it with costs.

27. However the Bank shall carry out a Joint Valuation of the property should it elect to press on with its Statutory Power of Sale. The parties to agree on a joint Valuer and in default hereof the Court shall do so.

Dated, Signed and Delivered in Court at Nairobi this 29th day of June, 2017.

F. TUIYOTT

JUDGE

PRESENT;

Gatheru for Plaintiff

Owiti for Defendant

Alex - Court Clerk