



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

ELC CASE NO. 735 OF 2017

KALKA FLOWERS LTD.....PLAINTIFF

VERSUS

BANK OF BARODA LTD KENYA.....1ST DEFENDANT

SPOTLIGHT INTERCEPTS AUCTIONEERS.....2ND DEFENDANT

RULING

The application before this court is a notice of motion dated the 24th May, 2017 brought pursuant to section 3 and 3A of the Civil Procedure Act and Order 40 and 51 of the Civil Procedure Rules, Section 90(2) and 97 (2) of the Land Act 2012 and Section 44 of the Banking Act.

The application is premised on the grounds which in summary are that the Plaintiff is the owner of land no. KAJIADO/KISAJU/3029 which the Defendants intend to auction. The Plaintiff is not in arrears and has not been served with a statutory notice or demand notice and the Defendant's statutory power of sale has not accrued. The advertisement is in violation of the Plaintiff's right to redeem its property and the Plaintiff disputes the interest and penalties accruing on the principal amount borrowed.

The application is supported by the affidavit of ARUMUGAMPILLAI SRITHAR who is a manager of the Plaintiff which is a duly registered company in Kenya. He deposes that he is a director of the Plaintiff company alongside his wife and sometime in 2010 the Plaintiff took a loan of Kshs. 60 million and has been repaying it but because of interest and penalties, the amount due is Kshs 100 million. He avers that despite making the payments, the Defendants have unlawfully advertised the Plaintiff land parcel number KAJIADO/KISAJU/3029 and intend to sell it on 26th May, 2017. He claims the Defendants have not served the Plaintiff with any statutory notice of sale as required by law. He states that the Plaintiff has workers, a flower farm and animals on the property which is prejudicial if the auction takes place. He reiterates that the Plaintiff has not received any demand notice or statutory notice to inform him that the loan is due.

The 1st Defendant opposed the application and has filed a replying affidavit sworn by its Manager for Sarit Centre Branch AJEET KUMAR on the 31st May, 2017 where he deposes that the Plaintiff is a Customer of the Defendant's Sarit Centre Branch. He states that in November, 2010 the Plaintiff sought the release of two titles that had been previously used by it to secure advances with the 1st Defendant so that the same could be charged to NIC Bank Limited who would pay the 1st Defendant Kshs. 250 million leaving a balance due and payable of Kshs. 60 million which the Plaintiff offered to repay on terms that would be agreeable to the 1st Defendant. He claims the 1st Defendant approved the Plaintiff's application for a loan of Kshs. 60 million and there was a letter of offer which was duly signed by the Plaintiff where

it undertook to repay the loan in 60 equal monthly instalments of Kshs. 1,396,096 commencing on 31st January, 2011 but has not been servicing the loan. Further that on 11th May, 2011 the 1st Defendant wrote to the Plaintiff pointing out that it had failed to repay a single instalment. He maintains that on 2nd July, 2013 the 1st Defendant's advocates sent the statutory 90 day notice to the Plaintiff demanding the outstanding arrears of Kshs 30,714,090 which together with the outstanding interest totaled Kshs. 77,746,081.47 and on 20th August, 2014, the 2nd Defendant on instructions from the 1st Defendant duly issued a 45 day notice of sale of property. He asserts that on 4th November 2014 at the request of the Plaintiff, the 1st Defendant agreed to stop the auction of the Plaintiff's property that was scheduled for 7th November, 2014 but thereafter the plaintiff failed to make any payments towards the loan despite promising to do so.

He further states that on 3rd July, 2015 the 1st Defendant wrote to the Plaintiff informing them that as no payment had been made since 7th November, 2014 when the auction was put off, the Bank had no option but to commence auction process to recover monies owed. Further in July 2015 the Plaintiff and its lawyers wrote various letters to the 1st Defendant requesting for time to pay up the loan and on 2nd November, 2015 the 2nd Defendant issued a Notice to the Plaintiff to pay the sum of Kshs. 77, 746,081 within 45 days failing which the suit property would be sold by public auction. He reiterates that on 17th February, 2016 the Plaintiff deposited twelve (12) cheques amounting to Kshs. 11,880,000 with the 1st Defendant and promised to liquidate the balance of the loan within 30 days and the Plaintiff's lawyer also wrote reiterating this promise and requested the scheduled auction scheduled for 18th February, 2016 to be postponed, and the 1st Defendant acceded to the Plaintiff's request. He affirms that on 24th March, 2016 the Plaintiff's lawyer wrote to the 1st Defendant seeking an extension of the period to pay the outstanding balance by 22nd April, 2016 and another letter seeking a further 10 days but no more payments were received from the Plaintiff leading to the 1st Defendant instructing Dayton Valuers to carry out a current valuation of the suit property, thereafter a notice of sale dated 22nd March, 2017 was issued to the Plaintiff through the 1st Defendant's lawyers. He reiterates that the 2nd Defendant duly issued the Plaintiff with a Notice specifying that unless the balance outstanding was repaid, it would sell the suit property by public auction and the property was advertised for sale upon expiry of the said notices. He asserts that the Plaintiff has acknowledged his indebtedness, was served with requisite statutory notices and other notices by the 1st Defendant's advocates and auctioneer, has sought and granted indulgences of stopping the sale of the suit property, but has failed to repay the loan, the property has been valued to determine the forced sale value and instructions granted to the auctioneer to proceed with the auction.

The Plaintiff through its manager ARUMUGAMPILLAI SRITHAR filed a further affidavit where he reiterated that the Company has a loan balance of Kshs. 60 million which they partly paid but the same has not been discounted. He insists the company was not served with a notice of sale as required by law and they do now owe the lawyer's and surveyor's fee. He avers that the amount claimed by the 1st Defendant as due is Kshs. 152,070,829.45 and he has requested for a statement but in vain. He states that in the advertisement made on 10th May, 2016 the Plaintiff was not given sufficient time to redeem his property.

Both parties submitted on the application on 13th July, 2017.

The Plaintiff's counsel Mr. Itaya reiterated the facts of the plaintiff's case and submitted that no notice was issued to the Plaintiff in accordance with section 90 of the Land Act, and no notice in the replying affidavit to prove this position. He stated that Rule 15 of the Auctioneers Rules requires Notice of Sale to be issued and there is no evidence to prove this. He submitted that the entire process is irregular and relied on the case of Albert Mario Cordero & Anor Vs. Vishram Shamji [2015] eKLR. He further submitted that section 44(a) of the Banking Act requires that interest rate on a loan should not be more than the loan itself. In the instant case the principal debt is Kshs. 60 million but the interest rate is 84 million. He submitted that they had demonstrated a prima facie case.

Mr. Githaiya who is Counsel for the 1st Defendant submitted that the issue that needs to be determined is whether the Plaintiff is in default of loan repayment or not. Further that the loan was to be paid in 60 monthly instalments of Kshs. 1,396,096 commencing the 31st January, 2011. He referred to the Offer

Letter marked as exhibit 'AK2" and stated that the Plaintiff only made first payment of the loan on 18th February, 2016 which is more than five years later. He submitted that he who comes to equity must come with clean hands, and the Plaintiff has expressly admitted to owing the 1st Defendant and has no right to seek an equitable remedy. He referred to annexure 'AK9" which is correspondence between the Plaintiff, his advocates and the 1st Defendant where it admitted to owing the bank. The amount outstanding as at 31st July, 2015 was Kshs. 113, 969, 790.52 and the Plaintiff was supplied with statements with correspondence showing there was no dispute as to the amount owing. He reiterated the 1st Defendant's advocate issued a statutory notice dated 2nd July, 2013 and subsequently a 45 day notice was issued on 20th August, 2014. He submitted that there is proof of service and it is the Plaintiff who sought postponement of the sale and this was done on three different occasions. Plaintiff was issued with a notice in 2014. He submitted a valuation on the suit property was done on 7th March, 2017 and the 45 day notice issued on 22nd March, 2017 pointed out the amounts due from the Plaintiff and asked it to remedy the default failure of which the suit property would be sold. He submitted that a further 45 day notice was issued and suit property advertised for sale. He said Plaintiff had been aware 1st Defendant would sell the suit property due to the default and it was supplied with statements every three (3) months as evident in exhibit 'AK18". Further that the offer letter indicated there would be penal notice in the event of default and Plaintiff is not entitled to the relief sought. He relied the case of **Bii Vs. KCB** and prayed that the application should be dismissed with costs.

Mr. Itaya reiterated that the Plaintiff was disputing that no notices were issued and that the same should be issued afresh as the entire process is irregular.

Analysis and Determination

The court has considered the materials presented and arguments canvassed by the respective parties in respect to the Notice of Motion dated 24th May, 2017, I find that the only issue for determination at this juncture is whether the Plaintiff is entitled to the temporary injunction orders sought.

From the Plaintiff's and 1st Defendant's opening and closing arguments, it is not in dispute that the Plaintiff secured a loan of Kshs. 60 million with the 1st Defendant and undertook to repay it in 60 equal monthly instalments of Kshs. 1,396,096 commencing on 31st January, 2011. The Plaintiff is not denying in principle that it owes a debt to the 1st Defendant. It is seeking for a temporary injunction claiming that the Defendant did not serve it with the requisite notices as stipulated under section 90 of the Land Act; and has not furnished it with its statement of accounts.

The principles for granting of temporary injunctions were settled in the case of **Giella Vs. Cassman Brown & Co. Ltd (1973) EA 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 in doubt, it will decide an application on the balance of convenience."

Bearing this principle in mind, it behoves this honourable court to interrogate whether the Plaintiff has made out a prima facie case with a probability of success at the trial.

The question we need to ask is whether the defendants served statutory notices upon the Plaintiff as required by the Land Act. From the annexures 'AK 5', 'AK6', 'AK 11' AK 15 and 'AK 16' within the Defendant's replying affidavit the answer is in the affirmative. It is worth noting that the Plaintiff's address on the Letter of Offer is the same address where the said notices were sent. Further, on receipt of the notices, the Plaintiff including its lawyers exchanged several correspondence with the 1st Defendant requesting for the sale of the suit land to be postponed to which the 1st Defendant acceded to. In annexure 'AK12' which is a letter from the Plaintiff dated 17th February, 2016, the Plaintiff wrote to the 1st Defendant as follows: **' we refer to the above matter and request you to postpone the auction scheduled on 18th February, 2016. We have already deposited cheques - a total of 12 cheques amounting to Ksh.**

11, 880,000 on 16th February, 2016 which will clear on 18th February, 2016. We undertake to pay the balance debt within thirty (30) days from today. We shall be providing letter from our advocates M/s Wanjama & Company Advocates today assuring payment of balance debt within 30 days. Therefore we request your indulgence to defer the auction process to be held on 18th February, 2016 and we clear the outstanding debt within thirty days. '

The Court notes vide a letter dated 17th February, 2016 from Wanjama & Company Advocates who were the Plaintiff's lawyers they confirmed that the Plaintiff would pay off the balance debt within thirty (30) days from the date hereof once the 1st Defendant called off the auction. The said lawyers vide a letter dated 24th March, 2016 which is annexure 'AK13' wrote again to the 1st Defendant indicating the Plaintiff was unable to repay the balance debt as promised but sought the bank's indulgence promising that the Plaintiff would repay the said balance by 22nd April, 2016. In the case at hand, the Defendant served all the requisite notices to the plaintiff as proved in annexures 'AK 5', 'AK6', 'AK 11' and 'AK 15' respectively. The Auctioneer vide annexure 'AK 16' which is a letter dated 13th April, 2017 issued the Plaintiff with 21 days notice to redeem the suit property by paying Kshs. 152,070,829.45 plus interest failure of which the sale would proceed.

The Plaintiff has averred that they were never issued with loan statements by the 1st Defendant but did not to annex any copies of correspondence from it to the 1st Defendant seeking for the loan statements.

Section 90 (1) stipulates that '**If a chargor is in default of any obligations, fails to pay interest or any other periodic payment or any 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 chargee 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. '**

Section 90 (3) stipulates that '**if the chargor does not comply within two months after the date of the service of the notice under, subsection (1), the chargee may -**

- (a) sue the chargor for any money due and owing under the charge;**
- (b) appoint a receiver of the income of the charge land;**
- (c) lease the charged land, or if the charge is of a lease, sublease the land;**
- (d) enter into possession of the charged land; or**
- (e) sell the charged land.**

I concur with the 1st Defendant's Counsel that the Plaintiff has not come to court with clean hands and has sought the indulgence of the 1st Defendant several times to defer the sale of the suit land.

The Plaintiff granted his property as security for the loan with the 1st Defendant and severally admitted its indebtedness to the 1st Defendant and it is a long established legal rule that ***“. . . when part of amount claimed is admitted or proved to be due, a Chargee cannot be restrained by an injunction.”*** This position has clearly been stated in the case of **LABELLE INTERNATIONAL LTD. AND ANOTHER – VS – FIDELITY COMMERCIAL BANK & ANOTHER, CIVIL CASE NO. 786 OF 2002.**

On the issue raised by the Plaintiff on the arbitrary interest rate applied to their loan account by the 1st Defendant. The Court notes that the Plaintiff indeed signed the Letter of Offer and accepted the terms of interest therein. It cannot refute now and claim the interest rates were against the Banking Act. Further Section 84 (1) of the Land Act is clear on variation of interest rate and stipulates as follows: '**where it was contractually agreed upon that the rate of interest is variable, the rate of interest payable under a charge may be reduced or increased by a written notice served on the chargor by the chargee.....**

From the above, it is clear that Plaintiff has not established a prima facie case to meet the threshold for the

grant of orders of injunction. I consequently dismiss the Plaintiff's Notice of Motion dated the 24th May, 2017 with costs.

I vacate the interim orders granted earlier.

Dated signed and delivered in open court at Kajiado this 24th day of October, 2017.

CHRISTINE OCHIENG

JUDGE