



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

HCCC NO. 211 OF 2016

DESIRES DERIVE LIMITED.....APPLICANT/PLAINTIFF

VERSUS

BRITAM LIFE ASSURANCE CO. (K) LTD....RESPONDENT/DEFENDANT

RULING

1. Sometime in the year 1998, Desires Derive Limited (the Plaintiff) borrowed a sum of Kenya Shillings Five Million Two Hundred Thousand (Kshs.5,200,000/=) from Britam Life Assurance Co. (k)Ltd (The Defendant). The loan was applied towards the purchase of Apartment No.C4 at Hurligham Park, Nairobi. Pursuant to the terms of the Loan Agreement the property was charged in favour of the Defendant. A dispute has arisen in respect to the said facility and the Plaintiff brings this Action seeking, inter alia, a Declaration the Plaintiff has acquired rights under The Law of Limitation of Actions Act (Chapter 22 of The Laws of Kenya) and that the Charge is null and void and should be discharged.

2. Simultaneously with presenting the suit, the Plaintiff filed a Notice of Motion dated 26th May, 2016 for the following prayers:-

1. This application be certified urgent and service thereof be dispensed with in the first instance.
2. A temporary Order for Injunction do issue restraining the Defendant, its servants and/or agents from exercising its statutory power of sale over apartment C4 on Land Reference No.1/311 pending the hearing and determination of this application.
3. A temporary Order of Injunction do issue restraining the Defendant, its servants and/or agents from exercising its Statutory power of sale over apartment C4 Land Reference No.1/3111 pending the hearing and determination of this suit.
4. The costs of this application be provided in the cause.

Although there was an auction scheduled for 28th June, 2016, the same was put off by an Order of this Court. The reason for this becomes apparent shortly.

3. Repeated in the Plaintiff and in the Affidavit of J. Muchemi Wanyeki sworn on 26th May 2016 is the case for the Plaintiff. J. Muchemi Wanyeki is the Managing Director of the Plaintiff Company. In a nutshell, the Plaintiff's grievances are five. The Plaintiff complains that the Defendant never communicated the outstanding arrears before purporting to exercise its Statutory Power of Sale. In his affidavit, Mr. Wanyeki depones that the Defendant has failed to provide the Plaintiff with loan statements from the date of advance.

4. It is the case of the Plaintiff that the amount sought to be realized by the Defendant is caught up by the in-duplum Rule. The Plaintiff states that by September, 2008 it had paid a sum of Kshs.11,611,656.90 against a loan of Kshs.5,200,000/=.
5. In addition, the Court is asked to find that the Defendant's attempt to exercise its Statutory Power of Sale is time barred pursuant to The Limitation of Actions Act(Cap 22 of Laws of Kenya).
6. On the process leading to the notification of sale, the Defendant is faulted for allegedly failing to value the property and failing to issue Statutory Notice as required by Law.
7. The Defendant resisted the Application and a Replying Affidavit by Joseph Mburu was sworn on its behalf on 15th June 2016. He is the Senior Supervisor, Loans and Mortgages at the Company.
8. Mr. Mburu sets out how the Plaintiff and the Defendant executed a mortgage on 17th December 1998 in respect to the suit property. The mortgage was over Apartment No.C4, Hurlingham Park and situated on LR No.1/311. The mortgage was duly registered in compliance with the law.
9. That the Plaintiff defaulted in repayment of the facility and by February 2001, the loan had accrued interest and stood at Ksh.6,123,686.97/=. A request by the Plaintiff for a waiver was turned down by the Defendant. On 26th August, 2008, the Defendant paid a lump sum of Ksh.1,014,00/= and that from that date the Defendant has not made any further payment. However, it is deposed for the Defendant that as at May 2016, the Plaintiff had paid Ksh.10,634,544.90 towards the mortgage loan.
10. In respect to non-availability of Statements, attached to the Affidavit of Mr. Mburu are copies of Statements said to have been furnished by the Defendant to the Plaintiff.
11. That as a result of the Plaintiffs default, the Defendant issued the Plaintiff with a Notice of Intention to Exercise its Statutory Power of Sale dated 19th August 2015.
12. On 25th January 2016 the Plaintiff, through its Chairman, wrote to the Defendant. The letter was responded to on 25th February 2016 by the Defendant's Director, Legal and compliance. On the issue of valuation, this Court was shown a Valuation Report on the property dated 10th July, 2015.
13. The Application before Court is for a Temporary Injunction and this Court is obliged, first, to examine whether the Plaintiff has shown a prima facie case with a probability of success (*Giella Vs. Cassman Brown & Co. Ltd [1973] EA 38*). In carrying out that examination this Court would be keenly aware that at this Interlocutory stage it must desist from any firm findings that may embarrass any eventual Trial of the matters herein.
14. As correctly submitted by Counsel for the Defendant the in-Duplum Rule which was given Statutory clothing in Kenya by Section 44A of The Banking (Amendment) Act No.9 of 2006) Act is applicable to Institutions as defined in the Act. Under the Act Bank means:-

“a company which carries on, or proposes to carry on, banking business in Kenya but does not include the Central Bank”.

While a financial Institution means;-

“a Company, other than a bank, which carries on, or proposes to carry on, financial business and includes any other company which the Minister may, by Notice in the Gazette, declare to be a financial Institution for the purposes of this Act”.

A schedule to the Central Bank of Kenya Act has a list of Banks and Financial Institution under Section 2 of the Act. The Defendant is not one of the Banks and Institutions in that Schedule. The submission by the Defendant's Counsel that the Provisions of Section 44A of The Banking Act does not bind the Defendant is therefore not without force. In my view, in so far as the Plaintiff is questioning the Interest

charged by the Defendant on the basis of in-Duplum Rule only, the argument by the Plaintiffs will be met by this credible submission.

15. Is the Defendant's intention to exercise its Statutory Power of Sale time barred pursuant to the Limitation of Actions Act (Chapter 22 of The Laws of Kenya)? The Plaintiff does not state which provision of the Act bars the Defendant but it would seem that the Plaintiff is relying on Sections 19(1) and 19(4) of The Limitation of Action Act which provides:-

19(1) "An action may not be brought to recover a principal sum of money secured by a mortgage on land or movable property, or to recover proceeds of the sale of land, after the end of twelve years from the date when the right to receive the money accrued".

19(4) "An action to recover arrears of interest payable in respect of any sum of money secured by a mortgage or payable in respect of proceeds of the sale of land, or to recover damages in respect of such arrears, may not be brought after the end of six years from the date on which the interest became due:

Provided that –

(i) Where a prior mortgage or other encumbrancer has been in possession of the property mortgaged, and an action is brought within one year of the discontinuance of such possession by the subsequent encumbrancer, the subsequent encumbrancer may recover by that action all the arrears of interest which fell due during the period of possession by the prior encumbrancer, or damages in respect thereof, notwithstanding that the period exceeded six years.

(ii) Where the property subject to the mortgage comprises any future interest of life insurance policy and it is a term of the mortgage that arrears of interest shall be treated as part of the principal sum of money secured by the mortgage, interest does not become due before the right to receive the principal sum of money has accrued.

But as the Charge is still in subsisting, the Plaintiffs argument on Limitation will have to contend with the following holding by Justice Gikonyo in the Decision of **RAJNIKANTKHETSHI VS. HABIB BANK A.G ZINCH [2016] eKLR**

"These arguments are quite robust and useful, but one matter stands out and is agreed by both parties: That the Charge herein still subsisting on the suit property. In my considered opinion, as long as the Charge is subsisting and has not been discharged, the cause of action consisting in a discharge of charge is unaffected. Similarly, unless there exist circumstances to the contrary, as long as the debt for which such charge was given as security or guarantee remains unpaid, the cause of action to recover the debt through lawful realization of the security or enforcement of the guarantee thereof is also alive".

At the main hearing, the Plaintiff has the task of persuading this Court that this proposition by Justice Gikonyo is not the true position of the Law.

16. Section 97(2) of The Land Act provides;

"A chargee shall, before exercising the right of sale, ensure that a forced sale valuation is undertaken by a valuer".

The Defendant showed Court a forced sale Valuation on the Suit Property which was undertaken by Kenval Realtors (EA) Ltd on 10th July, 2015. The forced sale value was put at Ksh.11,500,000/=. It is not argued that the Valuation is unreasonable, or unjustifiable or in any way breaches the duty of the Charge under Section 97(2).

17. On the issue of Statements, the evidence placed by the Bank is that it furnished the statements to the Plaintiff on regular basis. There is also evidence that on at least four occasions the statements were furnished on the specific request of Mr. Wanyeki made on behalf of the Plaintiff. These include requests made on 12th May 2010 and 16th April 2013. The Plaintiff will have to prove that it did not receive these statements. That will be a matter for the main hearing but for now I am unable to find that this is sufficient reason to stop the Defendant from exercising its Power of Sale.

18. On the issue of Statutory Notices required under The Land Act, it was conceded by the Defendant's Counsel that Notice under Section 96(2) was not issued. Section 96(2) provides:-

“Before exercising the power to sell the charged land, the chargee shall serve on the chargor a notice to sell in the prescribed form and shall not proceed to complete any contract for the sale of the charged land until at least forty days have elapsed from the date of the service of that notice to sell.

Counsel nevertheless argued that the Bank fused the Notice required by that provision with the 45 days Notice issued pursuant to the provisions of the Auctioneers Rules.

19. The law seems clear enough that after issuance of the 3 months Notice under Section 90, a Chargee cannot exercise its Power of Sale before serving a further Notice of 40 days as required by Section 96(2). Whether this further Statutory requirement is unreasonable or absurd it must be given its full effect not only because it is an express and unequivocal Statutory requirement but also because it is now an important component of the Chargor's equity of redemption. The Bank cannot shrink on that right by fusing it with another notice. It is because of this breach that this Court put off the intended sale of 25th June, 2016.

20. That said, there is evidence that there is a debt owed by the Plaintiff to the Defendant. There is evidence of default of repayment. A charge over the suit property still subsists. The evidence available so far seems to show that the only lapse on the part of the Bank is the non-compliance with the provisions of Section 96(2) of The Land Act. In the face of the said default, an equitable outcome would not be to perpetually prevent the Bank from pursuing the remedies available to it as a Chargee.

21. These are my orders:-

- a) The Bank shall be enjoined from exercising its Statutory Power of Sale until it complies with Section 96(2) of The Land Act and thereafter the Provisions of the The Auctioneers Rules.
- b) Only in terms of Order (a) above does the Notice of Motion of 26th May 2016 succeed.
- c) Costs of the Notice of Motion to the Plaintiff.

Dated, Signed and Delivered in Court at Nairobi this 29th day of July, 2016.

**F.
JUDGE**

TUIYOTT

PRESENT;

Morara for Plaintiff

Serem holding brief for Wamboi for Respondent

Alex - court clerk