

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL SUIT NO. 10 OF 2016

BRADE GATE HOLDINGS LIMITED.....1ST PLAINTIFF/APPLICANT

DR. THUO MATHENGE.....2ND PLAINTIFF/APPLICANT

VERSUS

JAMII BORA BANK LIMITED.....DEFENDANT/RESPONDENT

RULING

By a plaint dated 16th June 2016, the plaintiffs (hereinafter referred to as the applicants) instituted these proceedings against the defendant (hereinafter referred to as the Respondent) seeking orders of injunction restraining the defendant or its agents from offering for sale, selling or in any manner dealing with land title number **Ruguru/Gachika/254**, a declaration that the defendant's purported exercise of statutory power of sale is irregular, null and void for non-compliance with the mandatory provisions of the law, a declaration that the instructions given to auctioneers and valuers in purported exercise of statutory power of sale was irregular, null and void and any consequential auctioneers and valuers charges should not be debited against the applicants' loan account. There is also a prayer for general damages and costs.

The plaint was accompanied by a Notice of Motion dated the same day expressed under the provisions of Order **40** Rules **1** and **2** of the Civil Procedure Rules, 2010, Sections **1A**, **1B**, **3A** and **63** of the Civil Procedure Act^[1] and section **44 A** of the Banking Act^[2] and all other enabling provisions seeking orders *inter alia* that a temporary injunction be issued restraining the Respondent, his agents or servants from offering for sale, selling or dealing with title number **Ruguru/Gachika/254** in any manner pending the hearing and determination of the application and also pending the hearing and determination of the suit.

When the matter came up for *ex parte* hearing, interim orders were granted pending *inter partes* hearing. However, on 4th October 2016 both counsels recorded a consent that the applicants pay all the outstanding arrears on or before 26th October 2016 in default, the said *ex parte* order shall stand vacated. This confirms that the applicant was still in default even as at the time the application came up for hearing *inter partes*, a position that this court cannot ignore and which raises questions as to whether the applicants are running away from lawful obligations.

Such a scenario was ably described by Lenaola J (as he then was) in *Jopa Villas LLC Vs Private Investment Corp & 2 Others*^[3] Lenaola J when he stated that:-

“I am clear in mind that the Applicant is running away from the obligations lawfully imposed and with its knowledge and participation. Courts should not aid it in that quest but will instead uphold the rights of the 1st Defendant to recover the monies lawfully advanced.....our Courts must uphold the sanctity of lawful commercial transactions”

Essentially, the grounds in support of the application are stated on the face of the application and the supporting affidavit. These can be summarized as follows:- that the Respondent advertised the property for sale through its agents without following down laid down procedure and law and more particularly the provisions of section **90 (2) (b)** and section **97 (2)** of the Land Act^[4] (hereinafter referred to as the act)

The applicant further states that the Defendants action to issue auctioneers notification of sale before serving the applicant with the **90** days statutory notice is a clog on the applicants equity of redemption and denies the applicant the legal duration provided under section **90 (1)** and **96 (2)** Act.

Further the applicants state that they have been repaying the loan amount dutifully and that as at the time of filing this suit, the applicants insisted that they had no outstanding arrears, but that notwithstanding the defendants have continued to demand unknown amounts and have insisted on a second valuation, barely a week after the first one was done and insisted on the applicant paying the cost of the said valuation. In view of the actions complained of, the applicants are apprehensive that unless restrained by the court, the respondents may proceed with the intended sale and that lack of a statutory notice makes the intended sale a nullity. Attached to the supporting affidavit are copies of e-mail communication and cheques in support of the applicants averment that he cleared the arrears.

The application is opposed. On record is the Replying affidavit of **Rufus Macharia**, the Debt Recovery Manager of the Respondent who avers *inter alia* that the applicants borrowed **Ksh. 30,482,744/=** on the strength of his title referred to earlier, that the terms of the facility are stipulated in the letter of offer and the charge instrument and that the applicant is a constant defaulter and as at 29th June 2016 the total facility outstanding was **Ksh. 26,271,803.24** comprising of the principal sum, outstanding interests, arrears and penalties as stipulated in paragraph **9** of the said affidavit.

The Respondent avers that the requisite statutory notices were served, namely, a three months statutory notice dated 14th December 2015, forty days statutory notice dated 11th March 2015, **45** days redemption notice and notification of sale dated 22nd April 2016. Copies of the said documents are exhibited to the said affidavit. The **90** days statutory period is shown as having been sent by registered mail to the applicants postal address. Also the letter dated 11th March 2016 is shown to have been served by registered mail.

Pages **45** to **47** of the said affidavit shows that the notification of sale was served by registered mail. The postage receipts appear at page **48C**. The affidavit of service appearing at page **48A** states that the same documents were served upon the applicants general manager.

The Respondent avers that it at all material times kept the applicants aware of the status of the account and that at the time the statutory notices was issued the applicants were in default, that after numerous demand he paid a substantial amount leaving arrears of **Ksh. 39,763/=** as at 18th May 2016 and that the Respondent was ready and willing to accommodate the applicants only if he complied with three conditions, namely, that he settles the said arrears, grant access to valuers and settle all recovery costs, but the applicants declined and in the meantime the next instalment fell due. Further, it is the Respondents position that as at the time the property was advertised for sale, the applicants were in default, hence the Respondents statutory right of sale had accrued.

The Respondent insisted that there is a legal justification for the second valuation in that the valuation is inconformity with the provisions of section **97 (2)** of the act, hence the applicants suit is baseless and accused the applicant of failing to disclose all the necessary information relevant to this suit.

Both parties agreed that the application be determined by way of written submissions. Counsel for the applicants submitted that the statutory notices were not served as required which is a fundamental breach of the statute and cited decisions rendered in *Trust Bank Ltd vs Eros Chemists*[5] and *Elizabeth Wambui Njuguna vs Housing Finance Co of Kenya Ltd*. [6]

On service of the statutory notice, counsel referred to clause **39** of the charge documents which states that "all notices or demands for payment by the bank shall be deemed to have been properly served on the chargor if delivered by hand or sent by registered post, telex or fax to the borrowers' registered office or any principal places of business in Kenya" and argued that the alleged service on a third party was defective. However, I must point out that in addition to service upon the alleged third party, service was also effected by way of registered mail which is provided for as correctly submitted by counsel for the

applicant as stated herein above.

Counsel also submitted that the auctioneer did not attach the mandatory certificate to certify that the person served declined to sign and cited the decision in *Moses Kibiego Yator vs Ecobank Kenya Limited*. [7] Counsel also submitted that statutory notice did not conform to the provisions of section 90 and 89 of the act and accused the Respondent of abrogating the rights of the applicants by hiding behind the contract.

Counsel submitted that the applicants have satisfied the tests for granting of injunctions as laid down in the case of *Giella vs Cassman Brown*[8].

The Respondents counsel opened his submissions by citing the above quotation extracted from a decision rendered by Justice E. K. Ogola in *John Karanja Njenga & Another vs Bank of Africa*[9] whereby the learned judge stated as follows:-

"However, for this court, the defendant's right to exercise its power to sell the charged property arises the moment there is a debt which remains outstanding despite demand. It is therefore upon the plaintiffs to prove that there is in fact no debt due to the defendant."

Counsel reiterated that the applicants were in default, that statutory notice was duly served, that section 97 (2) of the act requires that "a chargee shall, before exercising the right of sale, ensure that a forced sale valuation is undertaken by a valuer" while the Auctioneers Act[10] requires that a valuation report should not be more than 12 months old prior to sale. Counsel also submitted that the applicant did not file authority as provided under order 4 Rule (4) & (6) of the Civil Procedure Rules.

Regarding the default in servicing the loan, counsel cited the decision in *Turbo Highway Eldoret & Another vs Bank of Africa*[11] where it was held as follows:-

"In our case, I am not persuaded that the plaintiffs have demonstrated a prima facie case with a probability of success. Significantly, they have failed to demonstrate that there has not been default or that the statutory power of sale has not arisen. Despite alleging that no statutory notices were sent, on the contrary, I have seen the notices and I believe that they were properly sent. From the material presented, I do not see how I can stop the Bank from proceeding to sell the properties in issue."

Counsel also cited the decision by Emukule J in *Daniel Ndege Ndiragu vs Barclays Bank of Kenya Ltd & Another*[12] in which the judge stated that:-

"those who fail to service and persist in such failure, do no equity. An injunction is an equitable remedy. Those who seek equity must therefore do equity. Failure to service a loan or to pay the lender or to pay into court what has been admitted takes an applicant outside the realm of exercise of the court's discretion....An injunction will not be granted because the amount is disputed, or interest has been piled. Those are matters of inquiry, at trial, and should the lender be found to blame, it will be condemned in damages to the borrower."

Also in the above cited case the learned judge cited the decision in *Sambai Kitur vs Standard Chartered Bank & 2 Others*[13] where the court stated that a borrower having offered his property as security and having defaulted in repayment prompting the bank to exercise its statutory power of sale cannot claim that he will suffer loss incapable of being compensated by way of damages. Counsel citing Emukule J in above decision stated that the balance of convenience lies with the Bank and stated that section 99 (4) of the act provides a remedy for illegal exercise of statutory power of sale. Finally, counsel cited Ringera J in *Woodcraft Industries Ltd & 3 others vs EAST African Building Society*[14] where he held that:-

"To give an injunction to restrain a party from exercising a statutory power of sale which has arisen and is exercisable on the basis that it would be harsh to the borrower for whatever reason, in whichever circumstances would be, to my mind, shirk judicial responsibility to enforce

contractual rights. It would be to render securities useless."

At this juncture, it is necessary for this court to briefly examine the legal principles governing applications of this nature. In an application for an interlocutory injunction the onus is on the applicant to satisfy the court that it should grant an injunction. An injunction, being a discretionary remedy is granted on the basis of evidence and sound legal principles.

In the celebrated case of *Giella Vs Cassman Brown and Co .Ltd*^[15] the Court set out the principles for Interlocutory Injunctions. These principles are:-

- i. The Plaintiff must establish that he has a **prima facie** case with high chances of success.*
- ii. That the Plaintiff would suffer irreparable loss that cannot be compensated by an award of damages.*
- iii. If the court is in doubt, it will decide on a balance of convenience.*

The above principles were authoritatively captured in the famous Canadian case of *R. J. R. Macdonald Vs. Canada (Attorney General)*^[16] where the three part test of granting an injunction were established as follows:-

- i. Is there a serious issue to be tried?;*
- ii. Will the applicant suffer irreparable harm if the injunction is not granted?;*
- iii. Which party will suffer the greater harm from granting or refusing the remedy pending a decision on the merits? (often called "balance of convenience").*

Also of useful guidance in the application before me is the criteria considered in granting an injunction laid down in the decision in *American Cynamid Co. vs Ethicom Limited*^[17] which established the test in the English courts in deciding if an injunction should be granted. This test was followed in Ireland in the case of *Camus Oil vs The Minister of Energy*^[18]. The test has three elements:-

- i. there must be a serious/fair issue to be tried,*
- ii. damages are not an adequate remedy,*
- iii. the balance of convenience lies in favour of granting or refusing the application.*

The said principles have been reiterated in numerous cases in Kenya. In *Mbuthia vs Jimba Credit Corporation Ltd*^[19] **Platt JA** echoed the position adopted in the *American Cyanamid* case cited above and stated that in an application for interlocutory injunction, the court is not required to make final findings of contested facts and law but only needs to weigh the relative strength of the parties cases.

In *Moses C. Muhia Njoroge & 2 others Vs Jane W Lesaloi and 5 others*^[20] the court while making a determination on the issue of a *prima facie* case with a probability of success cited the Court of Appeal decision in the case of *Mrao Ltd Vs First American Bank of Kenya and 2 others*^[21] where the Court of Appeal held that:-

"A Prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later".

Steven Mason & McCathy Tetraut in their well researched article entitled "*Interlocutory Injunctions: Practical Considerations*"^[22] have authoritatively stated as follows:-

"With some exceptions, the first branch of the injunction test is a low threshold. As stated by the Supreme Court in *R. J. R. Macdonald Vs. Canada (Attorney General)*^[23] "Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely to succeed at the trial. Justice Henegham of the Federal Court explained the review as being "on the basis of common sense and a limited review of the case on the merits."^[24] It is usually a brief examination of the facts and law.

In certain circumstances, the court will impose a more restrictive standard and require the moving party to demonstrate that it has a more strong prima facie case. If the injunction will likely end the dispute between the parties, then the court may hold the plaintiff to this higher standard. Similarly, where the nature of the relief sought is mandatory, or when the question is a question of mere law alone, then this higher standard will apply..."

In *Kenleb Cons Ltd vs New Gatitu Service Station Ltd & another*^[25] Bosire J held that "to succeed in an application for injunction, an applicant must not only make a full and frank disclosure of all relevant facts to the just determination of the application but must also show he has a right legal or equitable, which requires protection by injunction." Also Bosire J in *Njenga vs Njenga*^[26] held that "an injunction being a discretionary remedy is granted on the basis of evidence and sound legal principles."

The second test for determination is whether the applicant will suffer irreparable loss. The following paragraph in *Halsbury's Laws of England*^[27] is instructive. It reads:-

"It is the very first principle of injunction law that prima facie the court will not grant an injunction to restrain an actionable wrong for which damages are the proper remedy. Where the court interferes by way of an injunction to prevent an injury in respect of which there is a legal remedy, it does so upon two distinct grounds first, that the injury is irreparable and second, that it is continuous. By the term irreparable injury is meant injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact that the plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by injunction, if his rights cannot be adequately protected or vindicated by damages. Even where the injury is capable of compensation in damages an injunction may be granted, if the act in respect of which relief is sought is likely to destroy the subject matter in question"

In order to show irreparable harm, the moving party must demonstrate that it is a harm that cannot be quantified in monetary terms or which cannot be cured.^[28] But what exactly is "irreparable harm"? **Robert Sharpe**, in *"Injunctions and Specific Performance,"*^[29] states that *"irreparable harm has not been given a definition of universal application: its meaning takes shape in the context of each particular case."*

Where any doubt exists as to the applicants' right, or if the right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which injury the applicant, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right.^[30] The burden of proof that the inconvenience which the applicant will suffer if the injunction is refused is greater than that which the respondent will suffer if it is granted lies on the applicant.^[31]

Thus, the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction.^[32] The court will seek to maintain the *status quo* in determining where the balance on convenience lies.

An injunction is an equitable remedy, meaning the court hearing the application has discretion in making a decision on whether or not to grant the application. The court will consider if it is fair and equitable to grant the injunction, taking all the relevant facts into consideration.

In *Showind Industries Vs Guardian Bank Limited & Another*[33] it was held that:-

“.....an injunction is granted very sparingly and only in exceptional circumstances such as where the Applicant’s case is very strong and straight forward. Moreover, as the remedy is an equitable one, it may be denied where the Applicant’s conduct does not meet the approval of Court of equity or his equity has been defeated by laches”

Turning to the facts of this case, and applying the above tests, the first question to address is whether the applicant has disclosed a *prima facie* case with a reasonable probability of success. Does the applicants case raise triable issues? If yes, then the applicants will have satisfied the first test. The first question that arises is whether or not the applicants were in default. From the documents presented to the court, I am satisfied that the applicants were in arrears, and had defaulted in loan repayment, hence the Respondent was legally entitled to commence recovery process. Significantly, the applicants have failed to demonstrate that there has not been default or that the statutory power of sale has not arisen. In this regard, I am **not** satisfied that the applicants have demonstrated a *prima facie* case.

The applicants argue that the Respondent has been insisting on a second valuation. To me, the provisions of section **97 (2)** of the act are very clear. Before a chargee exercises its right of sale, it is a requirement that a forced sale valuation be undertaken and this has to be read together with the provisions of section **11 (1)** of the Auctioneers Act which provides that such a valuation should not be more than **12** months old. The applicants concern appears to be to evade the cost of the valuation. Unfortunately the said concern is not a ground for refusing a Bank from exercising its rights of sale.

The applicants state that the statutory notice was not served. I do not think so. At pages **36** to **38** of the Replying affidavit is a copy of the statutory notice. Pages **39** to **40** shows that it was mailed by registered mail to the applicants address. This has not been disputed. The postage receipts have been exhibited. The address used is the same address used by the applicants in their documents. I find that service was proper. In addition to postage, there was physical service which the applicants are challenging. I am not satisfied that service was effected at the applicants premises.

The applicants counsel submitted that the statutory notice was defective. Section **90** of the Land Act provides, *inter alia*, that: _

“The notice required by subsection (1) shall adequately inform the recipient of the following matters—

the nature and extent of the default by the chargor;

if the default consists of the non-payment of any money due under the charge, the amount that must be paid to rectify the default and the time, being not less than three months, by the end of which the payment in default must have been completed

if the default consists of the failure to perform or observe any covenant, express or implied, in the charge, the thing the chargor must do or desist from doing so as to rectify the default and the time, being not less than two months, by the end of which the default must have been rectified”

I have carefully looked at the statutory notice and I am satisfied that it fully conforms with the provisions of the above section.

On the issues of irreparable loss, this case brings out an important contractual principle that security pledged to a financial institution or bank stands the risk of being sold and the intended sale is within the contemplation of the parties to the loan agreement. In other words, the sale of property by the mortgagee

cannot lead to irreparable loss since it is the contractual arrangement or intention of the parties and expressly provided for in the loan agreement or mortgage deed. Exceptions to the general rule must relate to issues like whether the mortgagor is in default and whether statutory power of sale has arisen. Where the agreed amount has not been paid and the borrower is still in default on the agreed amount, the right of the bank to sell is established and what the court can do is to cause the ascertainment of the right value for forced sale of the property.

As for the balance of convenience, I reiterate what I stated above, *"the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction.*^[34]*The court will seek to maintain the status quo in determining where the balance on convenience lies."* Considering the facts of this case in totality, I find that the balance of convenience is not in favour of the applicants. Since the Respondents statutory power of sale has arisen, I find that the balance of convenience lies in enforcing the contractual obligations of the parties.

Consequently, I find that the application under determination has no merits and that the applicant has not satisfied the tests for granting the injunction sought as laid down in the above cited authorities. Accordingly, I dismiss the application dated 16th June 2016 with costs to the Respondent.

Right of appeal 30 days.

Dated at Nyeri this 16th day of November 2016.

John M. Mativo

Judge

Delivered at Nyeri this 16th day of November 2016.

Hon. Justice Jairus Ngaah

Judge

[1] Cap 21, Laws of Kenya

[2] Cap 488, Laws of Kenya

[3] **Machakos HCCC NO 215 of 2008**

[4] Act No. 6 of 2012

[5] {2000} 2 EA 550

[6] {2006}eKLR

[7] {2014}eKLR

[8] {1973}EA 358

[9] NBI HCCC No. 577 of 2015

[10] Cap 526, Laws of Kenya, Section 11 (1)

[11] Nakuru ELC No 363 of 2015

[12] Nakuru Civil Suit No. 8 of 2012 "B"

[13] Eldoret HCCC No 50 of 2002

[14] HCCC No. 602 of 2000

[15] {1973} EA358

[16] {1994} 1 S.C.R. 311

[17] {1975} A AER 504

[18] {1983} 1 IR 88

[19] {1988} KLR 1

[20] High Court ELC case Number 514 of 2013

[21] {2003} KLR125

[22] www.mccarthy.ca/.../interlocutory_injunctions_practical_considerations.pdf

[23] Supra

[24] Dole Food Co. Vs Nabisco Ltd {2000}, 8 C.P.R. (4TH) 461, (F.C.T.D.)

[25] {1990} K.L.R 557

[26] **{1991} KLR 401**

[27] Halsbury's Laws of England, Third Edition, Volume 21, paragraph 739, page 352.

[28] Supra note 3

[29] Robert Sharpe, Injunctions and Specific Performance, looseleaf, (Aura, On: Canada Law Book, 1992), P 2-27

[30] See Halsbury's Laws of England, Third Edition, Volume 21, paragraph 766, page 366.

[31] Ibid

[32] Supra note 6

[33] **{2002} 1 EA 284**

[34] Supra note 6