REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

CIVIL CAUSE NO. 370 OF 2014

THIONGO GERALD KANYINGI…….....…..….1ST PLAINTIFF

NAOMI WANJIRU KANG'ETHE…….....…….2ND PLAINTIFF

PRECIOUS INSURANCE BROKERS LIMITED….....3RD PLAINTIFF

Versus

EQUITY BANK LIMITED...……..….....….1ST DEFENDANT

ANTIQUE AUCTIONEERS…….....2ND DEFENDANT

RULING

Injunction application

[1] The Applicants have applied for an injunction to restrain the Defendants by themselves or agents or servants from selling parcel of land comprised in title number Nairobi/Umoja Block 83/14/177 (hereafter suit property). The Application is supported by the affidavit of GERALD THIONGO KANYINGI and it is expressed to be made under the Judicature Act, section 1A, 1B and 3A of the Civil Procedure Act, Order 40 rule 1 & 2 and Order 51 rule 1 of the Civil Procedure Rules and the inherent jurisdiction of the Court.

The Applicants' gravamen

[2] The Applicants averred that the 1st and 2nd Plaintiffs are the registered proprietors of the suit property. The suit property was offered as security for re-payment of financial facilities advanced to the 3rd Plaintiff and/or companies associated with the 1st and 2nd Plaintiffs. The registered encumbrances are as follows;-

(i) A first legal charge made on 2nd December, 2005 to secure a sum of Kshs. 800,000/- advanced to Rosana Safaris Tours & Travel Limited.

(ii) A further charge made on 22nd February, 2007 to secure a further financial accommodation to Rosana Safaris Tours & Travel of Kshs. 1,700,000/- making the aggregate debt under the further

charge to be Kshs. 2,500,000.00.

(iii) A 2nd Further charge made on 18th June, 2008, to secure an additional sum of Kshs. 500,000/-, thus making the aggregate debt to be Kshs. 3,000,000/-.

(iv) A 3rd Further Charge made on 5th December, 2008 to secure monies advanced to 3rd Plaintiff. The existing debt is stated to be Kshs.3, 000,000/- and the additional borrowing by 3rd Plaintiff is Kshs. 4,000,000/- making the aggregate debt to be Kshs. 7,000,000/-

[3] In addition to offering the suit property as security, the 1st and 2nd Plaintiffs executed guarantee and indemnity in respect of all the above debts. By a letter dated 12th January, 2012, the Bank advanced to the 3rd Plaintiff Kshs. 7,000,000/- for the purpose of restructure on loan account number 0010595135136. On 27th June, 2014, the 1st Plaintiff was served with notice to redeem the suit property dated 25th June, 2014 together with a notification of sale of suit property dated 25th June, 2014. The 1st Plaintiff engaged the 1st Defendant in talks to have the notification of sale withdrawn. In the meantime, the 2nd Defendant published an advertisement to sell the suit property on 27th August, 2014 in the Daily Nation of 11th August, 2014. By a letter dated 11th August, 2014, the 1st Plaintiff was notified that the outstanding debt on the account of the 3rd Plaintiff was Kshs. 13,849,330.91 and also there was another debt of Kshs. 4,989,330.91 outstanding as at 9th August, 2014. By the letter of 11th August, 2014, the 1st Plaintiff was requested to settle the entire debt on or before 27th August, 2014. All subsequent requests made to the 1st Defendant for restructuring of the loan were ignored necessitating these proceedings. The Plaintiffs claim is that the Bank had not issued the requisite statutory notice prior to the attempt to exercise its statutory power of sale. In addition, the Bank has combined debts owing to a third party and loaded the same upon the 3rd Plaintiff's account.

[4] The Plaintiffs file the Application dated 26th August, 2014, for an injunction to restrain the Defendants from selling the suit property pending the hearing and determination of the suit. The Major grounds of the application are as stated above; that is to say; 1) the Plaintiffs were not served with the requisite statutory notice as provided under Section 90 of the Land Act; 2) the Defendant has loaded unto the 3rd Plaintiff's loan account, debts owing to 3rd parties; and 3) that the notification of sale was not served upon all parties as provided under Section 96 of the Land Act.

These grounds satisfy the principles of law on interlocutory injunctions as set out in **Giella vs Cassman Brown & Co. Ltd [1973] EA 358.** In **Mrao vs. First American Bank of Kenya Ltd**, prima facie case was defined to be; one, on the material presented, and properly directing itself, the Court will conclude that there exists a right which has been infringed by the opposite party as to call for an explanation or rebuttal from the latter. Although the 1st Defendant alleges it issued a notice in September, 2013, it has not annexed certificates of postage or evidence of service of the notices to all the Plaintiffs or any of them. The 1st Defendant did not discharge its burden of proof in accordance with Sections 107 -108 of the Evidence Act which provide as follows;-

107. Burden of proof

(1) Whoever desires any court to give judgment as any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(ii) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. Incidence of burden

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. Proof of particular fact

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

[5] While imploring the 1st Defendant to indulge the Plaintiffs by restructuring the loan, the 1st Plaintiff does not mention the statutory notice. It is obvious that the 1st Plaintiff became aware of the impending sale of the suit property in June, 2014 upon receipt of the notification of sale from the 2nd Defendant. See letters dated 6th August, 2014, 11th August, 2014 and 14th August, 2014. It is the Plaintiffs submission that in the absence of service of the mandatory statutory notice, the 1st Defendant cannot lawfully exercise its power of sale. They relied on the case of **Elizabeth Wambui Njuguna vs. Housing Finance Co. of Kenya Ltd[2006]eKLR** and specifically on the following portion-

"The other issue under this rubric is whether non service of a valid statutory notice is fatal to the exercise of the statutory power of sale by the chargee or it is an irregularity which is remediable in damages under the provisions of Section 77(3) of R.L.A …. I think the omission to serve a valid statutory notice is not an irregularity or impropriety to be remedied in damages. It is a fundamental breach of the statute, which derogates from the chargor's equity of redemption."

[6] And also on the case of **Francis Gathungu Kariuki vs. Industrial & Commercial Development Corporation [2007] eKLR**, Justice Waweru held;-

"That where there is no proper service of the statutory notice upon the Plaintiff, and the Defendant's statutory power of sale did not accrue. The Plaintiff has therefore established prima facie case with a probability of success."

[7] *The Applicants further argued that the notification of sale does not comply with the provisions of the Land Act and is therefore null and void. The suit property is;- i) A leasehold from Nairobi City Council for a period of 99 years from 1978; ii) Jointly held by the 1st and 2nd Plaintiffs; iii) Partly Residential and partly utilized as a school. The Defendants served the notification upon the 1st Plaintiff only. The report and valuation on the suit property by Prestige Management Valuers dated 17th July, 2014 disclosed to the 1st Defendant the existence of the school, namely Rosyln Academy. By a Deed dated 31st January, 2012, the 1st and 2nd Plaintiffs assigned the suit property's rental income to the 1st Defendant. The Defendants have not explained why no notice was served upon the 2nd Plaintiff, the City Council of Nairobi (offices of the Nairobi County Government) or affixed at the building. Indeed the affidavit of Patrick Ngigi is obvious that service was done upon the 1st Plaintiff only. Section 96 of the Land Act, 2012 provides that where a chargor is in default of the obligation under a charge and remains in default after expiry of the time provided for rectification of the default, the Chargee is at liberty to exercise the power to sell the charged property. However, before exercising the power to sell, the charge is required to issue a notice of at-least forty (40) days. A copy of the notification to sell the charged property* ***MUST*** *be served on-*

(a) -

(b) holder of the land out which the lease has been granted, if the charged land is a lease;

(c) a spouse of the chargor who had given consent;

(d) any lessee and sub-lessee of the charged land or of any buildings on the charged land;

(e) any person who is a co-owner with the chargor;

(f) –

(g) any guarantor of the money advanced under the charge;

(h) any other person known to have a right to enter on and use the land or the natural resources in, on or under the charged land by affixing a notice at the property; and

(i) any other persons as may be prescribed by regulations, and shall be posted in a prominent place at or as near as may be to the charged property.

[8] The Applicants submitted that the Defendant loaded onto the 3rd Plaintiff's loan account debts owing to other companies such as Rosana Safaris Tours & Travel Ltd. According to the 1st Defendant as paragraph 25 of the affidavit of Charles Waweru, there is mix up of accounts held in the name of the 3rd Plaintiff and Rosana Safaris Tours & Travels Limited due to a technical hitch at the Bank. The said technical hitch was occasioned by the customer identity number 200343709. The Applicants says that it is inconceivable how the 1st Defendant opened about three accounts on one or similar customer identity number for two (2) different companies; the said companies being distinct entities separate from their shareholders. The First legal charge dated 2nd December, 2005 shows the borrower to be Rosana Safaris Tours & Travels; the aggregate debt is Kshs. 800,000/- only yet the 1st Defendant in its affidavit and statement of account reflect that debt as Kshs. 5,000,000/-. See paragraph 6 of the affidavit of Charles Waweru. The circumstances under which the debt of Rosana Safaris Tours & Travels was consolidated to the debt owing from the 3rd Plaintiff are not clear. The statements of account availed by the Defendant are generated by the 1st Defendant and it would have been proper for the 1st Defendant to correct the mix up upon discovery. Instead, the Defendant has now produced before the Court Four (4) different loan accounts statements. These are;- 0010595135136, 0010101206443, 0010598753730 and 0010599840626.

[9] The Applicants further urged that, in issuing the alleged statutory notice of sale, the 1st Defendant has not specified how much money is due under which account but treats the three debts as one yet the terms and conditions applicable to each debt are different. The terms applicable to each facility taken by the Plaintiffs or their related companies cannot be similar and the 1st Defendant has irregularly and un-procedurally operated the said accounts without taking into account any payments made to offset the debts. This kind of operation of the accounts and loading of all the debts together has made it impossible for Bank to track payments made and amounts to clogging of the right to redeem the suit property. The Plaintiffs believes that the above is a demonstration of a prima facie case and it is in the interest of justice that pending hearing and determination of the suit, there be an injunction restraining the 1st Defendant from selling the suit property. The 1st and 2nd Plaintiffs will also suffer irreparable loss if the 1st *Defendant is not restrained by this Court from selling and/or offering for sale the suit property. They urged the court to grant the Application dated 26th August, 2014 with costs to the Plaintiff.*

The Respondents opposed application

[10] The Respondent opposed the application. They submitted that the 1st and 2nd Plaintiffs are the directors of the 3rd Plaintiff herein. The Plaintiffs have been enjoying a cordial working relationship with the 1st Defendant whereby the 1st Defendant has advanced the Plaintiffs various facilities over time, some of which have been paid up while two are still outstanding. It is worthy to note the fact that the two accounts are outstanding is not in dispute. The Plaintiff's admit their

indebtedness to 1st Defendant. By a letter of offer dated 26th March, 2010, the 3rd Plaintiff obtained a loan facility of Kshs.8.4 million secured by a first, further and second further charge over property Title No Nairobi/Umoja Block 83/14/177 securing an aggregate amount of Kshs.7 million. The 1st and 2nd Plaintiff also gave personal guarantees to secure Kshs.8.6 million by as chargors. The facility was disbursed into loan account no.001059513136. The 3rd Plaintiff defaulted in repayment of the facility resulting into the bank seeking to exercise its statutory power of sale. However, this did not proceed as the Plaintiffs requested the bank to re-schedule the facility in order to accommodate a payment schedule that would be in line with the 3rd Plaintiff's cash flows. The 1st Defendant evaluated the application dated 10th January, 2012 and approved a 2nd facility of Kshs.7 million by making an offer dated 12th January, 2012. The 2nd facility was to be utilized in restructuring the 1st facility to accommodate a term of repayment in line with the 3rd Plaintiff's cash flows. It was to be repaid in 4 equal monthly installments of Kshs. 479,968/-. This facility was disbursed into loan account no.00100598753730 where Kshs. 6,020,642.15 was applied to offsetting the 1st facility and closing the loan account. It is worthy to note that this facility has never been serviced to date and stands outstanding at Kshs.10,084,480.91 as at 4th September, 2014 and continues to accrue principle interest as well as default interest. The suit property gives the Plaintiffs monthly rental income and who receive it as directors of a different company. The contention has not been denied by the plaintiffs.

[11] Further, the bank submitted that it was forced to advance a 3rd facility of Kshs. 3,030,000/- on 15th October, 2012 by a letter of offer to regularize a Bank Guarantee demand of even amount paid by the bank on behalf of the Plaintiffs. The facility was disbursed into loan account no.0010599840626 on 26th October, 2012 and the Plaintiff has again never made a single repayment towards the facility which is outstanding at Kshs. 4,211,328/- as at 4th September, 2014. Needless to say that, from the above facts the 1st Defendant has been gracious enough considering the persistent default in servicing the loans by the Plaintiffs. The 1st Defendant has accorded the Plaintiff enough and ample time to redeem the suit property but the same has never materialized.

[12] The 1st Defendant issued the requisite notices together with the notice to sell demanding that the Plaintiff regularize the accounts to no avail. Subsequently, the 1st Defendant issued instructions to the 2nd Defendant requiring them to issue the relevant notices and complete the sale of the property by Public auction leading to the instant application. All notices were procedurally sent and proof of posting annexed in the Replying Affidavit of Charles Waweru, the Credit Manager of the 1st Defendant's Fourways Branch. According to the Respondent the requisite Statutory Notices/Notification of Sale were sent through registered post to the Plaintiff and third parties pertaining and with interest in the suit premises. The registered post and the certificates are produced as annexures 14 and 15 in the Replying Affidavit. The suit premises comprises in rental premises and houses a school namely Roselyn Academy whose proprietors are the 1st and 2nd Plaintiffs. The 1st and 2nd Plaintiffs were issued with statutory notices as per the provisions of Section 96 of the Land Act. It would be a fallacy for the Plaintiffs to claim that the third parties were not served while all along they are the third parties.

[13] They relied on the case of ***Kisima Holdings Limited Vs. Fidelity Bank Limited [2013]eKLR*** *where Judge J.B Havelock in his ruling at page 18 of 18 states,*

"…..I appreciate that the plaintiffs are separate legal entities but in my opinion, the 1st plaintiff must be aware of the defaults of the 2nd Plaintiff and has not been open and straightforward with the court as regards thereto…."

This was stated in the context that the 1st Plaintiff was known to the 2nd Plaintiff owing to the fact that the 1st Plaintiff and 2nd Plaintiff both had the same directors.

[14] The Respondent also responded to the claim that they loaded the Plaintiffs' loan accounts with debts owing to a third party. At paragraph 25 of the Replying Affidavit of Charles Waweru on behalf of the 1st Defendant, it is sworn that the loan amounts were indeed disbursed to the 3rd Plaintiff's loan account and the disparity in the account names resulted from the fact that the 3rd Plaintiff and Rosana Tours and Travel Limited had the exact same Directors. The mistake was caused by system incapacity to differentiate the said accounts. The said incapacity has since been dealt with by a system upgrade by the 1st Defendant. The mistake was rectified and duly explained to the Plaintiffs who raised no objection on the same until action for recovery of the outstanding amount began. Given all the above, the Respondent submitted that the Applicants have not satisfied the test in ***Giella V. Cassman Brown*** *and have not raised a prima case in the sense of the law and as stated by Bosire JA in the Mrao Case; must show an infringement of a right, and the probability of the applicant's case upon trial. The Plaintiffs owe the 1st Defendant except they do not intend to discharge their contractual obligations to repay the loan. The Plaintiffs are only seek injunctive orders on procedural technicalities that are remedied perfectly by the 1st and 2nd Defendants conduct as regards the issuance of statutory notices. Obviously, the 1st Defendants right to exercise its statutory power of sale had arisen. The Plaintiffs seek to postpone the inevitable. See the finding in the Ruling by Judge J.B Havelock in* ***Patrick Waweru Mwangi & Another V. Housing Finance Company of Kenya Limited [2013] eKLR*** *when he stated that:-*

"an injunction is an equitable remedy. He that comes to equity must come with clean hands and must also do equity. The conduct of the Plaintiff in this case betrays him. He admitted in this court, quite frankly, that since leaving employment of the bank four years ago, he has never paid a cent towards redemption of the loan. He admits that he is in default, and yet he is also in possession. He can't have it both ways. Either he pays the loan, or allows the bank to realize its security. He who comes to equity must fulfil all or substantially all his outstanding obligations before insisting his rights. The plaintiff has not done that. Consequently, he has not done equity. In the hands of the Plaintiff, a permanent injunction would wreak havoc to the first defendant, and that would be unequitable. While charges are enjoined by law to follow the laid down procedures for the realization of their security, the courts must not at the same time be converted into a haven of refuge by defaulters. Even lenders and charges have their own rights".

[15] The Respondents urged the court to consider that the Plaintiffs are in default and in possession of the charged property. They have not paid up a cent to the 1st Defendant in almost three years. The same has been affirmed by the Plaintiffs and it is time that the 1st Defendant duly exercised its equitable rights. The court should dismiss the application herein with costs to the defendants.

THE DETERMINATION

[16] This is an application for injunction I need not re-invent the wheel except to state that a court in granting an injunction should consider the traditional principles set out in the case of Giella vs Cassman Brown but as they have developed to greater levels of refinement within the principles of justice enshrined in the Constitution. The major issues which seem to emerge are:

a) Whether the statutory notices herein were served in accordance with the law;

b) Whether the Defendant loaded the Plaintiffs accounts with debts of a third party;

c) Whether the conduct of the Plaintiffs is one which does not meet the approval of equity.

[17] I will combine issue (b) and (c). I will start with the two for the simple reason that they are straight forward. The Plaintiffs do not deny they owe the 1st Plaintiff except that the account of

the 3rd Defendant was loaded with a foreign debt owed by a third party called Rosana Safaris Tour & Travel Ltd. The allegation is startling and is being made with only one aim; to get an injunction by hook or crook. I say this well aware that the two companies are distinct from each other and also from those who compose it. It is quite last issue. My reasons are; a) the 1st and 2nd Plaintiffs are directors of the two companies; b) the two companies obtained loan facilities from the 1st Defendant; c) the 1st and 2nd Plaintiffs secured the loans to the two companies on the strength of the suit property and executed their personal guarantees for those loans. Again, the 1st Defendant has averred that the error which had been caused by system incapacity to differentiate the account and client's ID number had been rectified and explained to the Plaintiffs. And the Plaintiffs were supplied with statements of accounts after the rectification of the error which showed their total indebtedness to the 1st Defendant. The Plaintiffs have not told the court that it had paid any money for the last three years; it does not also state or show it has paid in full the loan the 3rd Plaintiff was advanced. In the circumstances, there is nothing which prevents the court from believing the 1st Defendant that the Plaintiffs have never paid a single cent for the last three years. In addition, the 1st and 2nd Plaintiffs are in possession of and receiving rental income and other incomes from the suit property. These things impel me to pay attention as a court to the legal theme coming out of the remarks by Havelock J made in the case of ***Patrick Waweru Mwangi & Another V. Housing Finance Company of Kenya Limited [2013] eKLR*** *that:-*

"an injunction is an equitable remedy. He that comes to equity must come with clean hands and must also do equity. The conduct of the Plaintiff in this case betrays him. He admitted in this court, quite frankly, that since leaving employment of the bank four years ago, he has never paid a cent towards redemption of the loan. He admits that he is in default, and yet he is also in possession. He can't have it both ways. Either he pays the loan, or allows the bank to realize its security. He who comes to equity must fulfil all or substantially all his outstanding obligations before insisting his rights. The plaintiff has not done that. Consequently, he has not done equity. In the hands of the Plaintiff, a permanent injunction would wreak havoc to the first defendant, and that would be unequitable. While charges are enjoined by law to follow the laid down procedures for the realization of their security, the courts must not at the same time be converted into a haven of refuge by defaulters. Even lenders and charges have their own rights".

[18] The foregoing notwithstanding, I will determine the other issue; whether the statutory notices issued herein were properly served as to support the exercise of chargee's power of sale. The affidavit of Charles Waweru has annexed the Statutory Notice dated 17th June 2011, a Demand Notice under section 90 of the Land Act dated 17th September 2013, Redemption Notice dated 25th June 2014 and Affidavit of Service of the Redemption Notice sworn on 30th June 2014. The Statutory Notice is registered to P.O. BOX 3969-00506, NAIROBI-which is the address used by the Plaintiffs in the Charge herein. The Plaintiffs seem to have been aware all through of the intention to sell the suit property and had been engaged in some negotiations on the restructuring of the debt. But, although the Plaintiffs have averred under oath that they are able and willing to pay the debt herein as long as they are given the proper accounts, their conduct is the opposite. They know the 3rd Plaintiff is indebted to the 1st Defendant but as guarantors, they have not made any effort to have the debt repaid. They are also the directors of the 3rd Defendant and as such directors, they have not caused any repayment of the debt for the last three years despite the fact that the 3rd Plaintiff is in possession of the suit property which is yielding monthly rental and other income. The Plaintiffs are just persons who take a loan from a bank without the intention of repaying. They have laid a lot of emphasis on lack of Certificate of Posting, but evidence show they were in constant talk with the 1st Defendant over the debt and the default. Letters of default were written and the Plaintiffs acknowledged the debt except they wanted a restructuring. The 1st and 2nd Defendants are the Chargors too and proprietors of the school situated in the suit property, and service on them is sufficient. The Plaintiffs have not shown there were other parties occupying or with an interest in the suit property who by law should have been but were not served with the requisite notices. There is a case made out that the Plaintiffs received the

statutory notice and the notifications of sale but want to feign ignorance in order to obtain an injunction and continue defaulting. The conduct of the Plaintiffs is such that it would not excite any love from equity. But, as I have always stated, the fundamental principle is to do justice in each case and follow a path which carries the least risk of injustice in cases of injunctive relief because the court may ultimately find that the injunction was not merited in the first place. See the opinion of Justice Hoffman in the English case of **Films Rover International (1986) 3 All ER 772 at page 780-781** on this approach in the grant of injunctive relief. The court is mindful there is a school on the suit premises and it would be prudent and in the interest of justice to delay the sale of the suit property d*espite the deplorable conduct of the Plaintiffs. The court also notes that the Plaintiffs have averred under oath that they are willing to repay the debt. Now therefore, on those considerations, I am persuaded to restrain the sale of the suit property for a period of three months only to enable the Plaintiffs pay off the debt herein. On expiry of the period of three months from today, the suit property shall be sold without any need to apply in that behalf. The Plaintiffs shall pay the costs of the application to the Respondents. It is so ordered.*

Dated, signed and delivered in court at Nairobi this 29th day of January 2015

F. GIKONYO

JUDGE