



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO 133 OF 2014.

JOHN DOMINIC OBEL.....1ST PLAINTIFF

ANNE ATIENO OBEL.....2ND PLAINTIFF

VERSUS

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

TIMELESS DOLPHIN AUCTIONEERS.....2ND DEFENDANT

RULING

Temporary injunction

[1] I should determine the Motion dated 7th April 2014 which is seeking an order of injunction to restrain the Defendants, by themselves or by their servants and or agents from selling, disposing of, transferring or causing to be transferred or interfering with the suit property known as ***L.R. NO KAJIADO/KAPUTIEI NORTH/5334***. The application is supported by the affidavits sworn by the Applicants on 7th April 2014.

Brief background

[2] On or around the 17th of January, 2013 the 1st Defendant granted a financial facility to the 1st Plaintiff, trading as Geomatics Services – through a Letter of Offer of the same date. The terms of the facility included the following:

- i. That the 1st Defendant would extend a solid Loop facility of Kshs. 8,000,000 (Eight Million Shillings) to be repaid within a period of sixty (60) days.
- ii. The said facility was to be secured inter alia by:-
 - (a) A first legal charge of Kshs. 5,000,000/= obtained over property title LR NO. KAJIADO/KAPUTIEI NORTH/5334 registered in the name of John Dominic Obel (held).
 - (b) Lien over Fixed Deposit Rate of Three Million (Kshs. 3,000,000/=) in the name of Geomatics

Services.

(c) Personal guarantee of Eight Million Shillings (Kshs. 8,000,000/=) from John Dominic Obel being the registered property owner.

[3] The 1st Plaintiff defaulted and the 1st Respondent issued the 1st Plaintiff with a Statutory Notice dated the 8th of August 2013. The said Notice was received on the 14th of August 2013 although it referred to a Title KAJIADO/KAPUTIEI – NORTH/113 as the property owned or been linked with the Plaintiffs. The 2nd Plaintiff who claims to be a co-owner and spouse off the 1st Plaintiff claims she was not served with the said Notice of sale of the charged property. A Notification of Sale and Redemption Notice dated 28th January, 2014 were subsequently issued by the 2nd Defendant on behalf of the 1st Defendant. The Plaintiffs claim, the Notification of Sale and Redemption Notice was served on the 1st Plaintiff but not on the 2nd Plaintiff. The Plaintiffs then filed this application after efforts to settle the matter failed.

The Applicants gravamen

[4] The Applicants allege that all parties expressly understood, agreed to and noted in the letter of offer that the purpose of the facility was to enable Geomatics Services to service a contract with the Ministry of Local Government through the Centre for Urban and Regional Planning. Geomatics Services had been engaged to provide consultancy services for topographical mapping and preparation of Integrated Strategic Urban development for the Ministry of Local Government. Despite the said contract of service being duly and competently carried out and all necessary approvals and directions for payment to be made to Geomatics having been given, there were delays in payments that persist up to now. As such Geomatics Services was unable to immediately pay outstanding amounts under the facility. They admit the Statutory Notice as well as the Notification of sale and Redemption Notice were issued and served upon the 1st Plaintiff but not upon the 2nd Plaintiff who is a spouse of and a co-owner with the 1st Plaintiff of the suit property. they also averred that the Statutory Notice dated the 8th of August 2013 referred to a Title KAJIADO/KAPUTIEI – NORTH/113 as the property owned or been linked with the Plaintiffs.

[5] The 1st Plaintiff contended that he approached the 1st Defendant to explain the cause of delay, particularly the non-payment by the relevant authorities to Geomatics Services and after a discussion with the Manager of the 1st Defendant on 5th of February, 2014 it was agreed as follows:

- 1) Consolidated Bank to liquidate Geomatics Services fixed account amount of Kshs. 3,000,000/=.
- 2) Geomatics to provide a letter from its clients confirming that it had not been paid since June 2013 and that arrangements were in hand to pay.
- 3) Geomatics to provide account statements for the last 6 months from its other bank.
- 4) Monthly repayment amount towards the loan balance be proposed.

[6] The 1st Plaintiff agreed with the said terms and proposed monthly installments of Kshs. 50,000/= . And the 1st Respondent through its letter of 18th March, 2014 confirmed that it had liquidated the fixed deposit account and credited an amount of **Kshs. 3,074,369.45** into the loan account on 24th February, 2014. It also confirmed that it had received the relevant bank statements. Further, the 1st Respondent revised the proposed monthly installments from Kshs. 50,000 to 100,000/= and insisted that it be paid in order to stop the intended auction. The 1st Plaintiff therefore deposited Kshs. 100,000/= with the 1st Defendant within a week of the 1st Respondent's letter of 18th March 2014. However, the 2nd Defendant, on instructions from the 1st Defendant, did proceed to advertise for public auction in the Daily Nation Newspaper of 24th March 2014, the subject property **i.e. L.R. NO KAJIADO/KAPUTIEI NORTH/5334 Hills View Estate.**

[7] According to the Plaintiffs contend that the suit property is a matrimonial home and failure to serve the Notices on the 2nd Plaintiff, who is the spouse and co-owner with the 1st Plaintiff of the suit property is a breach of Section 96 (2) and (3) of the Land Act, 2012 which provides inter alia as follows:

(2) 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.

(3) A copy of the notice to sell served in accordance with subsection (2) shall be served on;-

(a) the Commission, if the charged land is public land;

(b) the 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 the consent;

(e) any lessee and sublessee of the charged land or of any buildings on the charged land;

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

(g) any other chargee of money secured by a charge

[8] The Defendants in the Replying Affidavit do not expressly claim or confirm to have served her nor provided proof of such service on the 2nd Plaintiff who stands to lose her matrimonial property of which she is a proprietor without notice. They relied on the case of ***Pamela Imbuka Njaro & another v Joseph Vutita Njaro & 2 others [2014] eKLR*** which emphasized the importance of Section 96 of the Land Act and the mandatory requirement of the notice to be served on the spouse of the chargor, if that spouse has given consent and on any co-owner of the charged property. in the absence of proof of service of a copy of the Notice on the Spouse who had given consent, and who is a co-owner of the suit property and uses the land, the intended sale is vitiated. On that basis, the Applicants beseech the court to allow their application.

[9] They also relied on estoppel based on the agreement made on 5th of February, 2014 between the 1st Plaintiff and the 1st Defendant which recognized the difficulties faced by the 1st Plaintiff. Accordingly, the action by the Defendants to advertise sale of the suit property by public auction in the Daily Nation Newspaper of 24th March 2014 was contrary to the said agreement and they should be estopped. The Plaintiff contends that agreement of 5th February 2014 subsists and is a revision of the terms of the facility and charge and the 1st Defendant is barred from acting on the basis of the previous terms. To his great detriment, the 1st Plaintiff had turned his attentions and effort to the payment of monthly installments as agreed. They relied on the case of ***Doge v Kenya Cannery Ltd [1988]KLR*** wherein it was stated:

“The ratio of all these cases simply is this – and this is what I say:

“If a party is made so to believe in a certain state of facts and that party acts on those facts, to his detriment, and the other party stands by and does not stop him from so acting, that other party is estopped from changing his stand...”

It was further stated:

“On this particular I would conclude by adopting and reiterating words of Denning LJ when he put it in the way the ordinary man understands and I quote:

“it is a principle of justice and equity. It comes to this: when a man by his words or conduct, has

led another to believe that he may safely act on the faith of them – and the other does act on them – he will not be allowed to go back on what he has said or done when it would be unjust or inequitable for him to do so”.

The Defendants supported their actions

[10] The Defendants filed a Replying Affidavit sworn by Simon Githui on 29th May 2014 and elaborate submissions in opposition to the Motion Dated 7th April 2014. They confirmed that they agreed to and advanced a solid loan facility of Kshs. 8,000,000.00/= to the 1st Plaintiff to enable him service a contract with the Ministry of Local Government. The loan was repayable within a period of 90 days. But the 1st Plaintiff failed to repay and approached the bank for an extension of the repayment period. The bank was considerate enough and extended the repayment period by 60 days on 17th January, 2013. The 1st Plaintiff still failed to repay and on 20th May 2013, the bank extended the repayment period by a further 60 days on humanitarian grounds. When the 1st Plaintiff failed to repay after this extension, the bank proceeded to issue statutory notices to realize the suit property. The statutory Notices were sent via registered post to the Plaintiffs common postal address. At this point in time, the outstanding loan amount was Kshs. 8,730,202.85. Shortly after the notices were sent, the 1st Plaintiff approached the bank to try and negotiate a payment plan. This means that the notices were actually received by the Plaintiffs. Despite the notices, the Plaintiffs failed to redeem their property and thus the bank instructed the 2nd Defendant to sell the suit property by public auction. The 1st Plaintiff approached the bank with an offer to repay the loan in monthly payments of Kshs. 100,000.00. This was not acceptable to the bank as it would take him about 30 years to clear the loan plus interest, which the bank did not consider viable since the loan was supposed to be a short term facility.

[11] On 23rd June 2014, the 1st Plaintiff and his Advocate met with representatives of the 1st Defendant and their Advocates to try and resolve the matter. It was agreed that they would consult and get back to the 1st Defendants before the matter was mentioned in court next. To this day, the Plaintiffs have not communicated to the Defendants despite numerous attempts by the Plaintiff to settle the matter out of court. The Plaintiffs have made no payment since May 2014. The Respondent is, therefore, of the opinion that the Plaintiffs are not interested with settling this dispute or proceeding with the matter. They are only interested with the interim orders given on 10th April 2014.

[12] According to the Plaintiffs, the Statutory Notices were properly served and are thus valid. The 1st Plaintiff approached the bank immediately after receiving the Statutory Notices to negotiate an agreement. However, if the court is inclined to agree with the Plaintiffs on this point, it should not stop the Defendants from issuing fresh Statutory Notices with regard to the suit property. They cited the decision by Mary Kasango (J) in the case of ***Act Fast Security Limited vs. Equity Bank Limited (2014) eKLR*** which cited the decision of the Court of Appeal in the case of ***National Bank Of Kenya Ltd vs. Shimmers Plaza Ltd [2009] eKLR***. They also cited the case of ***Palmy Company Limited v Consolidated Bank of Kenya Limited (2014) eKLR, (Gikonyo (J))***.

[13] The Defendants decried that pegging the repayment of the loan advanced to the Plaintiffs to the government's payment for services rendered by the Plaintiffs would be unfair to the Defendants. The Plaintiffs have shown no evidence that the Ministry of Local Government will make payments for the services rendered. Thus, the Defendants should not be the victim of a contract of which they were not privy to. The application should be dismissed.

THE DETERMINATION

Issues

[14] The issue here is whether the Statutory Notice, the Notification of Sale and Redemption Notice were issued and served upon the 2nd Plaintiff- a spouse who had given consent as well the co-owner of the suit property. Eventually, and depending on my findings of the above issue, I should determine

whether an injunction should issue and the duration of such injunction or conditions I to attach to the injunction. I have considered all the affidavit evidence, the documents presented and submissions of parties. I take the following view of this matter.

[15] I have perused the entire file and I see a Statutory Notice dated 8th August, 2013 addressed to the 1st Plaintiff. He does not deny he received it. I also see a 45 Days Redemption Notice under rule 15(d) of the Auctioneers Rules, 1997 and Notification of Sale under the Schedule to the Auctioneers Rules, 1997 both dated 28th January, 2014. The said Notices were served on the 1st Plaintiff. There is no evidence that any or all of the above Notices or copies thereof was served on the 2nd Plaintiff. And although there is no title document which was produced in court, all the Notices herein and the Schedule of Property produced herein show that the registered owners of the suit property are the 1st and 2nd Plaintiffs. That issue is not in controversy, at least from the material before me. Similarly, although also, the charge or necessary supporting documents have not been produced, there is no reason to doubt the averments by the Plaintiffs that 2nd Plaintiff is a spouse who had given consent to the creation of the charge on the suit property. That fact has not been controverted or put into controversy by the 1st Defendant. Therefore, as such spouse and co-owner, the 2nd Plaintiff was entitled to all the notices required to be issued under the Land Act as well as the Auctioneers Act. Notices herein were issued to and served on the 1st Plaintiff. There is no evidence to show that the 2nd Plaintiff was served with a copy of the requisite notices under sections 90, 92 and 96 of the Land Act or under the Auctioneers Act. Much emphasis was laid on Section 96 (2) and (3) of the Land Act, 2012 but I have not even seen a Notice under the said section. The section provides inter alia as follows:

(2) 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.

(3) A copy of the notice to sell served in accordance with subsection (2) shall be served on;-

(a) the Commission, if the charged land is public land;

(b) the 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 the consent;

(e) any lessee and sublessee of the charged land or of any buildings on the charged land;

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

(g) any other chargee of money secured by a charge

[16] In furtherance of jurisprudence which is coming through from the courts, I should say something about the Notice under section 96 of the Land Act and the ones required under rule 15(d) of the Auctioneers Act. The court has said in other decisions including **Palmy Company Limited v Consolidated Bank of Kenya Limited (2014) eKLR** that the notice under section 96 of the Land Act is a mandatory pre-requisite before a Chargee exercises its Statutory Power of Sale. The said notice is different from the Redemption Notice under rule 15(d) of the Auctioneers Rules, 1997. Whereas, the Redemption Notice and Notification of Sale under the Auctioneers Act, Cap 526 of the Laws of Kenya is a general and mandatory pre-requisite applicable in all cases where immovable property is to be sold following warrant in execution of a decree or on a letter of instructions from any person, including Chargee; the Notice under section 96 of the Land Act is yet another deliberate statutory protection of the equity of redemption guaranteed under section 89 of the Land Act. The Redemption Notice and the Notification of Sale under rule 15(d) of the Auctioneers Rules, 1997, is not, therefore, the notice envisaged under section 96 of the Land Act but, it only becomes a necessary adjunct to and must be

issued as part of the exercise of the Chargee's Statutory Power of Sale simply by virtue of the fact that sale by public auction-including charged property- is governed by the Auctioneers Act. However, it must be noted that the exercise of the Chargee's Statutory Power of Sale has to lawfully accrue before the Auctioneers Act is called into play; that is to say, the Chargee must comply with the law and issue all the necessary notices under the Land Act including the one under section 96. For Completeness of this discourse see Rule 15 of the Auctioneer's Rules, 1997 which provides as follows:

“15. Immovable property

Upon receipt of a court warrant or letter of instruction the auctioneer shall in the case of immovable property –

a) Record the court warrant or letter of instruction in the register.

b) Prepare a notification of sale in the form prescribed in Sale form 4 set out in the Second Schedule indicating the value of each property to be sold

c) Locate the property and serve the notification of sale of the property on the registered owner or an adult member of his family residing or working with him or where a person refuses to sign such notification, the auctioneer shall sign a certificate to that effect;

d) Give in writing to the owner of the property a notice of not less than forty-five days within which the owner may redeem the property by payment of the amount set forth in the court warrant or letter of instruction; and

e) On expiry of the period of notice without payment arrange sale of the property not earlier than fourteen days after the first newspaper advertisement.

[17] From the above analysis, it is clear the direction the court is taking. However, I must admit and agree with the Defendants that they should not be subjected to the mercy of fulfillment of the contract between Geomatics Services and the Government. There has been no assignment of the debt from the government to the 1st Defendant. One more thing; I agree with the defendants that where an injunction is granted on the basis of lack of statutory notices or insufficient or invalid statutory notices, the court should grant injunction to restrain sale of the suit property based on the impugned notices, without prejudicing the right of the Chargee to issue proper notice in law and sell the property thereafter. On this subject, I am content to cite the decision by Mary Kasango (J) in the case of *Act Fast Security Limited vs. Equity Bank Limited (2014) eKLR* who stated that;

‘Having found that the Defendant failed to give Statutory Notices as required under the Land Act I am of the view that an injunction to be issued can only be a limited injunction restraining the Defendant from selling the charged property on the strength of the Notices thus far issued. In this regard I am well guided by the case; NATIONAL BANK OF KENYA LTD –Vs- SHIMMERS PLAZA LTD [2009]eKLR where the Court of Appeal stated-

“The duration of an order of injunction is at the sole discretion of the trial Judge and depends on the circumstances of each case. In this case, the duration of the injunction until the determination of the suit frustrated the statutory right of the bank to realize the security upon giving a notice which complies with the law, we venture to say that where the Court is inclined to grant an interlocutory order restraining a mortgagee from exercising its statutory power of sale SOLELY on the ground that the mortgagee has not issued a valid notice then the order of injunction should be limited in duration until such time as the mortgagee shall give a fresh statutory notice in compliance with the law.”

And also a work of this court in the case of *Palmy Company Limited v Consolidated Bank of Kenya Limited (2014) eKLR, Gikonyo (J)* that;

“The Notification of sale issued on 25th September, 2013 by the Defendant is in contravention of the law for it was based on no instructions in the strict sense of the law. The Defendant and the auctioneer herein are, therefore, restrained from proceeding on the said Notification of Sale to sell the suit premises. However, as the Statutory Notice is not impugned, the Defendant may issue a proper Notice to sell the charged property under section 96(2) of the Land Act, and may proceed thereafter to realize the security as provided in law and the charge.”

[18] The upshot is that I allow the application dated 7th April 2014 except the injunction will subsist for only six months or until the 1st Defendant has issued proper notices required under and in accordance with the law, whichever is earlier. It is so ordered.

Dated, signed and delivered in court at Nairobi this 28th day of January 2015

F. GIKONYO

JUDGE