REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

ELC CASE NO. 163 OF 2014

PAUL GICHIMU WAWERU ……...…….. PLAINTIFF/APPLICANT

VERSUS

EQUITY BANK OF KENYA LTD ……..……. DEFENDANT/RESPONDENT

RULING

This is in respect to the plaintiff/applicant's Notice of Motion filed herein on 29th May 2014 seeking the substantive order that the defendant, its agents or employees be restrained from disposing alienating, selling by public auction or in any way interfering with L.R No. KIINE/RUKANGA/1989 and KIINE/RUKANGA/1633 until this suit is heard and determined. The said application which is premised upon ***Order 40 Rule 1 (a), (b) 4 (1) and (2) of the Civil Procedure Rules 2010*** and ***Section 90 of the Land Act 2012*** is supported by the plaintiff/applicant's affidavit in which he has deponed, inter alia, that he is a director of the Mark Five Farm Fresh Ltd which was advanced a loan of Ksh. 17,200,000/= by the defendant/respondent secured on property No. L.R KIINE/RUKANGA/1989, 1633 and 1583 which were all registered in his names. That in April 2014, he sold KIINE/RUKANGA/1583 to one Bernard Mwaura Wathome and the entire proceeds of Ksh. 3,000,000 went towards the re-payment of the loan. Even after he had paid that sum, he was informed that the loan outstanding together with interest was Ksh. 17,222,395.45/= yet the defendant/respondent is not giving him the loan tabulations. He was also never served with any statutory notice until he saw his properties advertised for sale by Antique Auction Agencies. That the defendant/respondent has also not complied with ***Sections 90 and 97 of the Land Act*** and it is not possible that the outstanding loan is Ksh. 17,222,395.45/= which is in excess of what was borrowed.

On behalf of the defendant/respondent, JANET MUTHEE who is its Assistant Manager, Debt Recovery Unit, swore a replying affidavit in which she deponed, inter alia, that on or about 7th January 2012 the plaintiff/applicant and his wife as directors of Mark Five Farm Fresh Ltd approached the defendant/respondent for a loan of Ksh. 17,200,000/= which was secured by a charge over title No. KIINE/RUKANGA/1989. On 17th February 2014, the defendant/respondent sought to protect its interest better and the security was amended as follows:-

1. ***Personal guarantee by the plaintiff/applicant supported by first legal charge in favour of the defendant/respondent over property No. KIINE/RUKANGA/1989 to be registered and stamped to cover an aggregate of Ksh. 1,400,000/=***
2. ***Personal guarantee by the plaintiff/applicant supported by first legal charge in favour of the defendant/respondent over property No. KIINE/RUKANGA/1583 to be registered and stamped to cover an aggregate of Ksh. 1,700,000/=***
3. ***Personal guarantee by the plaintiff/applicant supported by first legal charge in favour of the defendant/respondent over property No. KIINE/RUKANGA/1633 to be registered and stamped***

to cover an aggregate of Ksh. 1,700,000/=

4. ***Director's personal guarantee and indemnity of Ksh. 17,200.000/= to be executed.***

The loan was to be repaid in 120 monthly installments comprising of both principal and interest in the sum of Ksh. 391,288/=. The loan agreement was duly executed together with the personal guarantee. However, there was a default in the repayment and on 8th May 2013, the borrower was advised to redeem the loan amount in three (3) months which at that time was Ksh. 15,614,183.45/=. On 7th October 2013 the plaintiff/applicant was informed of the intended sale of KIINE/RUKANGA/1989 and given three (3) months notice to redeem the loan as required by ***Section 90 of the Land Act.*** The loan was then Ksh. 15,981,162.45/= and the plaintiff/applicant was notified and he cannot now be heard to say that he was not informed.

On 9th January 2014, the statutory notice that had been issued having lapsed and the loan amount remaining un-paid, the defendant/respondent wrote to Danco Limited Valuers to prepare valuation reports on properties No. KIINE/RUKANGA/1583. KIINE/RUKANGA/1633 and KIINE/RUKANGA/1989 which was done and on or about 12th March 2014, the defendant/respondent wrote to Antique Auctions to proceed and dispose of the said properties. Antique Auctions gave the borrower 45 days notice to redeem the properties. On 31st March 2014, there was an offer by one Bernard Mwaura Wathome to purchase title No. KIINE/RUKANGA/1583 which the defendant/respondent consented to on condition that the proceeds of the same being Ksh. 3,000,000/= would be paid towards the satisfaction of the loan. On 29th May 2014, the advocate of Bernard Mwaura Wathome informed the defendant/respondent that title No. KIINE/RUKANGA/1583 appeared among the properties advertised for sale by Antique Auctions but were informed that the same would not be sold and therefore the plaintiff/applicant cannot rely on that erroneous listing of title No. KIINE/RUKANGA/1583 as a ground for stopping the intended auction and that matter has already been sorted out between the defendant/applicant and the advocate for Bernard Mwaura Wathome. That as at 4th June 2014, the amount outstanding was Ksh. 14,820,495.45/= which continues to attract interest and the plaintiff/applicant was served with the requisite notices. Further, that the plaintiff/applicant has not made a full and frank disclosure and has not demonstrated a prima facie case to warrant the intervention of this Court.

Counsels for both parties did file written submissions which I have considered together with the application, the rival affidavits and relevant annmexutes.

Being an application for injunction, it has to be considered in light of the principles set out in the case of ***GIELLA VS CASSMAN BROWN & CO. LTD 1973 E.A 358*** which are:-

1. ***First, the applicant must show a prima facie case with a probability of success***
2. ***Secondly an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which cannot adequately be compensated by an award of damages***
3. ***If in doubt, the application will be determined on a balance of convenience***

From his supporting affidavit, it is clear that the plaintiff/applicant's indebtedness to the defendant/respondent is not in dispute. What the plaintiff/applicant seems to be disputing is the amount due and he complains in paragraph 9 of the said affidavit that he has been making enquiries about the tabulations without success.

There is however evidence that statements relating to the loan were sent to the borrower at their known address and there is nothing on record to suggest that the address was wrong –see annexture JM 2. That statement is a sufficient tabulation of the position of the loan and the interest charged thereon. It is not clear what other tabulation the plaintiff/applicant required. From the letter of offer which the plaintiff/applicant executed before Nyagah Alice Gacheri advocate, it is clearly indicated that additional interest would be charged where there was a default under the facility. When the plaintiff/applicant defaulted on servicing the facility, that additional interest became payable in terms of the agreement. It is clear from clauses 4 and 5 of the agreement that the loan would attract interest at 25% per annum plus

another 6% if the loan was not paid on its due date. The Court cannot re-write an agreement for the parties and as default is not in dispute, the interest charged was in accordance with the agreement.

With regard to the issue that the defendant/respondent was demanding Ksh. 17,222,395.45/= even after the plaintiff/applicant had paid Ksh. 3,000,000/= following the sale of L.R. No. KIINE/RUKANGA/1583, it is clear from the replying affidavit of JANET MUTHEE and the annextures thereto that the notice demanding Ksh. 17,222,395.45 was issued on 14th March 2014 and the Ksh. 3,000,000/= was received in April 2014 after the notice had been issued. indeed the statement for the loan for the period 28th November 2013 to 23rd May 2014 (**Annexture**

JM- 22) shows that the borrower's loan account was credited with a sum of Ksh. 3,000,000/= on 12th April 2014 and that as at 23rd May 2014, the balance due was Ksh. 14,820,495.45/=. It is instructive to note that during the period 28th November 2013 to 23rd May 2014 (a period of some six (6)months), that account was only credited with the Ksh. 3,000,000/= thus demonstrating the further default by the borrower.

On the complaint that the defendant/respondent also advertised L.R No. KIINE/RUKANGA/1583 which had already been sold to another person, the defendant/respondent has explained that that was done by error and the buyer's advocate (Magee wa Magee) were duly notified – see **Annexture JM – 21**. Nothing really turns on that.

The plaintiff/applicant has also deponed that the defendant/respondent did not comply with ***Sections 90 and 97 of the Land Act 2012*** with regard to Statutory Notice and Valuation of charged property.

Before charged property can be sold in an auction, two notices have to be issued being:-

a. ***A three (3) months notice under Section 90 of the Land Act and***
b. ***A fourty (40) day notice under Section 96 of the Land Act.***

The notice required under ***Section 90 (1) of the Land Act*** shall contain the following information:-

- ***The nature and extent of the default by the charger***
- ***If the default consists of the non-payment of any money 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, the thing that the charger must do or resist from doing so as to rectify the default also the time being not less than two months***
- ***The consequences that in default, the chargee will proceed to exercise any of the remedies referred to in the section***
- ***The right of the chargor to apply to the Court for relief against those remedies***
- ***If the chargor does not comply, the charge may institute several remedies including selling the charged land.***

From the documents herein, a three months notice was issued to the plaintiff/applicant on 7th October 2013 – see ***Annexture JM -10***. The same is in compliance with Section ***90 of the Land Act 2012*** and is addressed to the plaintiff/applicant. Another notice dated 18th March 2014 was also issued by Ms Purple Auctioneers under ***Section 96 of the Land Act*** giving the borrower 45 days within which to pay the outstanding sum. Receipts of those notices is not disputed. Indeed the notice dated 18th March 2014 is among the plaintiff/applicant's own annextures in support of this application.

With regard to valuation of the charged property, there is a valuation report dated 16th January 2014 from the firm of Danco Limited with respect to the charged property being L.R No. KIINE/RUKANGA/1989. It is a comprehensive twenty (20) page document including the developments on the land – see **Annexture JM – 14.**

It is clear from all the above that not only was there a default on the part of the plaintiff/applicant, but also that there was full compliance with the law on the part of the defendant/respondent before the charged property was advertised for sale. Clearly, the plaintiff/applicant has not established the existence of a prima facie case which was defined in ***MRAO VS FIRST AMERICAN BANK OF KENYA LTD & TWO OTHERS 2003 K.L.R 125*** as follows:-

> "***A prima facie case in a civil application includes but is 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 that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter'***

From the circumstances of this case, the plaintiff/applicant has not established that he has a prima facie case with a probability of success which is the first hurdle that he had to surmount as per the ***GIELLA*** case (supra). On that basis alone, the application must fail.

Even if this Court were to consider the second principle in the ***GIELLA*** case (supra), it is clear that even if an injunction is not granted, damages would be an adequate remedy should the trial Court eventually find in favour of the plaintiff/applicant. Once a property is given as security, the same becomes a commodity subject to a sale and whose value can be ascertained and therefore, any loss suffered by the plaintiff/applicant upon the sale of the property is remediable by an award of damages. Indeed nowhere in his 26 paragraph supporting affidavit has the plaintiff/applicant deponed that he would suffer irreparable loss if the injunction is not granted. In any case, ***Section 99 (4) of the Land Act 2012*** reads as follows:-

> ***"A person prejudiced by un-authorized, improper or irregular exercise of the power of sale shall have a remedy in damages against the person exercising that power".***

Therefore, any loss that may be occasioned to the plaintiff/applicant as a result of the defendant/respondent's exercise of its statutory power of sale can adequately be compensated by an award of damages. It is also clear in my mind that the defendant/respondent is capable of making such compensation and it has not been suggested otherwise.

Finally, the remedy of injunction being an equitable remedy may be denied if the Court is of the view that the applicant is not deserving of the same. That may be the case where, for instance, the applicant has not approached the Court with clean hands. In this case, the plaintiff/applicant is clearly in default and apart from the Ksh. 3,000,000/= realized from the sale of L.R No. KIINE/RUKANGA/1583 and for which credit has been given leaving a balance of Ksh. 14,820,499.45/= as at 23rd May 2014 (see **Annexture JM – 22**), he has not placed before me evidence of the "***other payments"*** that he has deponed in paragraph 17 of his supporting affidavit. Having failed to keep his part of the contract, he cannot be deserving of the remedy that he now seeks. In ***WASHINGTON OKEYO VS KENYA BREWERIES LTD & ANOTHER C.A CIVIL CASE NO. 322 of 2000,*** the Court of Appeal made the following observations:-

> ***"It is trite law that a contracting party who fails to perform his part of the contract cannot obtain injunction to restrain a breach of covenant by the other party".***

Having considered all the matters herein, I find that the plaintiff/applicant's Notice of Motion filed herein on 29th May 2014 is devoid of merit. The same is accordingly dismissed with costs.

B.N. OLAO

JUDGE

26TH JANUARY, 2015

26/1/2015

Before

Hon. Justice R. Limo

CC – Mbogo

Wanjiru for Applicant – present

Respondent – absent

COURT: Ruling delivered in the presence of Wanjiru for the Applicant and in the absence of the Respondent.

R. LIMO

JUDGE

26TH JANUARY, 2015