



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
HIGH COURT CIVIL SUIT NO. 523 OF 2014

MOHAMED NOOR MOAW.....1ST PLAINTIFF/APPLICANT
AHMED GARAD WARDERE.....2ND PLAINTIFF/APPLICANT
BASHIR ABDI OSMAN.....3RD PLAINTIFF/APPLICANT
ALI JELLE ABDI.....4TH PLAINTIFF/APPLICANT
SAID BULE ABDI.....5TH PLAINTIFF/APPLICANT
LUL AHMED MOHAMED.....6TH PLAINTIFF/APPLICANT
UBAH ABDI YUSSUF.....7TH PLAINTIFF/APPLICANT
FATUMA MOHAMED ABDILLE.....8TH PLAINTIFF/APPLICANT

VERSUS

AL-JALAL ENTERPRISES LTD.....1ST DEFENDANT/RESPONDENT
GULF AFRICAN BANK LTD.....2ND DEFENDANT/RESPONDENT

RULING

INTRODUCTION

1. The **Notice of Motion** before the court is dated **12th November 2014**. It is filed under Section 1A, 1B, 3A, 63 (e) of the Civil Procedure Act, Order 40 Rule 2 (1) and 4 (1) Order 51 rule 1 of the Civil Procedure Rules, 2010 and all enabling provisions of law.
2. The application seeks the following orders:-
 1. *That this Honourable court be pleased to certify this application as urgent and heard ex-parte in the first instance.*
 2. *That this Honourable court be pleased to issue an order of temporary injunction prohibiting the Defendants or its agents from auctioning or in any other way dealing with LR No. 36/VII/1058 and LR No. 36/VII /1058 (IR No. 118910 and 11809 respectively) First Eastleigh Estate, commonly known as Sunrise Shopping Mall*

pending the hearing and final determination of this application inter-partes.

3. *That this Honourable court be pleased to issue an order of temporary injunction prohibiting the Defendant or its agents from auctioning or in any other way dealing with LR No. 36/VII/1058 and LR No. 36/VII /1058 (IR No. 118910 and 11809 respectively) First Eastleigh Estate, commonly known as Sunrise Shopping Mall pending the hearing and final determination of the suit herein.*
 4. *That this Honourable court be pleased to grant such or further orders as it deems fit.*
 5. *That costs of this application be provided for.*
3. The application is premised on the grounds set out therein and is supported by the affidavit of **Mohamed Nor Moaw** who is also the 1st Plaintiff. The said affidavit is filed in court on **13th November 2014**.
 4. The application is opposed only by the 2nd Defendant by a replying affidavit sworn by **Meimuna Abdullahi** dated **17th November 2014**. The 1st Defendant has not responded to the application.
 5. The brief history of the application is as follows. The 1st Defendant is the owner of the suit properties being LR No. 36/VII/1057 and LR No. 31/VII/1058 being the subdivision of original title IR No. 118910 and 11809 respectively located in First Eastleigh Estate Nairobi, on which property Sunrise Shopping Mall is erected (herewith called the '**suit property**'). The 1st Defendant charged the said suit property to the 2nd Defendant, to secure financial accommodation from the 2nd Defendant. In the cause of time the 1st Defendant defaulted in the repayment of the said financial accommodation pursuant to which default the 2nd Defendant sought to exercise its right of sale under the said charge. The 1st Defendant unsuccessfully challenged the 2nd Defendant right to sell the suit property in **HCCC No. 161 of 2014 Al-Jalal Enterprises Limited – Vs – Gulf Africa Bank Limited**. Pursuant to the 1st Defendant's failure to comply with a conditional Ruling of this court delivered on 17th October 2014, the 2nd Defendant advertised the suit property for sale. The Applicants being the 1st Defendant's tenants in the suit property, and being unhappy with the intended sale of the suit property, have now filed this application seeking orders of injunction to stop the said threatened sale which they say is in violation of their rights as tenants.

THE APPLICANT'S CASE AND SUBMISSIONS

6. Mr. Mirie for the Plaintiffs/Applicants submitted that there exists a landlord tenant relationship between the Plaintiffs and the 1st Defendant over the suit properties. The Plaintiffs have always diligently paid their rents and honoured other terms of the tenancy agreement. However, the Plaintiffs have learnt that the Defendants have without any notice to the Plaintiff put up the suit properties for sale by public auction on 17th November 2014 without taking into consideration the interest of the Plaintiff as lawful tenants. No notice has been given to the tenant under Section 96 of the Land Act, yet the 2nd Defendant has already instructed auctioneers to advertise for sale the suit properties. The Applicants now submit that unless the said sale by public auction is stopped they stand to suffer massive losses in business and they should therefore be protected by this court.

THE 2ND DEFENDANT'S CASE AND SUBMISSIONS

7. The 2nd Defendant states and submitted that there is no relationship whatsoever between the Plaintiffs and the 2nd Defendant. In any event, the Plaintiffs have not produced any scintilla of evidence to show that they are indeed tenants in the suit property. It was submitted for the 2nd Defendant that the Plaintiffs have failed to disclose the existence of HCCC No. 161 of 2014 Al-Jalal Enterprises Limited v. Gulf African Bank Limited where the Plaintiff in that suit, now the 1st Defendant herein, and where the Court found that the 1st Defendant herein is in default, has disobeyed various court orders and the 2nd Defendant's statutory power of sale has arisen. It was noted for record that the the Advocate who has sworn the Certificate of Urgency in this suit, James K. Mwangi, is the same Advocate who has been commissioning the 1st Defendant's affidavits in the said suit HCCC No. 161 of 2014 Al-Jalal Enterprises Limited v. Gulf African Bank Limited. It is therefore evident that the advocate and the Plaintiffs were at all times aware of the suit involving the Defendants herein and have never sought to be enjoined in the suit which is still

- pending. On this ground it was submitted that this suit is an abuse of the court process.
8. It was further submitted for the 2nd Defendant that the suit property has been advertised for sale in the daily newspapers for not less than three times and at no time did the Plaintiffs raise any objection to the intended sale. True copies of the newspaper advertisements are at page 39 to 40 of the exhibit. Therefore it was submitted, this suit by the alleged tenants is a veiled attempt by the 1st Defendant herein to frustrate the 2nd Defendant Bank from exercising its statutory power of sale using third parties. In the Ruling dated 17th October 2014 HCCC No. 161 of 2014 Al-Jalal Enterprises Limited v. Gulf African Bank Limited, the Court under what it referred to as “*principle of mercy*” stayed the sale of the suit property on the following conditions:
 - a. ***The Plaintiff/Applicant shall within 10 days from the date of this Ruling pay the Defendant Kshs. 30,000,000.00/=.***
 - b. ***The Plaintiff/Applicant shall pay a further Kshs. 30,000,000.00 within 90 days from the date of this Ruling.***
 - c. ***The Plaintiff/Applicant shall ensure that there is no outstanding arrears on account of the said loan on or before the end of 150 days from the date hereof.***
 - d. ***Failure by the Plaintiff/Applicant to abide by any one of the above conditions (a), (i) (ii) and (iii) the Defendant/Respondent shall be at liberty to fully exercise its rights under the Charge including the statutory right of sale.***
 9. The 2nd Defendant submitted that the 1st Defendant herein has failed to comply with the Ruling and orders of 17th October 2014 and the 2nd Defendant herein is proceeding to exercise its statutory power of sale as ordered by the Court. The intended sale of the suit property by the 2nd Defendant in exercise of its statutory power of sale is a contractual right against the 1st Defendant. With regard to service of notice of intended sale on the tenants, it was submitted for the 2nd Defendant that:-
 - i. ***The Court in the Ruling of 17th October 2014 HCCC No. 161 of 2014 Al-Jalal Enterprises Limited v. Gulf African Bank Limited took note of the fact that the 40 days statutory notice dated 19th February 2014 was not only served on the 1st Defendant but also on all the tenants of the charged property.***
 - ii. ***A true copy of the Affidavit of Service dated 28th February 2014 is at page 41 and 42 of the exhibit.***
 - iii. ***At page 43 to 51 of the exhibit is a true copy of the said 40 days statutory notice dated 19th February 2014 and a list of tenants served with the notice.***
 - iv. ***The affidavit of service, which was also filed and relied upon in 2014 HCCC No. 161 of 2014 Al-Jalal Enterprises Limited v. Gulf African Bank Limited clearly gives a detailed account of the service and the commotion that ensued after some tenants resisted service.***
 - v. ***Therefore, the Plaintiffs are being insincere when they allege that they were not served with the notice of sale.***
 10. It was further submitted for the 2nd Defendant that no cause has been shown by the Plaintiffs to warrant grant of the equitable injunctive orders; No cause has been shown to demonstrate that the Plaintiffs would suffer irreparable injury which cannot be compensated in damages; The Plaintiffs have failed to establish a prima facie case against the 2nd Defendant to warrant grant of injunction; The Defendant has the contractual right to realise its security and it has no obligation towards the Plaintiffs as there is no contractual relationship between the Plaintiffs and the 2nd Defendant. In any event, it was submitted that Section 99 (4) of the Land Act 2012 is to the effect that a person

aggrieved by unauthorized or irregular power of sale has recourse to a claim in damages against the person exercising that power. Therefore, there is absolutely no merit in the current application presented by the Applicants seeking equitable remedies.

DISPOSITION

11. I have carefully considered the application and the submission of the parties. In my view, the issue for determination is whether or not the Applicants, being the 1st Defendant's tenants can stop the sale of the suit property by the 2nd Defendant's statutory right of sale, which has arisen pursuant to HCCC NO. 161 of 2014 Al-jalal Enterprises Limited – Gulf African Bank Limited. It is to be noted that under Section 96 there is a requirement that a tenant who is in occupation of a property to be sold under a mortgage transaction shall be notified of the impending sale. Section 96 of the Land Act states:-

96.(1) Where a chargor is in default of the obligations under a charge and remains in default at the expiry of the time provided for the rectification of that default in the notice served on the chargor under section 90 (1), a chargee may exercise the power to sell the charged land.

(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 on the charged land of whom the chargee proposing to exercise the power of sale has actual notice;

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

(i) 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

(j) 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 land.

12. In relation to the above notice this court has made a finding at page 8 of the Ruling of 17th October 2014 in HCCC No. 161 of 2014 above said that the 40 days Statutory Notice dated 19th February 2014 was served upon all tenants of the charged property as well as upon the 1st

Defendant. This position is confirmed by the copy of the Affidavit of Service dated 28th February 2014 found at pages 41 and 42 of the 2nd Defendant's bundle herein. Although some of the tenants appeared to have objected to the said service and even harassed the process server, I am satisfied that the process server nonetheless made adequate service of the said notices who were served to the majority of tenants. The tenants who refused service and harassed the process server were still served when they detained the process server who had to be rescued by an administrative police. They cannot then deny service after harassing the process server. The intention was well known to them and indeed that is why they harassed the process server. The process server. While I believe there was adequate physical service of the said notices, a constructive service would still have sufficed in the circumstances. It is to be noted the said service was done in February 2014. That means that the notice of the 40 days was enough to enable the Applicants, if they had any objections thereof, to challenge that notification process rather than to wait until several months thereafter, and indeed when the chargee was now exercising its right of sale. I am satisfied that the 2nd Defendant had fully complied with the issuance of notices required under Section 96 of the Land Act. At pages 43 to 51 of the 2nd Defendant's bundle are exhibits of the said 40 day's Statutory Notices dated 19th February 2014 and a list of tenants served with the notice.

13. Having established that the Applicants were duly served as tenants by the Notices under Section 96 of the the Land Act, it is my finding that the present application is not merited and is indeed an abuse of the process of the court.
14. Further, the 1st Defendant has not bothered to respond to this application. It is difficult to resist the impression that this application by the tenants to the suit property is not meant to help the 1st Defendant to achieve injunction orders which it failed to secure in the Notice of Motion application dated 24th June 2014 filed in HCCC No. 161 of 2014 above said, which application was conditionally allowed in the Ruling of this court on 17th October 2014 but which conditions the 1st Defendant failed to comply with.
15. The upshot of the above is that the Plaintiff's/Applicant's application herein dated 12th November 2014 and filed in court on 13th November 2014 is dismissed for lack of merit.
16. Costs shall be to the 2nd Defendant/Respondent.

Orders accordingly.

READ, DELIVERED AND DATED AT NAIROBI

THIS 27TH DAY OF FEBRUARY 2015

E. K. O. OGOLA

JUDGE

PRESENT:

Mr. Mwangi for the Plaintiff/Applicant

Mr. Kimani for the Defendant/Respondent

Teresia – Court Clerk