



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO 280 OF 2014

GITOBU IMANYARA.....APPLICANT/PLAINTIFF

Versus

ECO-BANK KENYA LTD.....1ST DEFENDANT/RESPONDENT

S M GATHOGO

T/A VALLEY AUCTIONEERS.....2ND DEFENDANT/RESPONDENT

RULING

Injunction

[1] The application dated 26th June 2014 is seeking for the following prayers inter alia;

- a. **A temporary injunction restraining the Defendants either by themselves, their agents or servants from advertising for sale, selling, charging, mortgaging, leasing, entering, taking possession or in any other way whatsoever interfering with LR No 13460/19 Karen pending the hearing and final determination of this suit.**
- b. **Costs of this application to be awarded to the Applicant.**

[2] The Application is expressed to be brought under Order 40 Rules 1, 2, 3 & 4 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act. It is premised upon the grounds that;

- a) That the Respondents had threatened to auction the Applicant's property, albeit without regard to the law and the agreement between the parties.
- b) The intended auction means that the Applicant's property would be wrongfully and illegally sold thus rendering loss and damage to the Applicant.

[3] The application was further supported by the Applicant's affidavit sworn on 26th June 2014. The deponent averred that he had entered into an agreement with the 1st Respondent sometime in September 2009 for the advancement of loan facilities to be secured by a charge over L.R No 13460/19 Karen (hereinafter "suit property"). The facilities advanced were to enable the Applicant to construct a house in the suit property, and was to be paid directly to the contractor by the 1st Respondent upon being issued with certificates of completion of works. He deposed that sometime in early 2013, he received demand letters from the 1st Respondent, and upon inquiry, two things were mutually agreed upon; 1)that the said

demand letters would be withdrawn; and 2) the parties will enter and indeed entered into an agreement for the 1st Respondent to advance further facilities to the Applicant vide a letter of offer dated 10th July 2013. However, the 1st Respondent committed the following acts of breach. First, a copy of the variation of the charge was not issued to the Applicant despite demanding for it from the 1st Respondent. Second, the 1st Respondent reneged from the agreement to directly make payments to the contractor. Subsequently and by this failure by the 1st Respondent, the Applicant was unable to complete his obligations with the contractor, who has also been unable to complete construction of the house on the suit property and has thereby refused to hand over the keys to the 1st Respondent pending settlement of his outstanding dues. The Applicant made further averments: That the amount claimed by the 1st Respondent can only be recovered from the proceeds of the sale of the suit property after completion; and that no statutory power of sale is exercisable until and unless the agreement dated 13th July 2013 is duly implemented. The Applicant concluded that, the Notification of Sale was, therefore, invalid and ineffectual as it was purportedly not personally served upon the Applicant, and was in blatant breach of the provisions of the Land Act and the Auctioneers Act.

[4] The Applicant filed a Further affidavit sworn on 17th November 2014 wherein he deposed that the 1st Respondent was in breach of the provisions of Section 97 of the Land Act by failing to ensure that the suit property was to be disposed of at market value and to act in the best interest of the chargor. The Applicant herein further averred that the 1st Respondent had grossly undervalued the suit property, with an intent to defraud the Applicant and concealing the true market value of the suit property.

[5] He also filed submissions dated 18th November 2014. He submitted that the crux and genesis of this dispute revolved around the mortgage agreement entered between the Applicant and the 1st Respondent on 17th September 2009. In a letter of offer dated 10th July 2013, the parties entered into an agreement in which the charge was to be varied in accordance with the terms and conditions of the said letter of offer, and of which the 1st Respondent was to register and issue a copy thereof to the Applicant. No such copy was ever issued. Also, he submitted that the statutory notice dated 28th January 2014 could only be issued in reference to the further charge and not the charge dated 17th September 2009, as the agreement dated 10th July 2009 was never rescinded. Further, the aforesaid statutory notice did not indicate whether it applied to the charge dated 17th September 2009 or variation of charge vide the agreement dated 10th July 2013. Another matter was raised in the submissions, that the 1st Respondent had attempted to recover both the secured and unsecured facilities in the statutory notice dated 28th January 2014, and therefore the notice was irregular and defective.

[6] The Applicant also attached the Notification of Sale notice dated 5th May 2014 issued by the 2nd Respondent which he stated was not in compliance with the Auctioneers Act, and fell short of the provisions of Rule 15 thereof and therefore irregular, defective and of no effect.

The Respondents opposed the application

[7] The Respondents opposed the application and filed an affidavit sworn on 21st July 2014. They also filed submissions dated 16th February 2015, wherein they submitted that;

a) A dispute in arrears in a charge cannot be sufficient grounds to warrant an order for injunction. They cited the case of **Argos Furnishers Ltd v Ecobank Kenya Limited & Another (2014) eKLR, Nairobi HCCC No 1519 of 2000 Seed & General Ltd v Small Enterprises Finance Co Ltd (U/R)** and the Court of Appeal decision in **Fina Bank Ltd v Ronak Ltd (2001) 1 EA 54**.

b) The principles in **Giella v Cassman Brown & Another (1963) EA 358** were sequential and since the Plaintiff has failed to establish a *prima facie* case, then the second grounds would fail. On this they relied on the Court of Appeal case in **Kenya Commercial Finance Co Ltd v Afraha Education Society (2001) 1 EA 87**.

c) The notices as issued were not defective, and if in any event they were, the Court would only issue a limited injunction pending the issuance of fresh and valid notices. Reliance was placed upon the case of **National Bank of Kenya Ltd v Shimmers Plaza Ltd (2009) eKLR**.

DETERMINATION

[8] This is an application for injunction. I will not re-invent the wheel. Injunctive relief, just like other limbs in law, has also grown to provide for situations which were not exactly foreseen before. And courts are expected to examine the entire circumstances of the case in deciding whether or not to grant an injunction while they also seek for answers based on the traditional principles set in the case of **GIELLA vs. CASSMAN BROWN** to wit:-

- a) **Has the Applicant established a prima facie case with high chance of success?**
- b) **Will the Applicant suffer irreparable damages unless an injunction is issue? and**
- c) **Where does the balance of convenience lie?**

See the decision of Mabeya J in **Jan Bolden Nielsen vs. Herman Philliipus Steya Also Known As Hermannus Phillipus Steyn & 2 Others (2012) eKLR** where he cited Ojwang Ag. J (as he then was) in the case of **SULEIMAN VS AMBOSELI RESORT LTD (2004) E KLR 589** as follows:-

‘I believe that in dealing with an application for an interlocutory injunction, the court is not necessarily bound to the three principles set out in the Giella Vs Cassman Brown case. The court may look at the circumstances of the case generally and the overriding objective of the law. In Suleiman vs Amboseli Resort Ltd (2004) e KLR 589 Ojwang Ag. J (as he then was) at page 607 delivered himself thus:-

‘.....counsel for the defendant urged that the shape of the law governing the grant of injunctive relief was long ago in Giella Vs Cassman Brown, in 1973 cast in stone and no new element may be added to that position. I am not, with respect, in agreement with counsel in that point, for the law has always kept growing to greater levels of refinement, as it expands to cover new situations not exactly foreseen before. Justice Hoffman in the English case of Films Rover International made this point regarding the grant of injunctive relief (1986) 3 All ER 772 at page 780-781:- “ A fundamental principle is that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been “wrong””

Traditionally, on the basis of the well accepted principles set out by the court of Appeal in Giella Vs Cassman Brown the court has had to consider the following questions before granting injunctive relief.

- i. **Is there a prima facie case....**
- ii. **Does the applicant stand to suffer irreparable harm...**
- iii. **On which side does the balance of convenience lie? Even as those must remain the basis tests, it is worth adopting a further, albeit rather special and more intrinsic test which is now in the nature of general principle. The Court in responding to prayers for interlocutory injunctive relief, should always opt for the lower rather than the higher risk of injustice.....**

[9] I will apply the above test herein. I have considered all the pleadings, affidavit evidence, submissions by parties as well as the applicable law. I take the following view of the matter. It is not disputed that the Applicant and the 1st Respondent had entered into an agreement on 17th September 2009 in which the 1st Respondent was to advance loan facilities to the Applicant. In a letter dated 19th March 2013, the 1st Respondent issued a Statutory Notice to the Applicant claiming the amount of Kshs 48,932,018.20 which amount comprised of various facilities advanced to the Applicant but which were not necessarily under the charge instrument. The notice was issued under Section 90(1) of the Land Act, 2012. I note from the

material before the court that, on 10th July 2013, the parties entered into a further agreement in which the terms of the loan agreement dated 17th September 2009 were substantially varied, and which as a matter of necessity ought to have resulted into the creation of a further charge over the suit property. It seems the linchpin of the quarrel by the Applicant revolves around this point. There are, however, other contentions as we shall see later.

[10] The Statutory Notice issued by the 1st Respondent dated 28th January 2014, indicates that, the amount claimed is a sum of Kshs 68,710,032.44. In the Notification of sale dated 5th May 2014, it was stated that the amount was outstanding as of 30th April 2014 when the 2nd Respondent was issued with instructions by the 1st Respondent to sell the suit property. The contentions raised by the Applicant included; (a) that the Statutory Notice covered both secured and unsecured facilities and therefore went against the agreement dated 10th July 2014; (b) that the Notification of Sale issued dated 5th May 2014 was in contravention of the provisions of the Auctioneers Act and the Land Act, 2012.

[11] Questions of under valuation of the suit property, failure to issue copies of the charge and further charge and statement verifying the amount claimed as addressed in the letter dated 28th May 2014 and invalid notices under the Land Act and the Auctioneers Act are the major grounds on which the Applicant sought to establish a *prima facie* case for purposes of injunctive relief sought. Are these matters indomitable grounds on which I should grant an injunction?

[12] Although the 1st Respondent admitted that there was no Further Charge registered over the suit property, it argued that the Applicant failed to produce evidence in that regard. They urged that there was no *consensus ad idem* on the letter dated 10th July 2013, and therefore the terms and conditions in the charge dated 17th September 2009 were applicable. They said more about this subject; that failure to execute and register the charge and the credit agreement meant that the only security available for the subsequent advancements was the charge registered on 17th September 2009. Consolidation of accounts was also argued and reference was made to Clause 10.3.4 of the charge instrument which clause reads;

The Bank shall be at liberty without thereby affecting its rights hereunder at any time and without notice to the chargor, combine or consolidate all or any of the chargor's accounts with the Bank and set off or transfer any sum standing in credit of any one or more of such accounts in or towards satisfaction of any of the chargor's liabilities to the Bank on any other account or in any other respect whether such liabilities be present, future, actual or contingent, primary, collateral, joint or several or whether such accounts and liabilities be current deposit, loan or of any other nature whatsoever whether subject to notice or not, whether in Kenya Shillings or in any other currency or in one or more branches of the Bank in Kenya. (Underlining mine)

[13] I find it relevant to mention that the letter of offer dated 10th July 2013 is complementary to the letter of offer dated 11th May 2009 and both should be read together as opposed to isolation of each other. The former letter read in part as follows;

Save as herein expressly varied, all other terms of our letter of offer dated 11th May 2009 and referenced LOF/TL&ML/GI/CM shall continue to apply, and this letter of offer shall be complementary to and shall be read together with the aforementioned letter of offer.

The effect of the said letter is that all the said documents must feed into the terms and conditions in the charge instrument dated 17th September 2009. In furtherance to the said letter, the Applicant executed a credit agreement of Kshs 61,794,310/- dated 15th July 2013 which was received by the 1st Respondent on 16th July 2013.

[14] In light of all the above subsequent transactions and documentation, a further charge was to be

created over the suit property to secure the facility of Kshs 28,294,310/- but none was created and registered. The question that arises, therefore, is; what was the security for the amounts given for which the intended further charge was to cater for as per the letter of offer date 10th July 2013? It was the 1st Respondent's contention that the Applicant had failed to execute the charge instrument, and that they were therefore unable to register the charge instrument, and thereby all facilities advanced to the Applicant were secured by the charge created on 17th September 2009. They also relied on Clause 10.3.4 of the charge instrument dated 17th September 2009. Whether or not the charge dated 17th September 2009 is sufficient to cover all debts or is legally the charge, is better canvassed in a trial. But for purposes of this application, I can be deduced on the interim that the parties had entered into two (2) agreements dated 11th May 2009 and 10th July 2013 respectively, with the latter being a consolidation of the facilities advanced to the Applicant. It is also not in dispute that these facilities as expressed in the letter of offer dated 10th July 2013 were advanced to the Applicant for his use, and who, by his letter dated 3rd June 2013 and email dated 23rd January 2014, admitted that he had an outstanding obligation with the 1st Respondent, and even made proposals on how settlement of the sums dues would be achieved. Therefore, the Applicant's contention that there was a dispute as to the amount in arrears is not potent ground for an interlocutory injunction. See the case of **Argos Furnishers Ltd v Ecobank Kenya Ltd & Another** (supra) in which it was stated *inter alia*;

“The subject on whether disputes on the sum owing and interest charged on a mortgage sum could be a basis for the issuance of an injunction is replete with ample judicial precedents as well as respected literary works. I am content to adopt a work of Rudd, J in Bharmalal Kanji Shah & Another v Shah Depar Devji (supra) that:

...the court should not grant an injunction restraining a mortgagee from exercising his statutory power of sale solely on the ground that there is a dispute as to the amount due under a mortgage. “

[15] I reject the Applicants argument on disputed sums as a basis to apply for injunction. Perhaps the quarrels on statutory notices could be potent. The argument coming through from the Applicant is that the Notice of Redemption and Notification of Sale were defective, null and of no effect. The Redemption Notice and the Notification of Sale are both dated 5th May 2014. The Notification of Sale purported to fix the date of the public auction to be 10th July 2014. The redemption notice was served on 22nd May 2014. The Applicant urged that the Redemption Notice had not lapsed before the Notification of Sale was issued, and that a period of fourteen (14) days had not lapsed before the Notification of Sale could be issued advertising the suit property for sale by public auction ostensibly on 27th June 2014. They argued further that the 2nd Respondent had combined both the Notice of Sale and Redemption Notice, which they said was, in any event was a contravention of the Auctioneers Rules (1997). These are plausible legal arguments which require much more attention.

[16] The auctioneer is obligated under Rule 15(b) of the Auctioneers Rules, 1997 to:

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; (Emphasis added).

The Notification of Sale indicated the sum due as at 30th April 2014 to be Kshs. 68,710,032.44, but it did not indicate the value of the property to be sold.

[17] Again, the auctioneer is obligated under Rule 15(d) of the Auctioneers Rules, 1997 to;

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; (Emphasis added).

[18] The above is not all. The auctioneer is also obligated under rule 15(e), *inter alia* to;

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

[19] There is good reason why I have succinctly set out the above requirements in separate paragraphs. The procedure in the Auctioneers Rules is in the nature of foreclosure proceedings and will extinguish the chargor's equity of redemption. It must, therefore, be done strictly in accordance with the law. I need not refer to section 89 of the Land Act which is crystal clear that equity of redemption will only be extinguished in accordance with the law. The Auctioneers Act and Rules is one such law. The redemption notice and notification of sale violated the law. The value of the property to be sold was not indicated in the notification as required. Such is a statutory requirement which I think should be understood within the current land laws especially section 97(2) of the Land Act and its noble purpose of obtaining the best price obtainable for properties of similar character and in same locality. The omission by the auctioneer is a fundamental one and would warrant a conditional injunction being granted here. I will offer this for free; Auctioneers should strictly adhere to the law in drafting the Notices required under the law in order to avoid an otherwise ripe sale from aborting on such omission. Since I am inclined at issuing a conditional injunction, I will not address the claim for undervaluation because I expect that a forced valuation will be undertaken before any future sale is carried through- if we ever reach there. I should also note that I have not seen a notice under section 96(2) of the Land Act, which is also mandatory and prudence requires that banks should start issuing it. Courts have said time and again that the redemption notice under rule 15 of the Auctioneers Rules is not sufficient for purposes of section 96(2) of the Land Act. I should think that the law has afforded the chargor the safeguards in the Land Act and the Auctioneers Act and Rules and those safeguards should not be fused or limited at all by craft of interpretation of the law or sacrificed at the altar of convenience or practical sense. I hold the view that the chargor should be accorded all safeguards provided in law in so far as they are not inconsistent with the Constitution for better enjoyment of right to property in Article 40 of the Constitution. The chargee is taken to be aware of, and enters into a mortgage with the chargor subject to all these safeguards on equity of redemption. Accordingly I am guided by the following words of judicial wisdom in the case of **National Bank of Kenya Ltd v Shimmer Plaza Ltd**(supra) that;

“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 that complies with the law. We venture to say that 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 valid notice, then in our view, the order of injunction should be limited in duration until such time as the mortgagee shall give fresh statutory notice in compliance with the law. We respectfully think that the learned judge did not exercise his discretion judicially in the circumstances of this case when he granted an order of injunction until the determination of this suit.”

Order

[20] In light of all the above, I grant an injunction to restrain the Respondents from selling the suit property. However, the injunction shall last until such time as the mortgagee and or the auctioneer shall give fresh redemption notice and notification of sale in compliance with the law and more specifically Rules 15 of the Auctioneers Rule (1997).The statutory notice under section 90 of the Land Act was properly issued. It is so ordered.

Dated, signed and delivered in court at Nairobi this 17th day of June 2015.

F. GIKONYO

JUDGE