



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO 405 OF 2014

YUSUF ABDI ALI CO LTD..... PLAINTIFF

VERSUS

FAMILY BANK LIMITED.....DEFENDANT

RULING

INTRODUCTION

1. The Plaintiff's Notice of Motion application dated 16th September 2014 and filed on 17th September 2014 was brought pursuant to the provisions of Section 1A, 1B and 3A of the Civil Procedure Act, Order 40 Rules 1 and 2, Order 51 Rule 1 of the Civil Procedure Rules and all enabling provisions of the law. Prayers Nos (1), (2) and (4) of the said application were spent. It sought the following remaining orders:-

1. Spent.
2. Spent.
3. **THAT a temporary injunction be issued restraining the Defendant/Respondent by itself, its servants, agents and/or employees or whomsoever is acting on its behalf from trespassing onto, advertising for sale, selling, transferring or disposing off (sic) Land L.R. No 209/7963/51, or selling, auctioning or otherwise disposing of Motor Vehicles Registration Numbers KBJ 659E and KAV 463X belonging to a director of the Plaintiff/Applicant, pending the hearing and determination of this suit.**
4. Spent.
5. **THAT a declaration be issued, that the Statutory Notice issued to the Plaintiff/Applicant by the Defendant/Respondent was a nullity for being defective, for failure to detail the amount that the Plaintiff/Applicant must pay to rectify the default as required by Section 90(2)(b) of the Land Act No 6 of 2012.**
6. **THAT a declaration be issued, that the issue 45 days Auctioneers Notice to Sell upon the Plaintiff/ Applicant was a nullity, as the Defendant/ Respondent had not served upon the Plaintiff/Applicant a 40 days Notice to Sell as required by Section 96(2) of the Land Act No 6 of 2012.**
7. **THAT Land Title L.R. No 209/7963/51 be valued by an independent valuer to ascertain its current market value; owing to the conflicting valuations carried out on the Defendant/Respondents (sic) instructions.**
8. **THAT the costs of this Application be borne by the Defendant.**

THE PLAINTIFF'S CASE

2. The application was supported by the Plaintiff's Affidavit that was sworn on 16th September 2014 and a Supplementary Affidavit that was sworn by Mohammed Abdi on 4th April 2015 and filed on 27th April 2015. Both deponents were the directors in the Plaintiff Company. The Plaintiff's Written Submissions and List of Authorities were dated 22nd April 2015 and filed on 27th April 2015.
3. The Defendant took over a loan facility that had been advanced to the Plaintiff by M/S Equatorial Bank. The said facility was secured by a Charge over L.R. No 209/7963/51 (hereinafter referred to as "the subject property"). The Defendant further advanced monies to the Plaintiff which were secured by Motor Vehicles Registration Numbers KBJ 659E and KAV 463X (hereinafter referred to as "the subject motor vehicles). The said subject property and motor vehicles belonged to Yusuf Abdi Ali, mentioned hereinabove.
4. The Plaintiff stated that since 27th August 2008, it had made several payments to the tune of Kshs 13,684,276.21 and denied that it could have owed the Defendant a sum of Kshs 21,672,248.68 as had been indicated in the Redemption Notice. It also took issue with the conflicting amounts that were being demanded by the Defendant.
5. The Plaintiff admitted having received a demand in March 2014 calling for the payment of arrears in the sum of Kshs 3,046,560.26 whereupon it paid a sum of Kshs 2,240,000/=. It contended that despite its efforts to clear the arrears, on 10th May 2014, the Defendant instructed M/S Integra Trading (K) Limited to repossess the subject motor vehicles. It was also issued with a Notification of Sale dated 24th June 2014 indicating the date of sale of the subject motor vehicles and with a demand dated 16th May 2014 calling for payment of the sum of Kshs 19,251,558.38.
6. It averred that despite its further efforts to clear the arrears, the Defendant instructed M/S Antique Auctions to sell the subject property and also refused to respond to its request for extension of time to settle the arrears. It was its contention that the Defendant's instructions to the auctioneers to sell the property when it had made substantial payments towards clearing the loan, its failure to indicate the amount that had to be paid to rectify the default in the Notice under Section 90(2)(b) of the Land Act No 6 of 2012 and its failure to issue it with a Notice under Section 96(2) of the Land Act amounted to a clog or fetter of its equity or redemption. It also contended that the said Notices were defective.
7. It pointed out that valuations of the subject property had been given at Kshs 28,000,000/= and Kshs 8,000,000/= by M/S Daytons Valuers and Antique Auctions respectively which was a gross undervaluation of the subject property which was a flagrant breach of the its duty of care under Section 97 of the Land Act and that it any event, it had been more than a year since the said Valuation was obtained contrary to Rule 11 (b)(x) of the Auctioneers Rules, 1997.
8. It was its averment that any sale of the subject property would expose it to loss that could never be adequately compensated in damages and that its business would grind to a halt. It said that it was ready, willing and able to clear the outstanding arrears and proceed with the payment of the outstanding loan and therefore urged the court to grant the prayers it had sought.

THE DEFENDANT'S CASE

9. In opposition to the said application, on 23rd October 2014, Cosmas Mulinga Mwenga, the Defendant's Credit Manager swore a Replying Affidavit that was filed on the same date. The Defendant's Written Submissions were dated 2nd June 2015 and filed on 4th June 2015.
10. The Defendant confirmed that the Plaintiff sought and obtained financial accommodation from it which was secured by a First Legal Charge dated 6th July 2012 for Kshs 15,200,000/=: a Further Charge dated 22nd November 2012 for Kshs 2,700,000/=: a Second Further Charge dated 22nd October 2013 in the sum of Kshs 2,000,000/=: Original Logbook for the subject motor vehicles and Registered Chattel Mortgage over the said subject motor vehicles. The aforementioned directors of the Plaintiff duly executed joint and several guarantees for the sum of Kshs 19,835,000/=:.
11. When the Plaintiff defaulted in payment of its monies, it issued a demand letter dated 9th April 2014 for the payment of the sum of Kshs 19,486,044.24 which was outstanding as at 31st March 2014. When the Plaintiff failed to pay the said sum, it issued a forty (40) days' notice dated 27th

August 2014 demanding for payment of the sum of Kshs 21,672,248.68. It was therefore its contention that the Redemption Notice was issued in accordance with the law.

12. It also pointed out that a valuation of the subject property was done and that the same showed the Forced Sale Value, Open Market Value and Open Market Value for Mortgage purposes were put at Kshs 19,600,000/=, Kshs 28,000,000/= and Kshs 22,000,000/= respectively.

13. It was therefore its averment that since the Plaintiff had continued to be in arrears, the present application ought to be dismissed with costs to it as the Plaintiff had failed to establish a *prima facie* case with a probability of success at trial.

LEGAL ANALYSIS

14. It was not in contention that the Plaintiff was advanced financial accommodation which was secured by the aforesaid securities and that there were certain monies that were outstanding. What was for determination was whether or not the Defendant had fully complied with the provisions of the law before it purported to exercise its statutory power of sale as regards the issuance of the Statutory Notices and valuation of the subject property. The question of exactly how much money was outstanding was not an issue this court wanted to interrogate as the same was clearly not before the court for determination.

15. The Plaintiff was emphatic that the Statutory Notice issued on 16th May 2014 purportedly under the provisions of Section 90 of the Land Act had called for the payment of the sum of Kshs 19,251,558.38, which was the total outstanding amount as opposed to demanding the amount that it was required to pay to rectify the default. This fact was not denied by the Defendant.

16. The said letter stated in part:-

“...Following default of payment of the said loan advanced, you are indebted to us in the sum of Kshs. 19,251,558.38 as at 13th May 2014. The said amount continues to attract interest at the rate of 22.5% per annum compounded with monthly rests until paid in full.

TAKE NOTICE therefore pursuant to section 90 of the land act (sic) that we shall exercise our remedies over the charged property namely 209/7963/51 Within THREE (3) months of the service of this notice so as to recover the amount owed to us and secured by the said charge together with all interest accrued thereon and costs charges and expenses unless the amount owed to us is paid in full before then...”

17. Section 90 of the said Land Act Cap 280 (Laws of Kenya) provides as follows:-

1. **If a chargor is in default of any obligation, fails to pay interest or any other periodic payment or any part thereof due under any charge or in the performance or observation of any covenant, express or implied, in any charge, and continues to be default for one month, the chargee may serve on the chargor a notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be.**
2. **The notice required by subsection (1) shall adequately inform the recipient of the following matters—**
 - a. **the nature and extent of the default by the chargor;**
 - b. **if the default consists of the non-payment of any money due 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;**
 - c. **if the default consists of the failure to perform or observe any covenant, express or implied, in the charge, the thing the chargor must do or desist from doing so at to rectify the default and the time, not being less than two months, by the end of which the default must have been rectified;**
 - d. **the consequence if the default is not rectified within the time specified in the notice, the chargee will proceed to exercise any of the remedies referred to in this section in accordance with the procedures provided for in this sub-part; and**
 - e. **the right of the chargor in respect of certain remedies to apply to the court for relief against**

those remedies.

18. Reading the contents of the Statutory Notice dated 16th May 2014 annexed to the Plaintiff's Supporting Affidavit and marked "YAA 6" against the provisions of Section 90 of the Land Act, it was evident that the said notice did indicate the nature and extent of default, it did not indicate the amount the Plaintiff was required to pay to rectify the default and it did not also include the notification that the Defendant would proceed to exercise any of the remedies referred to in the said section in accordance with the procedures provided for in that sub-part. The said Notice only referred to the aspect of the right of a chargor in respect of certain remedies to apply to the court for relief against those remedies.
19. As was rightly pointed out by the Plaintiff, the failure by the Defendant to issue the Notice that strictly complied with the provisions of Section 90 (2) of the Land Act rendered the said Notice of 16th May 2014 defective and null and void *ab initio*. Any subsequent notices issued pursuant to the Defendant's exercise of its Statutory Power of Sale were therefore invalid and could not confer any right on the Defendant to proceed as such. On this ground only, the purported sale of the subject property had no legal basis.
20. The court therefore fully associated itself with the holding in the case of **David Gitome Kuhiguka vs Equity Bank Limited [2013] eKLR** that was relied upon by the Plaintiff where it was held that where a chargee failed to issue a notice that strictly complied with the provisions of Section 90(2) (b) of the Land Act, then such a notice could not be deemed to valid.
21. This court has in previous cases of **See Manasseh Denga vs Eco Bank Ltd & Another [2015] eKLR**, which was relied upon by the Plaintiff, and **Florence Njeri Karanja vs Moly Credit Limited [2014] eKLR** amongst several other cases, made similar findings.
22. The Defendant's submissions that the Notice was sent to the correct address and the case law in respect of service of the Statutory Notice to the correct the postal address, though noted by the court, were not relevant or material in the circumstances of the case herein as the said Notice under Section 90 of the Land Act was invalid and defective. The court thus saw no need to analyse the Defendant's submissions regarding the service of the said Statutory Notice for the reason that the Plaintiff had never denied ever having been served with the said requisite notices.
23. Turning to the Notice under Section 96(2) of the Land Act, the Defendant contended that it issued a forty (40) days' notice on 27th August 2014 and argued that the issuance of the Notification of Sale by M/S Antique Auctions on the same date was proper.
24. The Defendant pointed out that the issuance of the Notice to Sell under Section 90 rather than Section 96 of the Land Act was a procedural error that ought not be a ground to restrain it from exercising its Statutory Power of Sale and that in any event, no prejudice would be suffered by the Plaintiff in view of the said procedural error.
25. As the court is mandated by Article 159 (2) (d) of the Constitution of Kenya, 2010 to administer justice without undue regard to procedural technicalities, the court opted to assume that the indication of Section 90 as opposed to Section 96 of the Land Act in the letter of 27th August 2014 was a typographical error purely to enable it decide the Defendant's arguments that a Statutory Notice and Notification of Sale could be issued concurrently and/or simultaneously, on merit.
26. Section 96 of the Land Act stipulates as follows:-

"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."**
27. The court was in agreement with the Plaintiff's submissions that the Defendant was not expected to proceed to complete any contract for the sale of the charged land until forty (40) days had

- elapsed from the date of the notice to sell in the prescribed form which was not the case herein.
28. In the cases of **Manasseh Denga vs Eco Bank Ltd & Another** (Supra) and **Florence Njeri Karanja vs Molyn Credit Limited** (Supra) amongst several other cases, this court has held that a reading of Section 96 (1) of the Land Act shows that these forty (40) days would be in addition to the three (3) months' notice and different from the Notification of Sale to be issued by an auctioneer, a position that was also held by Gikonyo J in the case of **Palmy Company Limited vs Consolidated Bank of Kenya Limited [2014] eKLR**.
 29. The Defendant had argued that this issue was not settled as Gikonyo J had observed in the case of **Palmy Company Limited vs Consolidated Bank of Kenya Limited** (Supra). However, this court has always taken the firm view that issuing a Statutory Notice under Section 96(2) and Rule 15(d) of the Auctioneers Rule, 1997 concurrently and/or simultaneously is a fetter and clog to a chargor's right of redemption.
 30. As can be seen hereinabove, 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 of the Land Act, a chargee may exercise the power to sell the charged land but the chargee shall not proceed to complete any contract for the sale of the charged land until at least forty (40) days have elapsed from the date of the service of that notice to sell.
 31. In this Notice under Section 96(2) of the Land Act, the chargee is merely giving a notice to sell. Until the notice to sell in the prescribed form is gazette as envisaged in Section 96(2) of the Land Act, the court believes that such a notice is merely an indication of what a chargee intends to do. A chargor may redeem his property by paying on the fortieth (40th) day.
 32. A chargee would therefore not know at the beginning of the issuance of its notice under Section 96(2) of the Land Act that a chargor would default at the end of the said notice and thus instruct auctioneers to prepare for the sale of charged property at the time it is indicating its intention.
 33. An analogy of this would be a football player who is in an off side position during a football match. Such a player would be in front of the defence team and waiting for the ball so that he can take advantage to score without being tackled and showing his skills of dodging a football. It cannot be a fair game that one player should have advantage of the other players in a pitch so that he can easily score.
 34. It would therefore be surprising to the court and hardly equitable for a chargee to instruct an auctioneer to advertise the property for sale before a chargor has had full opportunity to pay. An auctioneer would essentially be in the position of a football player who is in an off side position and catches the chargor by surprise as he would be waiting in the wings and hoping the chargor does not pay the outstanding sum so that he can sell the property.
 35. In fact, if the said two (2) notices were to be issued concurrently, a chargor would not be certain whether or not he should redeem his property by paying the outstanding sums on that fortieth (40th) day of the Notice under Section 96(2) of the Land Act or the forty fifth (45th) day when the notice given by the auctioneer would be expiring.
 36. The issuance of the two (2) notices simultaneously would also unnecessarily cause undue anxiety to a chargor as he would be expected to pay the auctioneers charges, the auctioneers having been instructed and having taken action even if he would have redeemed his property on or before the (40th) as aforesaid.
 37. Further, on the argument that any instructions to the auctioneers ought to be given after the chargor defaults after the (40th) day, a chargor could pay a particular amount of money in the course of the forty (40) days' notice which would effectively mean that the amount in the Notification of Sale would be different.
 38. Notably, Rule 15 (d) of the Auctioneers Rules provides as follows:-

“Upon receipt of a court warrant of letter of instruction the auctioneer shall in the case of immovable property-

Give in writing to the owner of the property a notice 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.”

39. The certainty of the amount in the Notification of Sale is paramount as a chargor has the right to redeem his property before the fall of the hammer in a public auction as well have the certainty of being not locked out of the public auction in the event he does not redeem his property on the fortieth (40th) of the Notice under Section 96(2) of the Land Act.
40. The dominant purpose of the Land Act is to give a chargor all reasonable opportunity, within the confines of the law to redeem his property as Article 40 of the Constitution of Kenya, 2010 provides that parliament shall not enact law that arbitrarily deprives a person of property or limits or in any way restricts the enjoyment of any right under this Article. The court must therefore balance this against the interests of a chargor who should also not be restricted from exercising its statutory power of sale.
41. A Notification of Sale issued before the lapse of the forty (40) days' notice could therefore in the mind of this court no doubt raise legal challenges hence its firm position that the Notification of Sale by the auctioneers ought to be issued after the lapse of the forty (40) days' notice under Section 96(2) of the Land Act and not before that.
42. As regards the issue of valuation of the subject property, the court noted the Plaintiff's submissions that M/S Daytons Valuers had undertaken a valuation and returned the figures shown in Paragraph (12) hereinabove while the Notification of Sale of 27th August 2014 by M/S Antique Auctions had given the market value of the subject property at Kshs 8,800,000/=.
43. Clearly, there was a great disparity in the valuation of the subject property bearing in mind that both M/S Daytons Valuers and M/S Antique Auctions were both the Defendant's agents. In the absence of any valuation placed before this court by the Plaintiff, the court was unable to give its further input in this regard. It could also not grant a declaration on this issue based on a prayer in an application.
44. Suffice it to state that under Section 97 of the Land Act, a chargee is expected to exercise a duty of care towards a chargor, failing which it would be liable for breach of duty of care. The said Section provides as follows:-**"1. A chargee who exercises a power to sell the charged land, including the exercise of the power to sell in pursuance of an order of a court, owes a duty of care to the chargor, any guarantor of the whole or any part of the sums advanced to the chargor, any chargee under a subsequent charge or under a lien to obtain the best price reasonably obtainable at the time of sale. 2. A chargee shall, before exercising the right of sale, ensure that a forced sale valuation is undertaken by a valuer."**
45. Be that as it may, the court wholly agreed with the Plaintiff's assertions that a chargee could not rely on a valuation report that was more than twelve (12) months old. In particular, Rule 11 (b) (x) of the Auctioneers Rules stipulates as follows:-

"the reserve price for each separate piece of land based on a professional valuation carried out not more than 12 months prior to the proposed sale."

46. The Defendant did not provide any evidence to demonstrate that it had obtained a Valuation Report that was not more than twelve (12) months prior to the purported sale of the subject property. A perusal of the Valuation Report by M/S Daytons Valuers shows that the same was dated 20th September 2013 while the sale by public auction was scheduled for 29th October 2014.
47. In the absence of any evidence by the Defendant to the contrary, the court was more inclined to accept the Plaintiff's un rebutted affidavit evidence that the Defendant could not purport to sell the subject property and that the sale of the subject property when such circumstances were obtaining was clearly unlawful.
48. Having said so and having considered the pleadings, the affidavit evidence, written submissions and the case law in support of the parties' case, the court nonetheless came to the firm conclusion that the Plaintiff did not meet the threshold to be granted an interlocutory injunction as was envisaged in the celebrated case of **Giella v Cassman Brown (1973) EA 360** in which it was held as follows:-

"The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might

otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

49. Having admitted to being indebted to the Defendant, the Plaintiff had clearly not made out a *prima facie* case with a probability of success at trial. The question of the Plaintiff suffering loss that could not be compensated by way of damages if the interlocutory judgment was not granted could not arise. The balance of convenience could not tilt in its favour as the invalid the Statutory Notices could be regularised by the Defendant issuing fresh notices that strictly complied with the provisions of the law.
50. In view of the said indebtedness, the court was also not inclined to grant an injunction to restrain the Defendant from realising the subject motor vehicles as its securities. Indeed, the Plaintiff did admit that when it was issued with a demand letter to clear the arrears of Kshs 3,046,560.26, it only paid a sum of Kshs 2,240,000/=.
51. However, the Defendant is hereby requested to note the provisions of Rule 10 of the Auctioneers Rules before it proceeds to sell the subject motor vehicles, which Rule provides as follows:-

“A debtor may, at any time before the property seized or repossessed is sold, apply to a court for an order that the property be valued by an independent valuer.”

52. On the whole, the court found that the balance of convenience tilted in favour of the Defendant for the reason that the court could not re-write the contract between the parties herein by restraining it from exercising its rights as a chargee. The court found and held that the Defendant was at liberty to exercise its statutory power of sale or sell the subject motor vehicles provided that it fully complies with the strict provisions of the law.

DISPOSITION

53. Accordingly, the upshot of this court’s ruling was that the Plaintiff’s Notice of Motion application dated 16th September 2014 and filed on 17th September 2014 was not merited and the same is hereby dismissed. As the Defendant had not complied with the strict provisions of the Land Act before it advertised the subject property for sale by public auction, each party shall bear its own costs of this present application.
54. For the avoidance of doubt, the status quo order issued on 13th October 2014 and extended several times thereafter is hereby vacated, lifted and/or set aside.
55. It is so ordered.

DATED and SIGNED at NAIROBI this 18th day of September 2015

J. KAMAU

JUDGE

READ, DELIVERED and SIGNED at NAIROBI this 22nd day of September 2015

F. AMIN

JUDGE

