



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 515 OF 2015

JOSEPH MUNYAO MUTISYA.....PLAINTIFF

-VERSUS-

HOUSING FINANCE COMPANY

OF KENYA LIMITED.....1ST DEFENDANT

BENJAMIN KISOI SILA

T/A LEGACY AUCTIONEERING SERVICES.....2ND DEFENDANT

RULING

1. The Application before the Court is the Plaintiff's Notice of Motion dated **22nd October 2015** and filed on **23rd October 2015**. It has been brought under the provisions of **Section 3A** of the **Civil Procedure Act, Order 40 Rules 1 and 2** of the **Civil Procedure Rules** and all other enabling provisions of the law.

2. The Plaintiff sought for the following orders.

1) THAT this application be certified as urgent and be heard ex parte in the first instance; (Spent)

2) THAT this Honourable Court be pleased to grant temporary injunction, restraining the Defendants/Respondents, whether by themselves or through their servants, agents or workmen from doing any of the following acts, that is to say, further advertising for sale, disposing off, selling, transferring or in any other manner whatsoever interfering with the Plaintiff/Applicant's quiet use, possession and enjoyment of his property Title No. Machakos/Matuu/1109 pending the hearing and determination of this application *inter partes*; (Spent)

3) THAT this Honourable Court be pleased to grant temporary injunction, restraining the

Defendants/Respondents, whether by themselves or through their servants, agents or workmen from doing any of the following acts, that is to say, further advertising for sale, disposing off, selling, transferring or in any other manner whatsoever interfering with the Plaintiff/Applicant's quiet use, possession and enjoyment of his property Title No. Machakos/Matuu/1109 pending the hearing and determination of this suit; and

4) THAT the cost of this application be provided for.

3. The application is based on the grounds set out therein and is supported by the Affidavit of **JOSEPH MUNYAO MUTISYA**, the Plaintiff herein, and sworn on **22nd October, 2015**.

4. It is the Plaintiff's case that the Defendants are in the process of selling by public auction **Title No. Machakos/Matuu/1109** measuring 1.9 hectare (herein the suit property) valued at **Kshs. 150, 000,000/=** belonging to him without justifiable cause and despite failing to issue a statutory notice as required by law. He contends further that the Defendants are intent on selling the suit property at a gross undervalue of **Kshs. 33,800,000/-** and hence ought to be restrained from so doing.

5. The Plaintiff avers that he has erected on the suit property a school known as Matuu High School and therefore there is clear and present danger that the school may have to be closed if the property is sold. In the circumstances, it is the Plaintiff's case that the students of the said school will thereby suffer irreparably more so in view of the fact that national examinations are currently ongoing.

6. He further avers that he has offered to dispose of other parcels of land belonging to him so as to redeem the loan account, but that the 1st Defendant has unreasonably refused to accede to this offer, notwithstanding the fact that only a small portion of the loan is in arrears and there is still a period in excess of 12 years within which he is required to pay the loan under their contract.

7. It is also the Plaintiff's case that the interest charges levied on his loan account by the 1st Defendant are excessive and illegal. It is his contention that the said charges were not approved by the Central Bank or the /Cabinet secretary for the time being in charge of finance. In addition to the foregoing, the Plaintiff contends that the 1st Defendant having not issued him with a statutory notice the advertisement for sale of the suit property is void *ab initio*.

8. In view of the foregoing, the Plaintiff seeks an injunction to restrain the Defendants from selling the security property pending the hearing and determination of the suit herein.

9. In opposition to the application, the 1st Defendant filed a Replying affidavit sworn on **26th October, 2015** by its Legal Manager-Litigation, one **Mr. Martin Machira**, in which he averred that contrary to the allegations made by the Plaintiff, the 1st Defendant had complied with all legal requirements for enforcing its rights as a chargee. He further averred that all requisite statutory notices had been issued to the Plaintiff before the date of the auction was fixed. He exhibited as attachments to the replying affidavit copies of the said statutory notices.

10. It was further averred for the 1st Defendant that the suit property had been valued and a forced sale value ascertained. It is therefore the 1st Defendant's case that the Plaintiff cannot validly argue that the property will be sold at an undervalue, for that would be speculative. It is also the 1st Defendant's case that the Plaintiff has expressly conceded that he is in default in settling the debt and that having previously sought indulgence and promised to settle the debt but failed to honour the promises, the Plaintiff is not deserving of the court's intervention.

11. The Plaintiff does not dispute that he has fallen behind schedule in servicing the loan he obtained from the 1st Defendant. He has admitted that he is experiencing financial difficulties but is nevertheless desirous of repaying the loan. On the other hand, it has been submitted for the 1st Defendant that the Plaintiff has not made any payments towards settling the loan from 6th October, 2014, a fact that is borne

out of the documents on the court record. Accordingly, whereas it is the 1st Defendant's case that its right to exercise its statutory power of sale has matured for realization, the Plaintiff raised a number of issues challenging the same, for which reason he seeks a temporary injunction pending a determination by the court of those issues.

12. It is now well settled that for an injunction to be granted, the Court will consider the basic principles set out in the renowned case of **Giella Vs Cassman Brown and Company Limited [1973] E.A 358**. The principles are that the applicant must show a *prima facie* case with a probability of success; secondly that he stands to suffer irreparable harm which would not adequately be compensated by an award of damages; and thirdly, if the Court is in doubt, it will decide an application on the balance of convenience.

13. In the present case, has the Plaintiff/Applicant established a *prima facie* case with a probability of success? A *prima facie* case was defined by the Court of Appeal in the case of **Mrao -vs- First American Bank (K) Ltd** thus:

“...a prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case.”

Hence, an applicant needs to demonstrate a legal right which has been infringed by a Defendant thereby calling for a rebuttal by the latter.

14. To ascertain whether the Plaintiff has established a prima facie case, the following are the issues to be determined herein:-

- **Whether the 1st Defendant issued the Plaintiff with the requisite statutory notices under the Land Act, 2012;**
- **Whether the 1st Defendant has undervalued the suit property;**
- **Whether the rates charged by the 1st Defendant on the loan account were illegal and excessive;**

15. On the 1st issue, Counsel for the Plaintiff submitted that the Plaintiff was not issued with a 3 months' notice of default the 40 days' notice of sale as required under sections 90 and 96(2) of the Land Act respectively. On the other hand Counsel for the Defendant maintained that the Plaintiff was indeed served with the requisite statutory notices. The said statutory notices are attached to the 1st Defendant's replying affidavit at pages 1 and 2. At page 1, the Statutory Notice issued therein and dated 26th June, 2014 is a three months' notice while the Notice at page 2 dated 9th February, 2015 issued subsequently is a 40 days' Notice after the Plaintiff failed to repay the debt within the three months. The 40 days' notice is the Notice contemplated under Section 96 (2) of the Land Act which states as follows:-

“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.

16. Although it is the contention of the Plaintiff/Applicant that he was not served with the requisite statutory notices, it is evident that he acknowledged receipt of the notice dated 9th February 2015 vide his letter to the 1st Defendant/Respondent dated 3rd March 2015. That letter has been exhibited as an attachment to the Replying Affidavit of **Mr. Martin Machira** and it bears the same address used in the notice. It is noteworthy that the same address appears in the bank statements as well as the other documents relied on by the Plaintiff/Applicant. It has further been demonstrated on behalf of the 1st Defendant/Respondent that the said notices were sent by way of registered mail and the 1st Defendant attached the respective certificates of posting as proof of the same. From the foregoing, it is manifest that the statutory notices were indeed issued as by law required. The suit property was advertised for sale in

October 2015 which was way past the 40 days' notice envisaged in the aforementioned sections of the Land Act.

17. The second issue raised by the Plaintiff is that the Defendants intend to sell the suit property at a gross undervalue.

The court has perused the valuation report procured by the 1st Defendant, which indicates the forced sale value of the suit property as Kshs. 33,800,000/=. The Plaintiff's position is that the current market value of suit property is Kshs. 150,000,000/= or thereabouts, which posturing is informed by the valuation report prepared by Lloyd Masika. That valuation report was exhibited herein by the Plaintiff/Applicant as Annexure JMM7.

18. Section 97 of the Land Act is clear that the chargee owes a duty of care to the chargor to obtain the best price reasonably obtainable at the time of sale. The only way to ascertain that the chargee has done so is by way of a credible valuation report. The 1st Defendant produced a valuation report prepared by **Highland Valuers Limited** dated 28th July, 2015 indicating that the suit property had an open market value of **Kshs. 45,000,000** while the forced value was at **Kshs. 33,000,000/=**. This valuation is indeed way below the value posted by Lloyd Masika of Kshs. 150,000,000/=.

19. However, something noteworthy about the valuation report by Lloyd Masika, is that the aforesaid value was posted in relation to two properties; L.R Nos. Machakos/Matuu/1108 & 1109, the latter being the charged/suit property herein. Plainly therefore, the said valuation report does not give an accurate reflection of the exact and distinct value of the suit property LR Machakos/Matuu/1109 but is a composite valuation of both LR Numbers 1108 and 1109. It is thus incredible for the Plaintiff to urge the court to find, on the basis of that valuation report that LR 1109 has a current market value of Kshs. 150,000,000/= or that the Defendants have grossly undervalued the same.

20. On the 3rd issue regarding the interest charges on the loan account, it is the Plaintiff's case that the charges levied on his account are excessive and illegal. It is also his contention that the said charges were not approved by the Central Bank or by the Minister for the time being in charge of finance. The Plaintiff did not substantiate this allegation in that he was not specific as to which charges or rates levied to his account were excessive or illegal. He did not also point out to this court which charges were not approved by the relevant financial authorities. It is not enough for the Plaintiff to merely allege that the interest charged was excessive and illegal without providing a *prima facie* demonstration thereof.

21. In his submissions, Counsel for the Plaintiff observed that between the period 2nd January, 2014 and 19th October, 2015 the Bank charged an interest of Kshs. 4,834,407/= which according to him was excessive. Again, Counsel did not in any way substantiate his contention to that effect. Therefore, the Plaintiff has failed to satisfy this Court on a *prima facie* basis, that the charges on his account were either illegal or excessive. Moreover, authorities abound that a dispute over interest *per se* is not sufficient in a case of this nature. In view of the foregoing, it is evident that the Plaintiff/Applicant has not on this score established a *prima facie* case with a probability of success.

22. With regard to the issue of damages, it is the Plaintiff's case that he will suffer irreparable loss that cannot be compensated by way of damages if the Court fails to grant the injunction orders. He avers that the suit property consists in part of a school whose students are currently undertaking national examinations and that the proposed sale would result in serious disruption at the school. It is noted however from the sale advertisement that the auction was to be conducted in Nairobi and not at the school. Moreover, as rightly pointed out by the Defence Counsel, it is not the usually the case that the sale process including vesting of title and possession would be completed on the day of sale.

23. In the case of **Nguruman Limited vs. Jan Bonde Nielsen & 2 others CA No. 77 of 1012**, the Court of Appeal had this to say with regard to what amounts to irreparable injury:

“Speculative injury will not do; there must be more than an unfounded fear or apprehension

on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot “adequately” be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is of such a nature that monetary compensation, of whatever amount, will never be adequate remedy.”

There being no proof herein to demonstrate that there would be disruption of learning or examinations at the said school if the suit property is auctioned as intended, or that the Plaintiff/Applicant stands to suffer such loss as would not be adequately compensated by an award of damages, it is plain that that the relief sought is not merited.

24. The Plaintiff has admitted that he has not fully repaid the loan and the same continues to accrue interest to date and that he has made payment promises to the 1st Defendant that he did not adhere to. Accordingly, the court is of the view that even the balance of convenience favours the 1st Defendant whose statutory power of sale has crystalized and properly so granted the evidence that compliance was had to the relevant provisions of the Land Act.

25. Much premium was made by the Counsel for the 1st Defendant of the conduct of the Plaintiff/Applicant in denying service of notice, when it is clear he was indeed served; in waiting till the eve of the sale to file seek the intervention of the court by filing this application when he was served with the notice of sale much earlier; in not making serious efforts to pay off the debt that is justly owing from him to the 1st Defendant; and in giving false payment promises to the 1st Defendant which he failed to honour. I would agree that all these are factors that would work against the Plaintiff/Applicant, for it is trite that he who seeks equity must approach the court with clean hands.

26. In view of the foregoing, the upshot of this court’s ruling is that the Plaintiff’s Notice of Motion dated **22nd October, 2015** and filed on 23rd October, 2015 is not merited and the same is hereby dismissed with costs to the 1st Defendant.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 28TH DAY OF OCTOBER 2015

OLGA SEWE

JUDGE