REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT EMBU

ELC CASE NO. E021 OF 2021

PAUL THEURI MUTAHI.....PLAINTIFF/ APPLICANT

VERSUS

FAMILY BANK LIMITED.....DEFENDANT/ RESPONDENT

RULING

1. Before the court is a notice of motion dated 6 .10.2021, and filed on 7.10.2021 by the Plaintiff. The Application is expressed to be brought under Sections 1A, 1B, 3 & 3A of the Civil Procedure Rules, Order 40 Rules 1(a), 2(1) & 2 of the Civil Procedure Rules and all other enabling provisions of the law.

APPLICATION

2. The Applicant is **PAUL THEURI MUTAHI** who is the Plaintiff in the suit while the Respondent is **FAMILY BANK LIMITED.** The respondent is the defendant.

3. The motion came with Four (4) prayers but prayers 1 and 2 are now moot. The prayers for consideration are 3 and 4 which are as follows:

Prayer 3: *Pending the hearing and determination of this application and suit, a temporary injunction be issued to stop and restrain the Defendant herein whether acting by itself or through their agents M/S Giant Auctioneers or other servants from attaching, advertising, selling, transferring and alienating, disposing or selling by public auction the Plaintiff's Title No. Gaturi/Weru/7470 & 7471.*

Prayer 4: *Costs of this application be provided for.*

4. The application is founded on the grounds on the face of it and on the supporting affidavit sworn by the applicant. The applicant averred that he was advanced a loan facility by the respondent, which loan he states to have been servicing but due to the corona pandemic, he defaulted but later resumed normal payments. He deposed that he has since secured a green card and has relocated to the USA and proceeded to furnish the defendant with an enhanced mode of payment of the arrears save for the inconsistencies in the interest payable. He pleaded that the defendant had instructed Giant Auctioneers to sell the suit properties which forms part of matrimonial property, which he also claimed to be held in trust for his siblings and other immediate family members and whose disposal would cause untold emotional stress.

5. He averred that the defendant did not serve to the guarantors/ his spouse the statutory notice of sale, notification of sale or any other document before instructing the auctioneers to advertise the property for sale. He said he is apprehensive that the suit property will be sold at a throw away price so as to recover the loan amount of Kshs. 1,074,160.08/- yet its combined value is about Kshs. 20,000,000/-. It is his assertion that the default was as a result of Covid 19 pandemic which he terms as an act of God and that it was not within his control.

6. It is his claim that he has since resumed payment as evidenced by his bank statement. According to him he has made frantic efforts to have the loan re-negotiated but the efforts have been fruitless. To demonstrate the efforts made, he states to have proposed payment of Kshs. 100,000/= monthly from the month of September 2021. He also said he visited the bank on several occasions for them to restructure the facility.

7. He pleads that he should be allowed to redeem the property. He further undertakes to repay the loan plus interest and has prayed that the application be allowed.

RESPONSE

8. The application is opposed by the defendant by way of a replying affidavit filed on 4.11.2021 and dated 25.10.2021. The affidavit is sworn by Wambani Sylvia, an advocate and a Senior Legal Officer with the defendant. She deposed that the plaintiff had admitted that he was advanced a loan facility by the defendant in the year 2014 and that he was in arrears and as such there were no good reasons as to why the

defendant ought not to exercise the statutory power of sale as required by law in case of default.

9. It was averred that the plaintiff was served with the required statutory notices by registered post (both the 90 days' statutory notice of sale and the 40 days' notice of intentions to sell) and the copies of the said notices were annexed to the replying affidavit. The defendant claimed that the plaintiff had been served with a redemption notice by the auctioneers and a further notification of sale.

10. According to the defendant, the plaintiff had failed to disclose to the court that he was granted a moratorium as a result of Covid- 19 pandemic and that the suit is just but an attempt to unfairly prevent the bank from realizing its money. It was stated that the bank had a right which right, had crystalized in law, and the defendant was exercising its powers as provided for under the law in event of a default to pay the loan advanced.

11. It was further deposed that the plaintiff does not deserve the orders sought as he is in default and any delay in selling the property would lead to the loan increasing; that he has not met the conditions for grant of orders of mandatory injunctions; that he was aware of the consequences of failure to repay the loan advanced to him; that he has not offered any security; that a dispute on interest is not a ground for stopping a chargee from realizing its security; and that an award of damages will be sufficient if at all it would be found that the bank was not entitled to exercise its power of sale after the hearing of the suit.

12. With leave of the court, the plaintiff filed a further affidavit. He reiterated that he was never served with the notices and that he ought to have been served personally. He averred to have left Kenya for the USA and as such, service of the notices ought to have been served in person not by registered mail. The plaintiff averred that he has been paying the money owed to the defendant despite the fact that he was disputing the interest payable and further he had never been served with the notices. The plaintiff further averred that he has a right to redeem the suit properties and that he is ready to abide by any direction issued by this court.

SUBMISSIONS

13. The application was canvassed by way of written submissions. The plaintiff's submissions were filed on 1.3.2022 and dated 27.2.2022. The plaintiff reiterated the contents in the application. He basically submitted that he had met the conditions for granting of the injunctive reliefs as were laid down in the case of **Geila –vs- Cassman Brown & Co. LTD [1973] EA 358** in that he had established a prima facie case with a likelihood of success, that he will suffer irreparable loss that cannot be compensated by an award of damages and that the balance of convenience is in his favour.

14. The plaintiff reiterated the fact that he was never served with the notices as at the date of the statutory notices, he had left Kenya for the USA as was evidenced by the VISA he had attached to the further affidavit and that he was willing to liquidate the stated amount henceforth. As such, he had a prima facie case. That further he stood to suffer irreparable loss if the property is sold yet the default was as a result of harsh economic times due to Covid- 19, something which was beyond his control. He relied on the case of **Alice Owino Okello –vs- Trust Bank Ltd & Anor LLR No. 625 (CCK).**

15. The defendant on the other hand filed his submissions on 28.2.2022 and dated 28.2.2020. According to the defendant, the plaintiff is not deserving of the orders sought as he is in arrears, a fact that the plaintiff is said to have admitted in the application and the affidavits. It was argued that the plaintiff had therefore not established a prima facie case with a likelihood of success. It was further submitted that the plaintiff had failed to demonstrate to the court that he would suffer irreparable loss which could not be compensated by way of damages, as in the event that the court finds that the property ought not to have been sold, the same can be compensated by way of damages.

16. Lastly it was argued that the balance of convenience is in favour of the defendant who is a secured creditor and who has a right to recover the said money. Reliance on this point was placed on the case of **Jim Kennedy Kiriro Njeru –vs- Equity Bank (K) LtD (2019) Eklr.** The defendant further submitted that the plaintiff was served with the notices in compliance with the law and further that it has demonstrated that there is default and as such its right of sale has crystalized.

ANALYSIS AND DETERMINATION

17. I have considered the application, the response made, and the further affidavit filed by the applicant. I have also considered the rival submissions by the parties. As I had already pointed out, the plaintiff is seeking for orders of injunction restraining the defendant from selling the suit properties which he had offered as security for a loan advanced to him. The said orders are of interim nature as they are sought pending the hearing of the suit.

18. The law governing grant of injunction is provided for under Order 40 Rule 1, 2 and 3 of the Civil Procedure Rules 2010. The conditions for granting orders of injunction were set out in the case of **Giella V Cassman Brown & Co. Ltd [1973] EA 358** where it was stated:

> "**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**

19. Further in the case of ***Nguruman Limited –vs- Jane Bonde Nielsen and 2 Others NRB CA Civil Appeal No. 77 of 2012 [2014] eKLR*** the Court of Appeal clarified that the conditions are to be applied as separate, distinct and logical hurdles which an applicant is expected to surmount sequentially. This means that if the applicant does not establish a prima facie case then irreparable injury and balance of convenience do not require consideration. On the other hand, if a prima facie case is established, then the court will consider the other conditions.

20. The issue for consideration therefor is whether the plaintiff has satisfied the above conditions so as to warrant this court to exercise its

discretion in his favour. What is a Prima facie case was described in the case of **Mrao Ltd v. First American Bank of Kenya Ltd & Others** Civil Appeal No. 39 of 2002, as:

> "**In civil case, it is a case in which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has been infringed by the opposite party as to call for an explanation or rebuttal from the latter**"

21. I have looked at the pleadings by the parties. It is not in dispute that the plaintiff was advanced a loan by the defendant and that he is in arrears of payment for the said loan. It is further not disputed that the defendant sought to sell by way of auction the properties which had been charged as security for the loan facility. The plaintiff has however argued that he disputes the interest charged upon the said loan. He also disputes service of the statutory notices as required by law. He submitted that the interest was calculated at a higher rate than the agreed 14% and further that he was not served personally with the required notices but the same were served by registered mail whereas as at that time, he had relocated to the USA, having won green card lottery. He annexed copies of his VISA to the USA as proof of such relocation.

22. The plaintiff also averred that the suit properties are trust land and further that the properties were to be sold at a loss as they were undervalued by the defendant. Are the issues raised by the plaintiff sufficient to warrant grant of the injunction sought?

23. On the issue of the computation of interest payable and/ or accruing, I note that the plaintiff did not furnish this court with a copy of the loan agreement so as to enlighten the same as to the agreed interest payable. This court is alive to the fact that a court cannot rewrite a contract on behalf of the parties. I am of the view that in the absence of any evidence as to the interest being excess, then the said allegation is unsubstantiated. Further with regard to the issue of computation of interest the court in the case of **Jim Kennedy Kiriro Njeru v Equity Bank (K) Limited [2019] eKLR stated as follows**

"**….** it clear that in accordance with the already existing jurisprudence, a dispute touching on the amount payable or interest chargeable without more is not a ground for restraining a chargee from exercising its statutory power".

24. Apart from the issue of interest, the plaintiff, in justifying the grant of the orders sought, stated that he was not served with the statutory notices as required by law. The defendant, in disputing this, argued that it had served the notices on the plaintiff through his last known address. The plaintiff on his part, and in the further affidavit and submissions, maintained the position that he was not in Kenya at the time the said notices were served on him and that they ought to have been served in person. He annexed to the application copies of the VISAs as evidence that he was in the USA at the time of the purported service.

25. In my view, the plaintiff herein had a duty to notify the defendant as to the change of his address for him to justifiably deny service. The defendant attached to the replying affidavit a statutory notice pursuant to section 90(1) of the Land Act 2012, which is dated 10.03.2021 and a list of registered mails with the plaintiff's name indicated as serial No35. The defendant also annexed a copy of Notice of Intentions to sell dated 16.06.2021 and which is indicated as having been sent to the plaintiff as per the attached list of registered mails.

26. As I have already stated, the plaintiff did not dispute the validity of the postal address indicated on the said notices but only stated that he had migrated to the USA at the time of issuance of the said orders. In my view the plaintiff cannot rely on that assertion to deny service of the notices. It was upon him to notify the bank as to the change of address.

27. Otherwise,the postal address being his, it can only be presumed that he had access to the same while in the USA. In **Bonface Renja Erambo -vs- Kenya Commercial Bank Limited [2020] eKLR**, the Learned Judge while finding that there was service by post relied on section 3(5) of the Interpretation and General Provisions Act which provides that:

"Where any written law authorizes or requires a document to be served by post, whether the expression "serve" or "give" or "send" or any other expression is used, then, unless a contrary intention appears, the service shall be deemed to be effected by properly addressing to the last known postal address of the person to be served, prepaying and posting, by registered post, a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would have been delivered in the ordinary course of the post."

28. In view of the above I am satisfied that there was sufficient service of the statutory notices. The said notices contained all the required information including the amount in arrears and most importantly the rights of the chargor and also the consequences of not complying with the notice.

29. As such, on a balance of probabilities, I am satisfied that the plaintiff was served with the notices and that the defendant fulfilled its duties under the law. The defendant's duty in effecting service was to have the same sent via the registered mail, which it did. The statutory notices and the notice of redemption were sent in the said mail. The plaintiff cannot dispute service whereas he did not notify the defendant as to the change in address when he migrated to the USA.

30. Having stated as above, I however note that the fact that the applicant had migrated to the USA is not disputed. I am of the considered view that the applicant should have communicated the fact of his relocation to the respondent. He should also have given the address through which he could be reached. He didn't do any of this. He is conveniently ignoring his omissions and trying to blame the respondent for using the address given earlier.

31. As for the property being matrimonial properties and further being held in trust for the siblings, I find that apart from the plaintiff mentioning the same, he never annexed any evidence as to the prove of the same. I am alive to the fact that this court in determining an application such as the one before it is not supposed to hold a mini-trial and determine issues with finality. However, the applicant has a burden of proof and the said proof must be on a balance of probabilities.

32. The applicant did not even attach a copy of a title to the said land parcels. From the copy of the titles annexed to the replying affidavit,

the suit lands are indicated to be owned by the plaintiff solely. As such, he can only be presumed as the sole owner under section 26 of the Land Registration Act. There was nothing which prevented his spouse to swear an affidavit to the effect that the suit properties are indeed matrimonial properties. The issue of the land being held in trust was equally not proven.

33. Considering all the above, it is clear that the plaintiff herein did not establish a prima facie case so as to warrant issuance of the orders of interim injunction. As I stated elsewhere in this judgment, where a party fails to satisfy the first condition (establishment of a prima facie case), then irreparable injury and balance of convenience do not require consideration. In the same breath, I think and so find that it will be an academic exercise to consider the other two conditions (for grant of orders of injunction).

34. However, I note that the plaintiff has deposed and indeed reiterated and submitted that he is ready and willing and capable of liquidating the said loan save for the interest payable and which he deposed that the same was not as per the required rate as required by the Central Bank of Kenya. As I have already stated, the plaintiff did not state the agreed interest rates as per the contract neither did he attach a copy of the same. Further it is trite law that this court cannot rewrite a contract on behalf of the parties but only to enforce the same.

35. The plaintiff has further argued that the defendant undervalued the suit properties and has annexed a valuation said to have been undertaken in the year 2014. According to the plaintiff the property as at that year was valued at Kshs. 20,000,000/=. He contests that the values of the property given by the defendants in the valuation report amounted to an undervaluation of the property. The elements to be considered by the court in challenging a valuation report were stated in the case of **Zum Zum Investment Limited v Habib Bank Limited [2014] eKLR** where it was held that

> **"***The Plaintiff must satisfactorily demonstrate why the valuation report that the Defendant intends to rely on in disposing of the suit property does not give the best price obtainable at the material time. The Plaintiff needs to show, for instance, that the Defendant's valuer is not qualified or competent to carry out the valuation, or that the valuation was carried out in consideration of irrelevant factors or that the valuation was done way before the time of the intended sale. The Plaintiff has not raised any of such grounds.*

36. In placing reliance on the above case, in the interim I find that the plaintiff has not satisfactorily convinced this court that the defendant has in any way undervalued the property in it's valuation report. The undervaluation alleged by the plaintiff has also not been demonstrated.

37. When all is considered therefore, it is clear that the applicant has not sufficiently demonstrated the merits of his application. I hereby dismiss the application with costs to the respondent.

RULING DATED, SIGNED and **DELIVERED** in open court at **EMBU** this **24TH DAY** of **MARCH 2022.**

In the presence of M/s Wanjeri for Kamotho for respondent and M/s Muthoni Mboi for Githui for applicant.

Court Assistant: Leadys

A.K. KANIARU

JUDGE

24.03.2022