



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
CIVIL SUIT NO. 27 OF 2013

HASMUKHLAL VIRCHAND SHAH 1ST PLAINTIFF

MAYURI SUNIL SHAH 2ND PLAINTIFF

JASODABEN CHANDULAL SHAH 3RD PLAINTIFF

VERSUS

I & M BANK LTD. DEFENDANT

R U L I N G

1. Before the Court is an application by the Plaintiffs dated 29th January, 2013. It is brought pursuant to the provisions of **Order 40 Rules 1, 2 and 4** of the *Civil Procedure Rules* and **Sections 1A, 1B, 3A and 63** of the *Civil Procedure Act*. The applicants seek for the following prayers *inter alia*:

“1. THAT pending the hearing and determination of this application inter parties or until further orders, this Court be pleased to issue an order of temporary injunction to restrain the defendant, either through itself, servant or agents or anyone claiming under them from advertising for sale, disposing of, selling by public auction or private treaty or otherwise interfering with the Plaintiff’s ownership and/or interest of ALL THAT property known as Mombasa/Block XXVI/380-Kizingo;

2. THAT pending the hearing and determination of this suit or until further orders, this Court be pleased to issue an order of temporary injunction to restrain the defendant, either through itself, servant or agents or anyone claiming under them from advertising for sale, disposing of, selling by public auction or private treaty or otherwise interfering with the Plaintiff’s ownership and/or interest of ALL THAT property known as Mombasa/Block XXVI/380-Kizingo;

3. THAT the Plaintiff be at liberty to apply for such other or further Orders as the circumstances in this case may permit;

4. THAT the costs of this application be provided for.”

2. The application is predicated upon the grounds as set out therein in that the Defendant is demanding for Kshs. 77,000,000/- from the Applicants, with an intention to sell the suit property as

above. The applicants contend that the sum claimed is well above the Kshs. 20,000,000/- expressly stipulated as the maximum amount claimable in the Charge. Further, the Plaintiff's maintained that the Defendant is in contravention of the mandatory provisions of the Land Act 2012 for failing to issue notices of its intention to exercise its statutory power of sale. It is the Plaintiffs' contention that the Defendant has not established the value of the property and further, it has not demonstrated that the sale of the suit property is the most deserved or suitable remedy in all the circumstances. The Plaintiffs also contend that the damage that they stand to suffer if the suit property (being matrimonial property) was sold cannot be compensated for monetarily. The Plaintiffs' application is further supported by the affidavit of **Hasmukhlal Virchand Shah** sworn on even date. The deponent avers that the suit property is the matrimonial home of the Plaintiffs and that the amount claimed by the Respondent of Kshs. 77,000,000/- is in excess of the total amount that the property was secured for. Further, the deponent, as the guarantor, contends that he has not been served with the Notice of Sale, which also goes for the 2nd and 3rd Applicants as the spouses of the Chargors, as named in the Charge in favour of the Defendant and as per the mandatory requirements under the Land Act 2012. It is further deponed that the deponent/guarantor is ready and willing to redeem the property, but the Respondent has failed and/or refused to furnish him with the requested statements of account. The applicant relied on **Mrao Ltd v First American Bank of Kenya Ltd (2003) KLR 125, Giella v Cassman Brown (1973) E.A 358, Printing & Numerical Registering Co. Ltd (1875) L.R, Stewan Holdings Ltd & Another v Duncan Kingora & Another H.C.C.C No. 714 of 1999 and Kanorero River Farm Ltd & 3 Others v National Bank of Kenya Ltd H.C.C.C No. 699 of 2001** to support their application.

3. In opposing the application, the Respondent filed its Replying Affidavit sworn on 18th March, 2013. In contending that the Applicants have failed to demonstrate a basis for the Respondent's right to exercise its statutory power of sale, the Respondent avers that the Applicants have been lethargic in seeking redress and that they have not fully disclosed material facts pertaining to the instant matter. They contend that the Applicants have been aware of the Respondent's intention to realize its security and only waited until the advertisement for sale on 21st and 28th January, 2013, scheduling the sale for 4th February, 2013, to act. It is further contended that the Applicants have never taken any steps to settle, regularize or reduce the demanded balance of Kshs. 77,000,000/- despite several demands and notices from the Respondent. Further, the Respondent contends that, at the time the suit premises was offered as security for the financial facilities, no notice or communication was advanced that the suit property was matrimonial property and that the actions by the Applicants disentitles them to the equitable remedy of injunction. They also relied on a number of authorities including **Virchand Virpal & Sons Ltd & 4 Others & I & M Bank Ltd H.C.C.C No. 259 of 2010, Habib Bank Ltd v Habib Bank AG Zurich [1981] 2 All E.R 650, A to Z Transporters Ltd v N.I.C Bank Ltd H.C.C.C No. 724 of 2009, Solid Hold Ltd v Transnational Bank Ltd & Another H.C.C.C No. 149 of 2004, Jimmy Wafula Simiyu v Fidelity Commercial Bank Ltd H.C.C.C No. 658 of 2012 and ENW v PWM & 3 Others H.C.C.C No. 240 of 2014** to support their objection.
4. The issues of contention arise from the process with which the realization process was executed. The Plaintiffs contend that the provisions of the Land Act, 2012 were not followed and thus the entire process was flawed. In admitting that the Statutory Notice was issued on 8th February, 2012 before the commencement of the Land Act on 2nd May, 2012, the Plaintiffs however, contend that the Notification of Sale issued on 5th December, 2012 did not comply with the provisions of Section 96 of the Land Act. The Respondent contends that, the 2nd and 3rd Plaintiffs do not fall under the category as entrenched under **Section 96(3)** of the *Land Act* and thus were not served with the Notification of Sale. It contends that the Notice was served pursuant to the provisions of the Auctioneers Act. It further contends that in following the determination in **Timothy Oguchu Omatu v National Bank of Kenya Ltd H.C.C.C No. 353 of 1994 and James Mutua Maingi & Another v H.F.C.K Ltd H.C.C.C No. 427 of 2006** on the issue of the valuation of the property in order to ascertain the forced sale value and the suit premises as valid security, they relied on **Gimalu Estates Ltd & Others v International Finance Corporation & Another H.C.C.C No. 606 of 2003**. It is not in dispute that the Plaintiffs did offer the suit premises as security for facilities that were extended to them by the Respondent on various occasions as evidenced by the

documents adduced by the Respondent in its Replying Affidavit. These include the First Charge over Mombasa/Block XXVI/380- Kizingo dated 24th September, 1992, a Further Charge dated 10th January, 1996, a Second Further Charge dated 25th May, 1998, and a Third Further Charge dated 29th January, 2009. These were exhibited as “HS-1”, “HS-2” and “HS-3” as well as the Respondent’s documents marked as “RVN1 a-c” and “RVN-10”. It was also not in contention that the facilities were secured under the Registered Land Act, Cap 300 (now repealed).

6. In disputing that the realization process was not properly executed, the Plaintiffs contended that Section 96 provides that the spouses of the Chargors should also be notified of the intended sale. **Section 96(3)(c)** reads:

“A copy of the notice to sell in accordance with subsection (2) shall be served on –
(c) a spouse of the chargor *who had given the consent*;”

However, the Plaintiffs admit that the provisions as enunciated under the Land Act, 2012 more particularly **Section 96**, were not contained under the Registered Land Act (now repealed). They contend nonetheless, that the provisions of the Land Act are applicable in this case, as the Notice of Sale was issued on 8th December, 2012, after the enactment of the Land Act. The Plaintiffs further contend that the suit property is the matrimonial home, which according to **Section 2** of the *Land Act*, is defined as:

“any property that is owned or leased by one or both spouses and occupied by the spouses as their family home;”

The Plaintiffs submitted that the suit property was the matrimonial home, with eight (8) occupants including the 2nd & 3rd Plaintiffs and an 85 year old **Chandulal Virchand Shah**, the 3rd Applicant’s husband. They submitted that service of the Notice of Sale on the spouses of the Chargors was mandatory as per **Section 96(3)(c)** of the *Land Act*, and failure to serve the same vitiated the entire realization process.

7. As has been admitted by both the Plaintiffs and the Defendant, the realization process was commenced sometime in 8th February, 2012 which was before the coming into effect of the Land Act, 2012. Under **Section 161(2)** of the *Land Act*, it is provided that:

“All other law relating to land shall be construed with the alterations, adaptations, qualifications and exceptions necessary to give effect to this Act.”

Section 161(1) repeals the statute as far set out in the Schedule thereto. However, **Section 162(1)** provides that the law applicable before the commencement of the Land Act shall continue to be applicable. The said provision reads:

“Unless the contrary is specifically provided in this Act, any right, interest, title, power, or obligation acquired, accrued, established, coming into force or exercisable before the commencement of this Act shall continue to be governed by the law applicable to it immediately prior to the commencement of this Act.”

It is not in dispute that the suit property was registered under the Registration of Land Act. The Land Act, in the Savings and Transitional Clause, allows for the applicability of any of the previous laws repealed, being enforceable to the extent:

“unless the contrary is specifically provided for.”

According to the Defendant, these provisions apply in the instant matter, since the Charges over the suit property were registered under the repealed laws. The Defendant further contended that the

realization process had commenced before the enactment of the Land Act, and hence was not applicable in this instance, especially with regard to **Section 96(3)(c)** of the same. According to Mabeya, J in **Jimmy Wafula Simiyu v Fidelity Commercial Bank Ltd** (supra), the learned Judge, with regard to the applicability of the provisions of **Sections 78 and 161(1)** of the *Land Act*, had held that:

“A careful reading of this Section will show that there is the use of the words “unless the contrary is specifically provided in this Act” Section 78 of the Land Act, 2012 which the Plaintiff relies on, is in my view, express and specific that Part VII of the Act on “General Provisions on Charges” applies to all charges on land including any charge made before the coming into effect of that Act. That Part VII generally deals with the creation, transfer, contents of charges and the remedies thereon. Part VII extends from Section 78 to 106 of the Act. In my view therefore, notwithstanding the provisions of Section 162(1) of the Act, the provisions of Section 78 of the Act being express and specific as to the application of Part VII of the Act, that part applies to the charges made before 2nd May, 2012 when the Land Act, 2012 came into effect. In this regard, I hold the view that prima facie, the provisions of the Land Act, 2012 is applicable in this case as regards Part VII thereof... That if by that time a lender had not properly commenced the enforcement of any rights or power under the repealed laws, the laws governing the exercise of that right or power is the Land Act, 2012. It is clear from the record that the statutory notice of sale dated 15th May, 2012 was issued after the Land Act, 2012 had come into force on 2nd May, 2012. The defendant had, therefore not commenced the process of enforcing its right under the previous law.”

The Applicants, in the evidence before Court admit that the realization process was commenced on 8th February, 2012, before the commencement of the Land Act on 2nd May, 2012. They have not disputed this fact and that proper process was exercised. What they dispute, however, was that the Notification of Sale was issued on 5th December, 2012 after the commencement of the Land Act. In the said ruling of Mabeya, J it was propounded that once the process of exercise of rights by a chargee was initiated before the commencement of the Land Act, 2012, then the law applicable would be the repealed laws as provided for under **Sections 78, 161(1) and 162(1)** of that Act.

8. In my view, the Respondent acted in accordance with the provisions of the repealed Registered Land Act and, as a result, cognizance of **Section 96(3)(c)** does not arise in this instance. The earlier sub-**section 96 (2)** obliges the chargee (the Defendant) to serve on the chargor a notice to sell in the prescribed form. Unfortunately, such form has yet to be prescribed by the Cabinet Secretary responsible for matters relating to land neither has the Land Commission. As a result, what notice of sale should the Defendant have served upon the Plaintiffs? The statutory notices were issued by the Respondent on 19th December, 2011 and 8th February, 2012 renders it (before the Land Act, 2012 commenced) in accordance with **Sections 65(2) and 74(1) & (2)** of the *Registered Land Act* and constituted sufficient notice to the Applicants, who have neglected and/or refused to make any attempts or take any steps to ameliorate their situation, or to regularize their accounts after the default. Instead they sought to hide behind the provisions of **Section 96(3)** of the Land Act. It is clear that the Notification of Sale dated 4th December 2012 was issued after the Land Act had come into force. However, it was issued under the provisions of **section 15 (C)** of the *Auctioneers Rules, 1997* which was applicable under the provisions of the Registered Land Act. That notice gave the Plaintiffs 45 days for payment thus satisfying the requirement of **section 96 (2)** of the *Land Act, 2012*. In the circumstances, this Court will not aid a wrongdoer and neither will it sit idle nor let the law be used a panacea for ills. The Court will, according to the provisions of **Sections 1A and 1B** of the *Civil Procedure Act*, uphold justice and ensure the fair and just determination of matters.
9. The principles enunciated in the determination in **Giella v Cassman Brown and Mrao Ltd & Another v First American Bank of Kenya Ltd** (supra) are that the Court will not normally exercise its discretion in granting an injunction if the applicant has failed to establish a *prima facie* case with a probability of success and that they can show that they stand to suffer irreparable loss. The Court, in further enunciating the importance of establishing a *prima facie* case, reiterated that a *prima facie* case will include, but not be limited or confined to a genuine and arguable case. The

Court of Appeal in **Mrao Ltd & Another v First American Bank of Kenya Ltd** (supra) held that the appellants had come to a Court of equity but having failed to show utmost good faith, the Court dismissed the application for injunction. In my opinion in the instant matter, the Applicants have failed to establish a *prima facie* as per the principles enunciated in **Giella v Cassman Brown** (supra).

10. My learned brother Ochieng, J in **Henry Wanyama Khaemba v Standard Chartered Bank** (supra) applied the determination in **Godfrey Ngumo Nyaga v H.F.C.K Civil Appeal No. 134 of 1987** in which it was held:

“Where a party has a statutory right of action, the Court will not usually prevent that right being exercised except that the Court may interfere if there is no basis on which the right could be exercised or if it was not being exercised oppressively.”

In dismissing the application for injunction before him, the learned judge also applied the finding in the case of **Moses Ngenye Kahindo v Agricultural Finance Corporation H.C.C.C No. 1044 of 2001** where it was held:

“A person who charges his property to secure a loan does so knowing only too well that upon default, the property could be sold to recover the loan. It does not therefore lie in the mouth of such a person to state that he could suffer an injury which cannot adequately be compensated in damages if the lender realizes the security in question.”

The upshot and in consideration of the foregoing, I find that the application by the Applicants dated 29th January 2013 is without merit and is hereby dismissed with costs to the Respondent.

DATED and delivered at Nairobi this 24th day of April, 2014.

J. B. HAVELOCK

JUDGE