



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA ATNAKURU

MISC. CIVIL CASE NO. 19 OF 2014

NAKURU STEROS SERVICES CO. LTD.....PLAINTIFF

VERSUS

NATIONAL BANK OF KENYA.....DEFENDANT

RULING

By a chamber summons dated 14/03/2014, the applicant prays that orders for a temporary injunction do issue against the defendant (National Bank of Kenya), M/ s Garam Auctioneers, their servants or agents restraining them from selling LR No.Nakuru Municipality Block 5/81 by public or private auction until the suit is heard and determined.

This is on grounds that the property has been advertised for sale yet the notification for sale is bad in law and the auction violated the Lands Act. Further, the plaintiff has not been given an opportunity to exercise its rights over the matter under the Lands Act and the intended sale price for the property is far below the market price.

In the supporting affidavit sworn by Joseph M. Wakubwa (the applicant's director) he deposes that he had identified the property and negotiated for a purchase price at Kshs. 180 million. The company raised Kshs.15 million and borrowed the balance of Kshs.165,750,000/= from the respondent.

At the time of borrowing the funds, a valuation carried out gave the property a value of Kshs. 199,300,000/= and a forced sale value of Kshs.129,545,000/=. A charge was then executed over the property- the monthly loan and interest repayment stood at Kshs. 2,474,826/=. According to the applicant, there was a mutual understanding between the parties that the plaintiff's income would be rent received from the lodgings and the shops that comprised the property. Further, that every loan repayment comprised both the basic loan and interest factors.

However upon purchase of the property, the applicant realized that the same was incomplete and required repairs and finish works to make it commercially viable - this required funds. This development was communicated to the respondent who did not seem to care, and the condition of the building, plus failure by the tenants to pay outstanding rent, made it difficult for the plaintiff to regularly service the loan. The applicant approached the respondent for an additional loan to enable quick repairs, but this was turned down.

Subsequently the applicant's directors sold other family assets so as to service the loan and carry out further renovations. The applicant's lament is that if the suit property were to be sold, the family would be completely destroyed. It is in this regard that the applicant seeks to rely on section 103-106 of the Lands Act, 2012 saying it has rights which should be exhausted before the respondent invokes its powers of sale.

Whilst acknowledging that in the charge documents, the respondent was vested with the power to appoint a receiver, (which power is also created by the Lands Act), the Respondent has without reason refused to exercise to this power the detriment of the applicant. Further, the applicant has made proposals on how it will service the loan, upon renovation of the building but the respondent has refused to budge. All the applicant seeks is a further 6 months and it will be ready to commence the monthly instalments.

The applicants also complain that the respondent has made the loan repayment impossible by increasing the interest rate from 13% to 45%; in violation of the **Donde Bill**. He urges this court to order for reduction of the interest rates to a manageable percentage, saying that, to date a repayment of Kshs.17 million has been made, yet the respondent has, in breach of all banking laws focused on interest alone, leaving the principal sum to accumulate and attract a huge interest. These acts are termed as being done by the respondent so as to create a false reason to sell the property.

The respondent is accused of completely refusing to negotiate and has instructed Garam Auctioneers to advertise the property for sale. This advertisement is faulted as the Respondent has failed to comply with section 97(a) of the Lands Act since no forced valuation of the property has been carried out with the applicant's participation. The applicants contend that the respondent's valuer is a relative of the previous owner who sold the property and any sale ought factor in the improvements, and the court ought to grant a reversed charge with a monthly repayment of Kshs.2,800,000/=.

The application is opposed and the respondent In a replying affidavit sworn by Doris Mbotela (the respondent's Recoveries Manager) she deposes that although the rate of interest was 13% per annum, the letter of offer clearly provided that the bank had a right to vary the rate of interest depending on the cost of prevailing funds in the market.

It is contended that the applicant has defaulted in servicing the loan on various occasions, resulting in the bank issuing statutory notices of sale on 10th April 2013, 22nd July 2013 and 5th November 2013. As at 11th March 2013, the applicant had not taken steps to pay the debt which has accrued to the total sum of Kshs.243,011,377/05 cents made up of Kshs.75,042,948.65 as the current account, accrued interest being Kshs13,068,266/=, mortgage account now stands at Kshs.138,349,961.18 and accrued interest on the current account is Kshs.16,550,201.20.

The bank confirms that in consequence of this default, it issued a statutory notice of sale, and instructed Garam Auctioneers to auction the charged property; and the applicant was notified of the intended sale. The respondent denies having had any mutual understanding with the applicant, pointing out that all the terms of the loan facility were reduced into writing in the letter of offer dated 28/01/2011. Further section 103- 106 of the Lands Act do not prevent the exercise of the chargee's statutory power of sale, nor has the applicant provided the court with any evidence or relevant particulars to warrant the intervention of the court. The respondent relies on the provisions of section 90 (3) (e) of the Land Act which provides various remedies that may be exercised by a charge where the chargor has failed to comply with a statutory notice issued.

As regards the applicant's lament on the state of the property, the respondent points out that there was no condition precedent in the agreement for grant of the loan which required carrying out of renovations before the repayments could begin. The respondent also seeks to clarify that the rate of interest pursuant to the letter of offer, and the charges registered in favour of the bank is 13% and not 45% as alleged by the applicant. The court's attention is drawn to clause 8 of the letter of offer which provides that where the borrower defaults in making repayment, default interest shall accrue on the sum due to the bank from the due date, to the date of repayment.

The proposals made by the applicant are unacceptable to the respondent who argues that the same do not meet the applicant's repayment obligations under the letter of offer, and that in any event section 97(a) in the Land Act does not exist.

The Respondent explains that after the applicant failed to comply with the statutory notices, it instructed Regent Valuers International to carry out a valuation of the property with a view to recover the amount

owed by the plaintiff, pursuant to provisions of section 97(2) of the Land Act.

The applicant is accused of delay in coming to court since the issuance of the statutory notices in the year 2013 and the notification of sale in January 2013, and it is merely using the court to obstruct the respondent from exercising its rights under the agreement.

It is on account of this that respondent's contend that applicant has not established a prima facie case with a probability of success, nor established that it will suffer irreparable injury which would not be adequately compensated by an award of damages and the balance of convenience does not tilt in the applicant's favour.

This court is urged to dismiss the application with costs.

The major issue for determination is whether the applicant has satisfied the principles which a court ought to take into consideration when dealing with an application seeking grant of a temporary injunction. These principles are well settled in the case of **Giella V Cassman Brown 1973 EA pg 358** and the respondent has aptly captured the same. In addressing whether the applicant meets these conditions, several issues arise:-

- (1) What is the place of section 90 3(e), section 97(a), section 103-106 of the Lands Act in relation to the prayers sought [Appointment of Receiver?]
- (2) Was there any mutual understanding by the parties regarding renovations vis a vis repayment.
- (3) Does the agreement allow the respondent to:
 - (a) Vary the interest rate.
 - (b) Has the interest rate been changed from 13 % to 45%.
- (4) Which family assets have been sold in a bid to save this property, and is this is the only asset left, so that its sale would irreparable damage to the applicant.
- (5) (a) Does the **Donde Bill**, which is cited by the Applicant apply here?
 - (b) Which Banking laws has the respondent violated? Was it necessary to involve the applicant in the valuation carried out with a view to the intended sale.
- (6) Can the court vary or change the terms of an agreement so as to accumulate the new proposed repayment rates

Donde Bill: It has not been clarified which facet of the Donde Bill is being invoked and in any event the Bill was not ever legislated. What happened is that the Banking Act was amended to address some of the Donde Bill's concern.

PRIMA FACIE CASE

In arguing the application, Mr. Kimatta submitted on behalf of the applicant that orders should issue to extend the period within which the loan should be repaid, from 120 months to 210 months, and a grace period of 6 months be given before making the repayments. Further, that the court should order for suspension of the repayments until the renovations are complete. Counsel justifies this proposal saying that respondent must have realised that in certain instances, the court can intervene in a contract and grant reliefs to avoid parties losing property due to circumstances beyond their control. One of the concerns raised is that the property is being possibly undervalued, because earlier its value was Kshs.60m and the improvements were given as being worth Kshs.139,600,000/= (by the respondent's report), and previously the respondent had given the market value at Kshs.174,000/= yet now the forced sale value is

being reduced to Kshs. 130 million with an insurance value of Kshs.110,000,000/=. This is described as a throw away price which would be greatly prejudicial to the applicant as the sale will not even cover the outstanding loan and the respondent would still have to chase the applicant for the balance. Counsel urges this court to be guided by two decisions, i.e. **Showcase Properties Ltd V KCB HCCC No.305 of 2013** (Milimani Commercial & Admiralty) and **David Gitune Kuhuguka V Equity Bank (Nrb Milimani HCCC No.94 of 2013)** where injunctive orders were granted to parties who had defaulted in repayment of loan facilities.

These arguments have been advanced to demonstrate that the applicant has established a prima facie case with probability of success.

In opposing this, Mr. Malonza has submitted on behalf of the respondent that no prima facie case has been established as the applicant has not demonstrated that it has a right which has been infringed as to call for an explanation from the respondent. He argues that the respondent is merely realising its statutory power by realising the security deposited after issuing a note to the applicant under section 90 of the Lands Act, to redeem the loan.

He points out that another statutory notice as provided under section **96(2)** of the **Land Act** giving the applicant 40 days to redeem the loan, had been issued and once the period lapsed, the respondent was at liberty to exercise its statutory power of sale. He contends that the property was valued, and under section **97(2)** of the **Land Act**, there is no duty on the part of the respondent to involve the chargor in the valuation before the intended forced sale. The position taken by respondent is that any defect in the property necessitating huge amounts of money ought to be taken up against the seller and not the financier. It is also argued that under **section 90(3)** of **Land Act** the respondent did not need to appoint a Receiver, as the provision gives the respondent an option in realising the statutory power of sale; to elect any of the remedies available.

Counsel submits that there is no way the applicant can establish a prima facie case when the self-same applicant has admitted to defaulting in repayment and applicant is simply running away from responsibilities. The competing arguments are, under-valuation of the property in respect of the forced sale versus the default in loan repayments. Alongside this is the question as to what the role of the court is in a situation where parties have signed a contract. Is the court's role limited to interpreting the contract or can the court re-write the contract by varying its terms. The answer to these questions in my view is what will determine whether the applicant has established a prima facie case with a probability of success.

Indeed what constitutes a prima facie case was discussed in the case of **Mrao Ltd. V First American Bank of Kenya Ltd. & 2 others (2003) KLR pg 125 at 126** hold No.4, to the effect that:-

"A prima facie case in a civil application includes but is not confined to a "genuine and arguable case". It is a case, which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party, as to call for an explanation or rebuttal from the latter."

Although the applicant says the property has been undervalued, it has not filed a separate valuation report to counter the one presented by the respondent.

However this court is being urged to consider that because some renovations & completion works have been undertaken, the value of the property must have risen. Whilst it is not disputed that there exists a contract which sets out the terms of repayments of the loan, and that the applicant has on several occasions defaulted in making repayments, this court is being urged to restrain the respondent from exercising its rights under the agreement, and take into consideration the effects the applicant has made towards repayment, the financial challenges and expenses and allow it to now set new terms of the agreement which the respondent ought to accommodate and the court can help it achieve this by issuing restraining orders against respondent.

I don't think it is proper for the applicant to complain that it is only upon taking over the property that it

became apparent that the works were incomplete. There was need to exercise due diligence, and good business sense. In any case, completion of works and such other related structural challenges of the premises was not form of condition precedent to the agreement.

In the **Mrao** (supra) case, Kwach JA, (as he then was) drew from **Halsbury's Laws of England Vol.32 (4th Edition) para 725** concerning circumstances in which a mortgagee may be restrained from exercising the statutory power of sale as follows:-

"The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has begun a redemption action.... He will be restrained however, if the mortgagor pays the amount claimed into court that is the amount which the mortgagee claims to be due to him, unless on the terms of the mortgage, the claim is excessive."

This situation must then be considered In the light of provisions in the Land Act 2012.

Section 90(1) of the Act provides that:-

"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."

This would appear to be the basis for the respondent's action against the applicant.

However in exercising the statutory power of sale, the chargee is required under section 97(1) of the Land Act: "to obtain the best price reasonably obtainable at the time of sale."

Section 97(3) provides that:-

"If the price at which the charged land is sold is twenty five percent or below the market value at which comparable interests in land of the same character and quality are being sold in the open market.

(a) There shall be a rebuttable presumption that the charge is in breach of the duty imposed by section 97(1)."

Although the applicant has not filed a separate valuation report on the property, it is not disputed that some works have been undertaken to significantly improve the status of the property. I doubt that with such development the property's value would have diminished especially given the current economic trends in the country with regard to real estate market. This is an arguable position which would probably succeed especially if, at the hearing, the applicant were to produce a valuation report for the property.

Section 103 of the Land Act allows a chargor to apply for relief, any time after the chargee has served the notice under section 90(1). The court is empowered to grant such relief having regard to whether the remedy proposed is reasonable and necessary so as to prevent reduction of the value of the charged property, and among the reliefs a court may grant, includes extending the period of time for compliance by the charger and even make modifications to the charge.

I am therefore satisfied that the applicant has established a prima facie case with probability of success as the Land Act docs recognise that the court may in some instances interfere with a contract entered into by parties - see **Showcase Properties Ltd V Kenya Commercial Bank HCCC No.305 of 2013.**

Irreparable Damages

It is argued by the applicants counsel that the property is a family investment where the applicants have put everything within the family so as to raise money for the project; hence it is not just the value of the property. He submits that the Lands Act gives Banks power to look for ways to help a borrower make repayments.

In response, Mr. Malonza submits that once the property was given as security, it became a commodity whose value can be ascertained; and any loss which the chargor may suffer if the property is sold by auction, becomes ascertainable. He points out that the property has in fact been valued and once given as security, a party cannot claim irreparable loss, he refers to the case of **Ooko V Barclays Bank of Kenya Ltd. & Sunrise Homes Ltd. V National Bank of Kenya.** [2002] 2 KLR 125

Counsel contends that it has not been demonstrated that the respondents cannot compensate the applicant for any damages it may suffer if the property is sold to realise the loan, as the respondent is a reputable bank listed in the security of exchange, and is capable of compensating the applicant.

Whether the premises is family property with great sentimental significance is besides the point - the applicants were aware of that when they staked it out as security for the loan. That property has a value attached and can be redeemed, so that a proper market price is determined. It means that if the same were to be sold, and the suit succeeds, damages could easily be quantified so as to adequately compensate the applicant. It has also not been shown that the respondent would not be able to meet the damages - see case of **Sunrise Home Ltd V National Bank of Kenya and Another HCCC (Nrb)** (Commercial & Admiralty Division) **No.17 of 2014.**

I borrow from the words of Gikonyo J in the afore cited case that once property is given as security for a loan, it becomes a commodity for sale, compensable by damages and it matters not what emotional intrinsic or invaluable attachment the chargor may have. In any event the other family assets which are said to have been sold to offset the loan are not specified. This limb the issue of irreparable harm which cannot be adequately compensated by damage is not proved.

Balance of Convenience

It is submitted on behalf of the applicant that this tilts in favour of the applicant because without the orders sought being granted, the property will be auctioned at a throw away price.

In response, Mr. Malonza argues that the balance actually tilts in favour of the respondent because the applicant has admitted defaulting in the repayments, and a dispute on the rate of interest charged is not a ground for issuing injunction to restrain the bank's statutory power of sale. He urges this court to be guided by the decision in **Ooko V Barclays Bank of Kenya** *supra* at pg 4.

He further submits that injunctions should not be issued where a party's conduct does not endear itself to the court, asking the court to note that the applicant has not performed its contractual obligation and has defaulted in loan repayments. Counsel draws to this court's attention the decision in **Industrial Hardware Ltd. V Standard Chartered Bank [1999] eKLR pg 25,** where the court refused to restrain the chargee after the charger admitted being in debt and noted that all legal requirements including serving statutory notices had been met. He contends that the court cannot be asked to remove the contract on grounds of alleged economic difficulties. Counsel cites the case of **Thomas Okongo V Cooperative Bank [2012] eKLR** whereat pg 38 the court noted that the contract allowed for the renegotiations of contract, but that it was not the function of the court to notify contractual obligations in a manner different from that contracted by the charge.

Counsel explains that situations where a court can restrain a chargee from exercising statutory power of sale are clear as was observed in the case of **John Nduati case** where the court noted that when a mortgager pays the amount claimed in full then such orders can be issued.

The orders issues are described as causing prejudice to the Bank as it is prevented from realizing the security despite default of the loaner; and in fact the respondent stopped repayment drawing from the case

of **Omega Enterprises V Kenya Tourism Corporation.**

I have no doubt in my mind about the place of the first principle enunciated in the case of **Giella V Cassman Brown** and there would be no reason to look at the balance of convenience. There is an arguable case made by the applicant herein.

Consequently the application succeeds on the basis that the applicant has established a prima facie case with probability of success. An order of injunction shall issue and remain in force pending hearing and determination of the suit.

The applicant is directed to fix suit for hearing within the next 60 days in default of which the order made stand vacated. Costs of the application shall be borne by respondent.

Delivered and dated this 13th day of August 2014 at Nakuru.

H.A. OMONDI

JUDGE