



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL AND ADMIRALTY DIVISION

CIVIL CASE NO 333 OF 2013

ST ELIZABETH ACADEMY- KAREN LIMITED.....PLAINTIFF

VERSUS

NATIONAL BANK OF KENYA LIMITED.....DEFENDANT

RULING

INTRODUCTION

1. The Plaintiff's Notice of Motion application dated and filed on 30th July 2013 was brought pursuant to the provisions of Sections 1A, IB, 3A and 63 (e) of the Civil Procedure Act, Order 40 Rule 1, 2, 3, 4, 9 and 51 of the Civil Procedure Rules, Sections 89, 90, 96, 103, 104, 105 and 106 of the Land Act, 2012 and all the enabling provisions of the law. Prayer Nos (1) and (2) were spent. It sought the following remaining orders:-
 1. Spent.
 2. Spent.
 3. **THAT the time for compliance and/or for rectifying any default to regularize the mortgage accounts concerning TITLE NUMBERS 1159/140 and 1159/377 and any of the Plaintiff's title in the Defendant's possession be extended for a period of 12 months or for such other period as the court may determine pursuant to powers conferred on the court under Section 104(2) as read with Section 90 of the Land Act, 2012.**
 4. **THAT in the alternative to prayer above, the Defendant's/Respondent's statutory powers of sale be suspended and/or postponed for a period of twenty four (24) months or such other period as the court may determine to enable the Plaintiff/Applicant redeem TITLE NUMBERS 1159/140 and 1159/377 and any of the Plaintiff's title in the Defendant's possession and for reconciliation of accounts to be undertaken.**
 5. **THAT in the alternative to prayers 3 and 4 above, pending the hearing and determination of this suit, the Defendant/Respondent whether by itself, employees, servants and/or agents or otherwise assigns and/or any person whatsoever acting on its behalf from alienating, advertising for sale or offering for sale, selling or taking possession of, leasing, transferring, charging or otherwise in any manner whatsoever interfering with the TITLE NUMBERS 1159/140 and 1159/377 and any of the Plaintiff's title in the Defendant's possession.**
 6. **THAT the Defendant/Respondent be ordered to issue the Plaintiff/Applicant with the bank statements regarding all its accounts held in the Defendant's Harambee Avenue Branch from inception of the facilities to the date of such order and to account to the**

Plaintiff/Applicant how the funds received by the Defendant in those accounts had been applied.

7. **THAT costs of the application be provided for.**

THE PLAINTIFF'S CASE

2. Anne Waudu, the Managing Director of the Plaintiff herein, swore Supporting, Supplementary and Further Supplementary Affidavits on 30th July 2013, 13th August 2013 and 10th September 2013 respectively on behalf of the Plaintiff herein. Its written submissions were dated and filed on 26th August 2013.
3. The Plaintiff was the proprietor of Title Numbers 1159/140 and 1159/337 (hereinafter referred to as "the subject properties") situated at Karen, Nairobi. It put the value of the said subject properties at Kshs 400,000,000/= and Kshs 180,000,000/= respectively.
4. It stated that it applied for and was granted two (2) banking facilities from the Defendant in the sum of Kshs 252,818,607/= (hereinafter referred to as "Mortgage 1") and Kshs 28,800,000/= (hereinafter referred to as "Mortgage 2") to finance the expansion of the school. The said facilities were secured by charges that were created over the said subject properties amongst others.
5. The Plaintiff was to repay Mortgage 1 for a period of seven (7) years by paying three (3) installments per annum in the sum of Kshs 14,635,735.95 on 15th January, 15th May and 15th September respectively. As regards Mortgage 2, the Plaintiff was to pay monthly installments of Kshs 464,645/= for a period of fifteen (15) years.
6. However, rising inflation rates, depreciation and interest rates that the Defendant raised from 15% to 22% in its letter to the Plaintiff dated 17th December 2011 caused the loan to spiral out of control. The Defendant rejected its proposals to re-structure the loan payments and advertised the sale of the subject properties on 1st August 2013 without issuing it with the requisite notice under Section 90 (1) of the Land Act, 2012. This led to the filing of the application herein.
7. It was its averment that there was a significant dispute regarding the amounts of monies that the Defendant collected as school fees covering the period of February 2012 to the time it filed its present application and further, that the Defendant had totally refused to disclose any information regarding the same.
8. It contended that from the time the Defendant advised it of the default, it made various efforts to regularise its accounts. It said that it was ready to remedy the default and redeem the subject properties if it was given more time. It stated that it had in fact secured a purchaser for Title Number 1159/140 but that the Defendant had attached conditions that it was unable to meet.
9. It argued that it had established a *prima facie* case with a probability of success and that it would suffer irreparable damage if the orders it had sought were not granted. It said that as the school had approximately 1,374 students and 250 members of staff whose learning and operations would be disrupted, it was in the best interests of justice that the orders it had sought be granted as the balance of convenience tilted in its favour.

THE DEFENDANT'S CASE

10. In response to the said application, on 6th August 2013, the Defendant filed a Replying Affidavit that was sworn by Paul Chelang'a on the same date. On 26th August 2013, he also filed a Further Affidavit that was sworn on even date. Its written submissions were dated 23rd August 2013 and filed on 26th August 2013.
11. It stated that the Plaintiff applied for various banking facilities which were secured by various Charges that were duly executed and registered. It said that it had conducted a valuation of the subject properties which was in the sum of Kshs 480,000,000/=. It contended that the Plaintiff had defaulted in repaying the banking facilities and also failed to honour several promises after the repayment of the loans were re-structured.
12. It was categorical that it issued the Plaintiff with the requisite statutory notices and the Plaintiff could not purport to benefit from the provisions of the Land Act, 2012 as the loans had been advanced to the Plaintiff before the enactment of the said Act. It denied having given consent to the Plaintiff to dispose of what it referred to as the Chineta (sic) property.

13. It was its contention that there had been no dispute of the outstanding sum of Kshs 354,712,302/= as at 31st July 2013 and that the Plaintiff had only raised the issue of interest for the first time when it filed the present application. It urged the court to dismiss the Plaintiff's application as the granting of an injunction would only worsen the situation.

LEGAL ANALYSIS

14. From the documentation that was placed herein, the court found the following to be the issues for determination by the court:-

- a. **Whether or not the Plaintiff had defaulted in payments of the loans that were advanced to it by the Defendant;**
- b. **Whether the Defendant issued the Plaintiff with the Statutory Notice before it purported to sell the subject properties;**
- c. **Whether or not the Plaintiff had met the threshold required before an injunction could be granted;**
- d. **Whether or not the Plaintiff was entitled to the remedies that it had sought.**

15. The Plaintiff stated that it did not know how much fees had been applied to the mortgage account and that the accounts were being run in an opaque manner. It averred that the Defendant deliberately had refused and/or neglected to issue it with bank statements running from 1st March 2012 to 30th July 2013. It also pointed out that in a period of fourteen (14) months, it had paid the Respondent a sum of Kshs 88,771,057.65 in respect of Mortgage 1 whereas it was only required to pay Kshs 43,907,207.85. In respect of Mortgage 2, it submitted that it had paid a sum of Kshs 7,788,952/= in the same period against the anticipated amount of Kshs 6,969,675/=.

16. It expressed doubt that it was in arrears as had been alleged by the Defendant on the ground that it had deposited large amounts in its accounts and argued that as over Kshs 80,000,000/= had been irregularly debited into its accounts, its equity of redemption had been irregularly interfered with.

17. On its part, the Defendant submitted that it had accounted for all monies it had received. It set out the details of the payments it had received from the Plaintiff in Paragraph 4 of its Further Affidavit and contended that the same was far much lower than the amount the Plaintiff had alleged was its annual income at the time it was applying for the banking facilities. The comparative table showing the annual income was annexed and marked as PC 1 (a) and PC 1 (b) on pp 8 and 23 of the said Further Affidavit.

18. The Defendant also submitted that the Plaintiff had never made an inquiry for bank statements until after it filed the present suit and that in any event, the Defendant had always issued the Plaintiff with bank statements and self-explanatory summaries.

19. The Plaintiff's request for bank statements appeared to have been made on 3rd June 2013 and 29th July 2013 as could be seen in pp 123 and 124 of its Supporting Affidavit. It did not present to the court, details of the accounts from which it had sought to be furnished with copies of statements. However, the court noted that the Defendant's attached copies of bank statements for various accounts on 126- 280 of Replying Affidavit.

20. As was correctly pointed out by the Defendant, each bank customer is entitled to bank statements. It was the responsibility of the Plaintiff to demand for the statements from the period of inception. The court was unable to accept that the Plaintiff would have failed to receive statements from 2009 until 1st March 2012 and taken no action. The court was therefore not satisfied that the Plaintiff had not been able to access the said bank statements as it had alleged or at all. Its application to have the Defendant compelled to give it statements for the said period was spurious and was intended to create an issue that would make this court believe that it was entitled to injunctive orders and/or the orders that it had sought in its application.

21. While the court did not wish to enter into the arguments of whether or not the Plaintiff had overpaid the loan facilities, it is evident that in its affidavit evidence and documentary evidence, the Plaintiff had admitted that it was indebted to the Defendant. The cause of the arrears was explained in Paragraphs 11, 12, 13, 14 and 15 of its Supporting Affidavit.

22. In its letter dated 3rd July 2013 on pg 79 of its Supporting Affidavit, the Plaintiff wrote to the Defendant to call off the auction and advising that M/S I & M Bank had confirmed that it would

be willing to pay the Defendant the sum of Kshs 250,000,000/=.

23. Similarly, in an undated letter to the Defendant on pg 127 of its Supporting Affidavit, the Plaintiff admitted the outstanding arrears. It stated as follows:-

“...In view of restructuring the facility to enable us make arrangements for payment of the arrears we are requesting you to kindly review the interest rates which has been charged in the facility to the initial interest rates at the time of granting the facilities.

Secondly, we are also requesting you to kindly wave (sic) the arrears on interest charged into our account taking into account that as you are aware the repayment of the loan facility comes from the school fees payable by our students whom some are orphans.

We are ready to pay a substantial amount after you consider our requests.”

24. It is therefore clear from the foregoing, that there was no evidence that was presented to the court to suggest that the Plaintiff was not indebted to the Defendant. Indeed, its contention that the Defendant had refused to disclose to it how much of the school fees it had credited in its various accounts did not negate the fact that it was truly and justly indebted to the Defendant. The Defendant could not therefore have been faulted for having proceeded to exercise its statutory powers of sale due to the duration of time it had taken for the Plaintiff to actualise the sub-division and sale of the said property.

25. Indeed on 1st October 2012, the Defendant wrote to the Plaintiff giving it ninety (90) days to complete the sub-division of L.R. No 1159/140- Karen. Notably, the Defendant’s assertions that it had not consented to the sale of the said property, the Purchaser who was said to have been “Cheneta Limited” (pg 85 of the Plaintiff’s Supporting Affidavit) were thus incorrect.

26. Although the letter of 3rd July 2013, the Plaintiff pointed out the difficulties it had faced due to campaigns, elections and Supreme Court issues and efforts by its brokers to put “the land” in the papers, it did not, however, demonstrate the relevance of these extraneous issues in its non-repayment of the loans.

27. Having said so, the question of whether or not the Defendant issued the Plaintiff with the requisite statutory notice was a pertinent issue for determination. Section 90 of the 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;**
 - a 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.**

28. The Plaintiff argued that it was entitled to rectify the default as was provided in Section 90 (2) (b) of the Land Act and that the Defendant ought not to have called the whole outstanding amount that the Defendant alleged was due to it from the Plaintiff. It referred the court to the case of **Trust Bank Limited vs Okoth [2001] 1 EA 274 (CAK)** in which the court held that statutory power of sale could not be conferred on a mortgagee until it had served the mortgagor with a statutory notice.
29. It submitted that as the object of that notice was to protect the rights of the mortgagor, such statutory power of sale could not crystallise until such a notice had been issued to a mortgagor and which in this case, this right had not crystallised.
30. On the other hand, the Defendant submitted that it sent the Plaintiff with the requisite statutory notice to the Plaintiff's postal address by way of registered mail making the said Statutory Notices valid, lawful and justified. It annexed copies of the Certificate of Postage which were on pg 11 of the Replying Affidavit as proof of service of the said mandatory notices.
31. In its letter dated 2nd July 2012 to the Plaintiff on pg 110 of its Replying Affidavit, the Defendant stated as follows:-

“ You have failed to regularize your outstanding arrears of Kshs 48,594,747=65.

We therefore hereby demand that you settle the said outstanding arrears of Kshs 48,594,747=65 together with further interest and costs thereon within thirty (30) days from date of service of this Notice...

...if the said amount is not paid in full within the period herein stated, you will be in default and the Bank shall call up the entire outstanding debt, being Kshs 317,252,856=50 (DR) as at 25th June 2013...

THIS NOTICE is given under the provisions of the Land Act 2012...”

32. In another letter to the Plaintiff dated 19th November 2012 on pg 112 of its Replying Affidavit, the Defendant wrote as follows:-

“...As has been previously communicated to you, default has occurred and the sum of Kshs 354,083,391=42 being the principal sum together with interest and costs thereon is due and payable by you to the bank...

Further, we hereby give NOTICE that if you fail to pay the above amount after expiry of Three (3) months from date of service... the Bank will proceed to exercise the powers granted under the Charge and by statute...

Under provisions of the Land Act, you are at liberty to apply for the relief in the manner and upon the reasons set out in the Act.

THIS NOTICE is issued to you pursuant to Section 90 (1) of the Land Act 2012...”

33. The court deemed it fit to set out the details of the two (2) demand letters by the Defendant to the Plaintiff to establish whether indeed the said Notices had complied with the provisions of the Land Act.
34. Evidently, the Defendant did in its letter of 2nd July 2012 inform the Plaintiff that it was required to rectify the default which was shown as Kshs 48,595,747.65. Notably, the Defendant demanded that the Plaintiff rectify the default within thirty (30) days. However, it did not indicate that the Plaintiff was required to rectify the default in three (3) months, the consequences if the Plaintiff defaulted in paying the arrears or the Plaintiff's right in respect of certain remedies that it could apply to the court for relief against those remedies or that the Plaintiff in accordance with Section 90 (2) (b), (d) and (e) of the Land Act. The Defendant issued three (3) months' notice under

- Section 90 (1) of the Land Act in its demand letter of 19th November 2012. In the demand of 19th November 2012, the three (3) months' notice was for the Plaintiff to pay to the Defendant the whole outstanding sum of Kshs 354,083,391.42.
35. In light of the provisions of Section 90 (2) of the Land Act, neither of the two (2) demand letters by the Defendant to the Plaintiff complied with the provisions of the Land Act. It was not necessary for the Defendant to have issued a demand letter asking the Plaintiff to rectify the default within thirty (30) days as the same was not provided for in the Land Act. The proper procedure would have been for the Defendant to issue the Plaintiff with a demand to rectify the default of Kshs 48,594,747.65 within three (3) months from the date of the notice.
36. As it is not clear which letter the Defendant intended to serve as the Statutory Notice under Section 90 (2) of the Land Act, the court finds that neither the demand letter of 2nd July 2012 nor that of 19th November 2012 were valid.
37. The Defendant did not seem to specifically submit on the requirement of a notice under Section 96 (1) of the Land Act as was contended by the Plaintiff. The said Section provides 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.”**

38. Evidently, the Statutory Notices were purportedly issued on 2nd July 2012 and 19th November 2012. After the expiry of whichever notice the Defendant intended to be that under Section 90 (2) (b) of the Land Act, 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. This was in accordance with the provisions of Section 96 (2) of the Land Act. The Defendant did not exhibit any such notice or any such notice in its remotest form or demonstrate that it had complied with the provisions of Section 96 (2) of the Land Act.
39. 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.
40. There was no doubt that the Plaintiff would suffer great injustice if it was denied its right of redemption which it was entitled to until the fall of the hammer at a public auction. Failure by the Defendant to have complied with the provisions of Section 90 (2) (b) and Section 96 (2) of the Land Act were serious issues that convinced this court that the Defendant's statutory power had not crystallised. Indeed, the calling of the whole outstanding sum of the loan that it had advanced to the Plaintiff in its letter of 19th November 2012 would definitely have denied the Plaintiff an opportunity to first rectify the default. - See **David Gitome Kuhiguka vs Equity Bank of Kenya Limited (2013) eKLR**.
41. Although the court should and ought not to re-write contracts that have been entered into by parties and whilst it noted the cases of **Joseph Kiarie Mbugua vs Consolidated Bank of Kenya Limited (2006) eKLR**, **Salim Manji & Another vs Southern Credit Banking Corporation Limited (2006) eKLR**, **Joseph Okoth Waudi vs National Bank of Kenya Limited (2006) eKLR** amongst several other cases where the common thread was that a chargee ought not to be restrained from exercising its statutory power of sale if a chargee was in default, it must always have at the back of its mind that the sale of a person's property is not a matter that should be taken casually because it deprives a party a right to own property, a right that is enshrined in Article 40 of the Constitution of Kenya, 2010. – See **Alice Awino Akello vs Trust Bank Limited LLR No 625 (CCK)**.
42. In this regard, the court associates itself with the holding in the case of **Kwanza Estates Limited vs Dubai Bank Kenya Limited (2013) eKLR** where the court held as follows:-

“I am satisfied that a party deprived of his property through an illegal process would suffer irreparable loss and or damage...”

43. Again, in Muiro Coffee Estate Limited vs Kenya Commercial Bank [2009] eKLR, Khaminwa J (as she then was) quoting from the decision of Ringera J (as he then was) in the case of Lucy Njoki Waithaka vs ICDC observed as follows:-

“It is not an invariable rule that where damages may be an appropriate remedy an interlocutory injunction should never be granted. If that were the rule, the law would unduly lean in favour of those rich enough to pay damages for all manner of trespassers. It would be unjust and be seen to be unjust.”

44. Having considered the pleadings, the affidavit evidence and oral and written submissions, the court found that in view of the invalidity of the Statutory Notice as aforesaid, the Plaintiff would suffer loss that would not be compensated by way of damages if it was not given an opportunity to exercise its right of redemption.

45. However, the Plaintiff did not establish a *prima facie* case with a probability of success as it was truly and justly indebted to the Defendant. There was no material fact to take to trial. It did not demonstrate that it had met the threshold that was set out in the case of Giella v Cassman Brown (1973) EA 360 in which the court stated 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.”

46. Appreciably, courts are not inclined to grant an interlocutory injunction pending the hearing and determination of suit on the ground that there was a dispute as to the figures. As was held by the Court of Appeal in the case of Civil Application No 108 of 2005 Francis J.K Ichatha v Housing Finance Company of Kenya Ltd (unreported), a dispute in computation of interest was a mathematical error that did not warrant restraining a chargee from exercising its statutory power of sale.

47. Having found that the Plaintiff was truly and unjustly indebted to the Defendant, the Defendant is therefore at liberty to re-issue the Statutory Notices that comply strictly in accordance with the Land Act. The Plaintiff was entitled to the right of protection and of equal benefit of the law in the same manner as all chargees who have been advanced financial facilities after the commencement of the Land Act.

48. The Plaintiff may very well take advantage of this time to reconcile its accounts with the Defendant. Due to the time it has taken for this matter to be heard and determined, the court expects that the Plaintiff has had sufficient time to organise its financial affairs as it had sought in the application herein.

49. In conclusion, the court was not persuaded by the Plaintiff's submissions that it was entitled to any of the remedies it has sought to be granted pursuant to Section 104 (2) of the Land Act.

DISPOSITION

50. Accordingly, the upshot of this court's ruling was that the Plaintiff's Notice of Motion application dated and filed on 30th July 2013 was not merited and the same is dismissed with costs to the Defendant.

51. It is so ordered.

DATED and DELIVERED at NAIROBI this 16th day of December 2014

J. KAMAU

JUDGE