



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 520 OF 2011
MALEZI PREPARATORY SCHOOLS LTD.....PLAINTIFF
VERSUS
ECO BANK KENYA LTD..... DEFENDANT

R U L I N G

1. On 24th of May 2012, the counsel for the parties herein informed the Court that negotiations were taking place as between the parties as to resolving this matter. That was the position right up until 5 December 2012 when the Court was informed that negotiations for settlement had not been finalised and thus it would be as well for the Court to rule on the Plaintiff's Notice of Motion dated 21 November 2011. Both parties had filed their respective affidavits with regard to the Application, as well as their submissions in connection therewith. It is to be noted that on 22 November 2011, I granted a temporary injunction *ex-parte* restraining the Defendant and its instructed auctioneers from selling by public auction or otherwise alienating, disposing of or offering to sale the Plaintiff's property title number Nairobi/Block 72/2915 situated in Langata (hereinafter "the suit property").

2. The Application sought orders under **Order 40 Rules 1, 3 and 4** of the *Civil Procedure Rules, 2010*. The Orders sought were that a temporary injunction be granted to preserve the suit property pending the hearing and determination of this Application inter partes. The second prayer sought for the said temporary injunction to be in place until the hearing and determination of this suit. The Application was brought on the following grounds:

"1. The Defendant through M/s Watts Enterprises (Auctioneers) advertised the suit property herein for sale in the Daily Nation of 08/11/11 by Public Auction scheduled for 24/11/11 and despite attempts and communications between the Plaintiff's and Defendant's Advocates to amicably resolve the matter, the same has failed thus necessitating these proceedings.

2. Whereas the Auctioneer served the Plaintiff with a Notification of Sale dated 02/06/11. No Statutory Notice under Section 74 – Registered Land Act (Cap 300) has ever been served by the Defendant upon the Plaintiff to enable the Statutory Right of Sale to accrue or mature.

3. The purported Statutory Notice date 29/11/10 which was never served upon the Plaintiff which only came to the Plaintiff's Notice in June 2011 and a Copy of which was given to the Plaintiff's Advocates on 10/08/11 is not valid Notice for the reasons that:

- **The same was never served upon the Plaintiff.**
- **The Plaintiff's Accounts with the Defendant were regularized on 06/12/10 after the purported Notice clearing the arrears then standing at Kshs.2,027,617.51 and upon payment of Kshs.6,000,000/= by the Plaintiff the Account was brought to a credit balance of Kshs.3,962,382.49 according to the Defendant's own Statements of the Accounts after the payment of Kshs.6 Million.**
- **The said Credit balance of Kshs.3,962,382.49 as at December 2010 was sufficient to cover the monthly Loan repayments of Kshs.757,000/= for a period of over Five (5) months till June 2011.**
- **No demand or Notice of arrears or fresh and valid Statutory Notice was ever served after June 2011 to enable the Defendant's right to exercise its Statutory Power of Sale to accrue or mature.**

4. The current exercise of the Defendant's Statutory Power of Sale is irregular, illegal, invalid, flawed and is therefore null and void and of no effect in Law and should be stopped by the Court.

5. The Defendant's current actions are calculated to clog and fetter the Plaintiff's attempts to fully redeem the mortgage through a process already known to the Defendants and commenced in August 2011 when the Defendant was given an undertaking for Redemption of the charges within six (6) months which the Defendant now wants to defeat illegally and irregularly before expiry of the said undertaking.

6. The suit property houses a College and part of the facilities is used by a School and its Sale/Auction will not only affect the current Students some of whom are due to sit their exams in December 2011 but also occasion severe loss and damage to the Plaintiff not capable of being quantified and/or compensated in monetary terms.

7. The Plaintiff has established a prima facie case with a high probability of success in that if the court finds that there was no valid Statutory Notice served, the entire process shall become null and void and if the sale is left to proceed upon a nullity and irregularity, the Plaintiff's exposure and redemption rights will have been taken away/extinguished irregularly and illegally.

8. The balance of convenience favours the grant of an interlocutory Injunction so as to preserve the suit property pending the hearing and determination of the Application and the entire suit herein.

3. The Application is supported by the Affidavit of one **Abok James Odera** again sworn on 21 November 2011. The deponent stated that he was the principal director of the Plaintiff Company and that it is the owner of the suit property upon which is constructed a 5 story College and Commercial building comprising hostels and rooms for accommodation. The building was incomplete and in February/March 2009, according to the deponent, the Plaintiff presented a proposal to the Defendant for the borrowing of Shs. 30 million for the purposes of completing the construction of the College building. The deponent stated that before the application to borrow was made, a valuation of the property had been prepared by Messrs. Regent Valuers International (Kenya) Ltd who in a report dated July 2009 valued the suit property at Shs. 74 million in its then unfinished state, with a mortgage value of Shs. 70 million. Before that on 13 May 2009, the Defendant had agreed to grant the Plaintiff its request for credit facilities/loan amounting to Shs. 30 million. The Plaintiff sought various changes to the letter of offer and finally a fresh revised letter of offer dated 1 July 2011 was issued by the Defendant Bank. By that time the Defendant seemed to have offered the Plaintiff further facilities of Shs. 3 million by way of working capital for the Plaintiff and a further (loan?) sum of Shs. 7,407,870/-.

4. I must confess that I found the story as related by Mr. Odera in his said affidavit to be muddled and confusing. However it appears that by 19 October 2011, the Defendant forwarded a new set of statements of account which showed the Plaintiff's current account with the debit balance of Shs. 1,883,725.10/-and the loan account bearing a lump sum debit of Shs. 38,364,445 .30. According to the deponent, the Plaintiff was surprised to see that the suit property and been advertised for sale in the Daily Nation newspaper of 8 November 2011. The Plaintiff maintained that it had never received any Statutory Notice under section 74 of the Registered Land Act. The Defendant had alleged that it had served a valid Statutory Notice dated 29 November 2010. Mr. Odera noted that as at that date, the arrears on the loan account, according to the Defendant's own statements showed a credit balance of Shs. 3,962,382.49 as the Plaintiff had paid into the account the sum of Shs. 6 million being the proceeds of a sale of a property specifically sold to remedy the situation. Finally, Mr. Odera deponed to the fact that the said advertisement in the Daily Nation for the sale of the suit property had caused the Plaintiff and its school business severe damage, loss of integrity and financial loss. The advertisement had caused panic among parents of students at the Plaintiff's school and college.

5. The Replying Affidavit of the Defendant was sworn by one **Cornelius Parasi** who identified himself therein as the Defendant's Customer Service Manager at its Nairobi Industrial Area branch. The deponent confirmed that the Plaintiff was granted facilities as set out in and pursuant to the terms contained in a facility letter dated 1 July 2009. It was a term as per the letter that during the six months moratorium period, the Plaintiff would service the monthly interest accruing during that period but after the expiry thereof it would pay both principle and interest by way of monthly instalments. Thereafter in March 2010, the Plaintiff had approached the Defendant to request for restructuring of its existing borrowing facilities, the balance of which as at 3 June 2010 stood at Shs. 33,638,275.20. The Plaintiff also requested for additional financing in the amount of Shs. 3 million. Thereafter, the Defendant issued a loan facility letter dated 3 June 2010 offering to lend a sum of Shs. 37,407, 840/-. Such was accepted by the Plaintiff. As regards the amount of Shs. 6 million paid into the Plaintiff's loan account, the deponent stated that the same was credited to the account in December 2010 by way of appropriation to reduce the Plaintiff's balance on its two current accounts and the residual balance was utilised towards the reduction of the arrears in the Plaintiff's loan account. The deponent went on to say that by letter dated 22 July 2011 addressed to the Plaintiff's advocates, it was made clear that the Plaintiff's loan account was in arrears as at that date of just over Shs. 4 million. Further correspondence passed between the parties' advocates from June to October 2011. In this correspondence, the Defendant had repeatedly asked the Plaintiff's officers to attend at the Defendant's bank premises for any clarification of its accounts, if required. According to Mr. Parasi, the Plaintiff chose to ignore the correspondence leaving the Defendant bank with no choice but to realise the charged property to recover the outstanding debt.

6. As regards the statutory notice, Mr. Parasi deponent to the fact that the Plaintiff was initially served with a demand notice to pay the outstanding arrears. Thereafter the Statutory Notice dated 29 November 2010 was served upon the Plaintiff and the deponent attached copies of both the Notice and the certificate of posting thereof. The deponent agreed that a meeting had been held with the representatives of the Plaintiff in June 2011 but no agreement was reached as between the parties for the Defendant to halt any further action towards redeeming the outstanding loan. He pointed to correspondence particularly with regard to how the Shs. 6 million, often referred to by the Plaintiff, had been utilised and copies of statements of account as requested by the Plaintiff had been forwarded to it through its advocates, under cover of a letter dated 22 July 2011. To clarify the position further Mr. Parasi detailed as follows in paragraph 28 of the Replying Affidavit:

“i) The statutory notice was duly served in accordance with the law and as covenanted in the charge instrument a copy of which I tender in evidence as exhibit “CP10”.

ii) At the time the statutory notice was duly served, the Plaintiff's accounts were in arrears and the Defendant rightfully called up the payment of the entire outstanding loan.

iii) The Plaintiff purported to pay a portion of the outstanding arrears but did not fully clear the outstanding arrears nor redeem the outstanding loan as called upon in the statutory notice.

iv) In any event, the Plaintiff's loan with the Defendant is still in huge arrears, which the Plaintiff has still refused and/or failed to pay and which legally entitles the Defendant to realize the charged property under powers granted in the registered Charge”.

The deponent made it quite clear, that in his opinion, it was not true as alleged by Mr. Odera, that the exercise of the Defendant's statutory power of sale was irregular, premature, invalid, bad in law and liable to be declared null and void. The Plaintiff had voluntarily charged the suit property and was all along aware that it had defaulted upon its contractual obligations. He had been advised by the advocates on record for the Defendant that the Plaintiff had failed to make out a *prima facie* case with a probability of success and even if it had any action at all, it could be compensated for in damages.

7. In its submissions as regards the Notice of Motion before court, the Plaintiff wished to stress the point as to whether it had been served with a valid, proper and legal Statutory Notice pursuant to which the Auctioneer had moved to advertise the suit property sale by public auction. It noted that this court had granted interim orders for stay of the sale given on 22 November 2011. It maintained that the only Statutory Notice given had been forwarded to the Plaintiff's advocates under cover of a “without prejudice” letter from the Defendant's advocates dated 22nd July 2011. Statutory Notice had not been served upon the Plaintiff at any time and no proof of service had been filed. The Plaintiff took up the points raised by Mr. Odera in his said Affidavit in support of the Application namely that at the time that the purported Statutory Notice was sent, the same being dated 29 November 2010, the Plaintiff had paid in a sum of Shs. 6 million which had the effect of clearing the arrears of the Loan Account leaving it in credit in the amount of Shs. 3,962,382.49. It maintained that this amount of credit was sufficient to cater for six months' instalments of the agreed monthly installment amount. Together with a further payment of Shs. 150,000/= into the account, repayments had been covered by the Plaintiff up to and including June 2011. The Plaintiff maintained that the arrears on the loan account were cleared on 6 December 2010 and there is no fresh default leading to any new arrears upon which a new and fresh Statutory Notice could be served to legitimise the realisation process commenced by the Auctioneers in September 2011. The Plaintiff submitted that in the absence of a valid Statutory Notice, the entire realisation process is a nullity. It went on to say that the Plaintiff is an educational institution and in advertising the sale thereof, such would obviously cause serious and irreparable damage with losses not easy to quantify or even to compensate.

8. In its submissions, the Defendant posed 3 issues for determination:-

- a. Was the Plaintiff served with a Statutory Notice?
- b. Whether or not the Plaintiff's accounts were regularised?
- c. Has the Defendant's statutory power of sale arisen/accrued?

It noted that the Statutory Notice together with the Certificate of Posting, had been exhibited to the Defendant's Replying Affidavit as “CP 6”. The Plaintiff had not taken any action to challenge the service of the Statutory Notice until the Defendant's appointed auctioneers had advertised the suit property for sale. The Charge instrument exhibited to the Replying Affidavit as “CP 10” clearly provided for service by way of registered post, with which the Defendant had complied. As regards the regularisation of the Plaintiff's accounts, the Defendant submitted that it had clearly demonstrated in the Replying Affidavit, how the 2 sums referred to by the Plaintiff being Shs. 150,000/= and Shs. 6 million had been utilised towards the account arrears. It also referred the court to the copies of the statements of account attached to the Replying Affidavit, which, it said, the Plaintiff had failed to controvert in any way. Finally, as regards as to whether the Statutory Power of Sale had arisen/accrued, the Defendant noted that the Plaintiff had not denied being indebted to it but all that it was asking for was more time to settle the debt. In the Defendant's submissions, no *prima facie* case had been made out by the Plaintiff sufficient to satisfy the first limb of the test laid down in **Giella versus Cassman Brown**.

9. I tend to agree with the Defendant's submissions that the Plaintiff does not deny its indebtedness to it. To my mind, this Application filed by the Plaintiff is a tactic designed to give the Plaintiff more time to

settle its financial obligations to the Defendant. This is obviously the reason why counsel for both parties appearing before court keep indicating that there is a possibility or chance of this matter being settled as between the parties. The Plaintiff seems to rely entirely upon the fact that the Statutory Notice was invalid and not properly given and that there was no proof filed of service thereof upon the Plaintiff. Further, Mr. K'Opere, learned counsel for the Plaintiff, orally submitted that the only Statutory Notice given by the Defendant bank was dated 29 November 2010 and the Plaintiff denied that it had ever been served therewith. Further, counsel maintained, that as at the date of the Statutory Notice there were sufficient funds in the account of the Plaintiff to service six months' worth of agreed monthly instalments by way of repayment. He maintained that the service of the auctioneer's notice was invalid as such was dependent upon the validity of the Statutory Notice.

10. I consider that the first point to note is as regards service of the Statutory Notice. From my perusal of the evidential material placed before court by the parties, it is apparent that the only Statutory Notice issued by the Defendant was that dated 29 November 2010 sent out by the advocates on record for the Defendant herein. I am satisfied that it was served by registered post as per the copy of the Certificate of Posting dated December 2010 exhibited as "CP 7" to the Replying Affidavit. Mr. Odera states that the Defendant never received the same and that is as may be. However, the Defendant sent copies of the Statutory Notice firstly, under cover of its letter to the Plaintiff school dated 20 June 2011 and secondly, a further copy to the advocates on record for the Plaintiff under cover of its letter dated 22nd of July 2011. In any event, what constituted proper service of notice is defined in the Charge document dated 14 May 2010 exhibited as "CP 11" again annexed to the Replying Affidavit herein. Clause 10 reads:

"That any notice required or authorized by law or by this Security to be served by the Bank on the Chargor shall be deemed to have been properly served on the Chargor if sent by registered post in a stamped envelope addressed to the last know postal address of the Chargor or if it be delivered to the place of business or abode of the Chargor or left at the Mortgaged Property. Where the addressee is a Company any notice required or authorized by law or by this Security shall be deemed to have been properly served by the Bank if served on any one of the Directors or the Secretary of the addressee or if delivered or sent by registered post telex or facsimile to the addressee at its registered office or any of its principal places of business in Kenya. Any notice sent by registered post shall be deemed to have been served on the addressee at 10 a.m. on the fifth succeeding business day following the day of posting notwithstanding that it be undelivered or returned undelivered and in proving service it shall be sufficient to prove that the notice or demand was properly addressed and posted. Any notice or demand sent by telex or facsimile shall be deemed to have been served at the time of transmission".

From the above, I don't believe that the Plaintiff can deny that it was properly served with the said Statutory Notice.

11. However, the next point raised by the Plaintiff was that as at the date of the Statutory Notice – 29 November 2010, the Plaintiff was not indebted to the Defendant. Looking at the copy of the Statement of Account exhibited at page 128 of the annexure to the Affidavit in Support of the Application, it appears to me that Account No. *[particulars withheld]* as at the 1 December 2010 was indebted in the amount of Shs. 2,027,617.51. Then on 6 December 2010 the account received a credit of Shs. 5,000,990.00 leaving a credit balance of Shs. 3,962,382.49. However, at page 126 of the annexure to the said Affidavit in Support, there appears a copy of a statement for account number *[particulars withheld]*. This would appear to be for the Plaintiff's Loan Account with the Defendant bank. Unfortunately the balance shown on that account is only at 31st of October 2010 and shows an amount outstanding at Shs. 38,364,445 .30. Moreover, the statement for the same Loan Account appearing annexed to the Replying Affidavit and exhibited as "CP 4" is also of little assistance to this court, as it is again only made up to 31 October 2010. Thus from the material before me it has proved impossible for me to tell whether, as at the date of the Statutory Notice being 29 November 2010, the Plaintiff was up-to-date with its loan repayments or otherwise. Certainly the injection of Shs. 6 million on 6 December 2010 would seem to have regularised not only the arrears on the Plaintiff's Loan Account but also settled the debit balances on its two current accounts.

12. It seems therefore that as regards the first principle of the **Giella v Cassman Brown** principles as exemplified in **Mrao Ltd vs First American Bank of Kenya Ltd & 2 Ors (2003) K L R 125** the Plaintiff has established a reasonable case. **Mrao** detailed the principles of granting an interlocutory injunction as follows:

"a) The applicant must show a *prima facie* case with a probability of success;

b) An interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not be adequately compensated by an award of damages;

c) If the court is in doubt, it will decide an application on the balance of convenience."

Mrao also established 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."

I think that the rights of the Plaintiff herein may have been infringed by the Defendant and that it has established a *prima facie* case with a probability of success in relation to the validity of the Statutory Notice, on the grounds not of invalidity of service thereof but that, as at the date thereof, its loan and other accounts were not in arrears.

13. As regards the second limb of the **Giella/Mrao** authorities, Mr. Odera drew the attention of the court to the fact that the suit property is being utilised as a school and that if it were to be sold, a large number of parents would be concerned and their children most likely displaced. I agree with the Plaintiff that the damage which will inevitably result from the sale of the suit premises would not be easy to assess in damages as the spin-off would be immeasurable in money terms. The third branch of the **Giella/Mrao** authorities is that the court will make a decision on the application as to the balance of convenience. I believe that the balance tilts in favour of the Plaintiff in this matter. Its school/college business is largely dependent upon the use of the suit premises. Should the premises be sold, it is most unlikely that the school/college business will be continued; it certainly cannot be made a condition of sale that it should continue. In the meanwhile, the Defendant still has the security of its Charge over the suit property to fall back on. What this all amounts to is that I allow the Plaintiff's Notice of Motion dated 21 November 2011 in terms of prayer 3 thereof. I also award costs of the Application to the Plaintiff.

DATED and delivered at Nairobi this 23rd day of January 2013.

J. B.HAVELOCK

JUDGE