REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 658 of 2012

JIMMY WAFULA SIMIYU.....…...PLAINTIFF

VERSUS

FIDELITY COMMERCIAL BANK LIMITED.....DEFENDANT

R U L I N G

1. I have before me the Plaintiff's Notice of Motion dated 16th October, 2012. The application is expressed to be brought under Order 40 Rule 1 (a) and Order 51 Rule 1 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act. The Plaintiff prays for an order of injunction to restrain the sale of his property known as LR No. Ngong/Ngong/47047 ("the suit property") pending the hearing and determination of the suit. The Plaintiff relied on the grounds on the body of the motion and his Supporting and Further Affidavits sworn on 16th October, 2012 and 18th December, 2012, respectively.

2. It was averred in the Affidavits that the Plaintiff is the registered proprietor of the suit property where he was in the process of constructing his matrimonial home, that the Plaintiff approached the Defendant for a loan facility for the purposes of completing the development in the suit property. The Plaintiff contended that he intended to borrow Kshs.6,000,000/- but this request was abandoned at the advice of the bank for a facility of Kshs.4,000,000/-. A Charge in favour of the Defendant was registered against the suit property. The Loan proceeds were disbursed to the Plaintiff in two equal tranches of Kshs.2,000,000/- on 26th May, 2011 and in October, 2011, respectively. The Plaintiff further contended that the said loan proceeds were exhausted by the end of the year 2011, prompting him to request the Defendant for a top up of the loan facility, which request was turned down. According to him, this was against the implied understanding made between the parties at the commencement of the loan facility.

3. It is further contended that due to the fact that his request for a further loan facility was denied, his loan repayment ability was frustrated as he was forced to pay both rental charges of his present residential house and the loan facility itself. He also contended that the rising interest rate at the time further diminished his ability to meet his financial obligations. That his financial situation was further aggravated by the fact that his law firm suffered the misfortune of a fire that razed Kimathi House 5th and 6th Floor within Nairobi on 1st April, 2012. This prompted him to issue notifications to the public, his clients and the Law Society Secretariat on his change of physical address. He was also forced to terminate his tenancy agreement in the aforementioned building. Unable to collect his mail, the Plaintiff was issued with another duplicate key to his post office box on 17th June, 2012. He was able to collect numerous letters but none of which concerned the present subject matter save for his monthly bank statements from the Defendant.

4. The Plaintiff contended that on or about 7th September, 2012, he received a telephone call from

Keysian Auctioneers intending to serve him with a 45 days Notification of Sale. This prompted him to schedule an appointment with the Defendant's legal manager, who confirmed that a Statutory Notice of Sale was issued to him on 15th May, 2012 by the Defendant's Lawyers. The aforesaid manager then proceeded to serve the Plaintiff with a copy of the said Statutory Notice. It is contended that the Plaintiff wrote to the Defendant protesting the lack of service and inadequacy of the notice dated 15th May, 2012 and served on 7th September, 2012 which he avers was illegal and void as it failed to comply with Section 90 (2) (b) of the Land Act. Conversely, the Plaintiff contended that he inquired through a letter dated 5th December, 2012 to the Post Master General on the whereabouts of the aforesaid statutory notice of sale. In response to this, the Postmaster General to him indicating that the statutory notice of sale was indeed delivered to the Plaintiff's Post office box but was returned to sender unclaimed on 10th August, 2012.

5. The Plaintiff further contented that on 12th September, 2012, he received an auctioneer's notification of sale with the intended public auction of the suit property scheduled for 16th November, 2012. That he made payment to the Defendant Bank of Kshs.350,000/- as a sign of good will. He contended that he has on numerous occasions approached the Defendant to negotiate alternative solution to remedy the non-performing loan facility including possible refinancing with other banks but this has been to no avail. He therefore contended that through its conduct the Defendant was intent on selling the suit property which would cause him irreparable loss and damage. The Plaintiff therefore called upon this court to invoke its powers under Sections 103 and 104 of the Land Act 2012 and find that it is in the interest of justice that the injunctive orders sought be issued.

6. The Defendant contested the application by filing a Replying and Further Replying Affidavits of Georgina Muthama sworn on 20th October, 2012 and 22nd November, 2012n respectively. It was contended by the Defendant that the Plaintiff first approached the defendant for a loan of Kshs.1,500,000/- for the purpose of completion of his residential house in the suit property. His Motor vehicle registration number KBJ 980H served as security for the said facility. That the Plaintiff defaulted on his repayments of this specific facility. The defendant also contended that in addition, the Plaintiff was advanced a loan facility of Kshs.4,000,000/- secured by a charge against the suit property. That however, the Plaintiff defaulted on the facility as the only installments received after drawdown were in June, July and August, 2011, the last installment having been received on 26th August, 2011.

7. The Defendant denied that any representations were made as to top up the facilities, that such additional facility would have to be considered and evaluated on the basis of previous performance of the Plaintiff's loan facilities. That given the history of the Plaintiff's default, the Defendant contended that the Plaintiff did not qualify for such additional facilities. It was the Defendant's contention that there is no proof of the Plaintiff's assertions concerning the fire that had allegedly destroyed his law firm and the relocation therefrom and that the same were mere afterthoughts as the Plaintiff defaulted on the loan facilities before the incidents occurred. It is further contended that the Defendant issued a statutory notice of sale dated 15th May, 2012 as required by the law and there was evidence by way of a certificate of postage. That the Notice of sale having been issued on 15th May, 2012, the Plaintiff was served with a notice of more than 90 days requisite period to warrant the auctioneers Notice by the end of August, 2012. The Defendant denied that the Land Act 2012 applied to this case. The Defendant also contended that the Plaintiff's assertion that the suit property's value shall appreciate after completion is not material in this instance given that the Defendant is a commercial entity and is not interested in keeping securities of a non-performing nature. The Defendant denied that the suit property a matrimonial home in terms the Land Act 2012. In the premises the Defendant submitted that damages in this case would be an adequate to remedy. The defendant urged that the application be dismissed.

8. I have considered, Affidavits on record and the written submissions of Counsel. I have also considered the various authorities relied by counsel. It is not in dispute that the Plaintiff is the registered proprietor of the suit property. It is also not in dispute that the Defendant granted the Plaintiff a loan facility of Kshs.4,000,000/- which was secured by a charge over the suit property in favour of the Defendant. The loan of Kshs.1,500,000/- previously advanced to the Plaintiff in my view, is a none issue in this matter as the same pertains to a chattels mortgage which, has no bearing whatsoever to this suit. It is also not

disputed that the Plaintiff is in arrears in terms of the loan advanced. When a party such as the Plaintiff approaches the court for an order of injunction, he must rise to the threshold for grant of such interlocutory relief as set in ***Giella Vs Cassman Brown and Company Limited [1973] E.A 358***. The threshold is that the applicant must establish a prima facie case with a probability of success; he must show that he stands to suffer irreparable harm not compensable in damages if the injunction is not granted; and thirdly, if in doubt, the court will assess the balance of convenience. How has the Plaintiff faired on these principles.

9. As already stated, the Plaintiff is indeed in default. He admitted this in his Supporting Affidavit. He sought to blame the Defendant for his default on the ground that the Defendant had declined to advance him further facilities although it would seem that the Defendant was not under an obligation to do so. It is trite law that a court will not restrain a mortgagee from exercising its power of sale when the amounts fall due for a continuation of one month (See Section 90, Land Act). However, the exercise of such power of sale must be undertaken within the confines of the law. In light of this, I must say that there are three issues that fall for determination. First, whether the Land Act, 2012 and Land Registration Act, 2012 apply to this case; secondly whether there is a valid statutory notice of sale sent to the Plaintiff by the Defendant and thirdly, whether the suit property constitutes a matrimonial home as contended by the Plaintiff to warrant the protection accorded by the Land Act, 2012.

10. I propose to start with the 3rd issue of whether the suit property is a matrimonial home to warrant special protection from this Court. The definition of a matrimonial home is contained in Section 2 of the Land Act as ***"any property that is owned or leased by one or both spouses and occupied by the spouses as their family home".*** The Plaintiff submitted that it was his intent to build a matrimonial home in the suit property where he and his family could reside. As such, he claims that this intent entitles him to protection from the anticipated actions of the Defendant. I find fault with this argument. As the Defendant puts it, the Plaintiff merely indicated the purpose of his loan facility to be completion of a residential house. The sections of the law relied on by the Plaintiff require actual occupation of the house to constitute a matrimonial home. In the absence of such occupation, the same will be construed as any other property. The Plaintiff himself averred that it was his intention to occupy the same from December, 2012. I therefore find that as at the time of coming to court and hearing of the application, the suit property was not a matrimonial home as it was yet to be occupied and therefore does not warrant the special protection of this court under the relevant law.

11. As regards the first issue, it was submitted by the Plaintiff that the Land Act, 2012 and Land Registration Act, 2012 are applicable in this case. The Plaintiff relied on Section 78 of the Land Act which provides that:-

"This Part applies to all charges on land including any charge made before the coming into effect of this Act and in effect at that time, any other charges of land which are specifically referred to in any section in this Part."

He also relied on Section 161 (2) of the Land Act which provides that:-

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

It is not denied that the Charge dated 18th May, 2011 was registered under the Registered Land Act Cap 300 Laws of Kenya (now repealed). The Plaintiff submitted that the saving and transitional clause at Section 162 of the Land Act, 2012 provide for the continuation of any right accruing to the Defendant even after the coming into force of the new land law but contended that any such right must be exercised with strict compliance to the Land Act, 2012. On its part, the Defendant contended that the new Land Acts do not apply. The Defendant relied on Sections 106(2) and 107(1) of the Land Registration Act. Section 106 (2) of the Land Registration Act provides:-

"106 (2) ……nothing in this Act shall affect the rights, liabilities and remedies of the parties under any mortgage, charge, memorandum of equitable mortgage, memorandum of charge by deposit of title

or lease that, immediately before the registration under this Act of the land affected, was registered under any of the repealed Acts"

Further Section 107 (1) provides:-

"Unless the contrary is specifically provided for 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."

According to the Defendant, these provisions ousts the application of the new Acts and that the repealed Acts continue to apply to the Charge dated 18th March, 2011.

12. A careful reading of Sections 106(2) and 107(1) of the Land Registration Act No. 3 of 2012 will show that the rights and obligations and remedies of parties in instruments created before the said law came into force were reserved. Further, such rights and obligations which were in existence before the coming into effect of that law were to continue to be governed by the law that was applicable before 2nd May, 2012. In our case, this should have been the Registered Lands Act, Cap 300 (repealed). Section 5 of the Land Registration Act also excludes all other written Laws from applying to land registered under that statute in so far as it is inconsistent with that Act. It is for the foregoing reason that learned counsel for the Defendant submitted that the principle of spousal interest does not apply in this case. Since I have already ruled that that principle is inapplicable, my concern is the submission by the Defendant that Section 90 of the Land Act, 2012 regarding the exercise of the remedies of the Defendant as a chargee does not apply to this case. The Defendant's position is that since the nature and form of notice issuable under Section 90(5) of the Land Act has not been formulated by the Cabinet Secretary and Land Commission, and by virtue of Section 162 of the Land Registration Act, the practice and procedure obtaining in the repealed laws is still applicable.

13. The saving provisions in the Land Act, 2012 that may be said to be equivalent of Section 106(1) of the Land Registration Act, 2012 is Section 162 (1) which provides: -

"162(1) <u>Unless the contrary is specifically provided in this Act</u>, any interest, title power or obligation acquired, occurred, 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."

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.

14. That being the case, it follows that on a prima facie basis Section 90 (1) of the Land Act, 2012 would also be applicable as it is under Part VII of the Act. That Section provides that before the exercise of the statutory power of sale, the Defendant was enjoined to issue a notice to the Plaintiff under that Section specifying the default and requiring the Plaintiff to rectify the default. Such notice was supposed to run for two (2) months after which, if the default persisted, the defendant would then have issued the statutory notice with a view to exercise its statutory power of the sale under Sections 90(3) and 96, respectively of the Land Act. I do not agree with the Defendant that for the reason that the Cabinet Secretary responsible for matters relating land and the Land Commission have not pursuant to Section 90(5) prescribed the form and content of the notice to be served under Section 90, that that notice should

not be served or that that section has not come into force. If that were the intention of the legislature, nothing would have been easier than to expressly state so. My view, on a prima facie basis, is that Part VII of the Land Act came into operation on the commencement of the Act on 2nd May, 2012. That if by that time a lender had not properly commenced the enforcement of any of its rights or power under the repealed laws, the law 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. That being the case, I am of the prima facie view that on the evidence on record, the statutory notice of sale issued on 15th May, 2012 was premature for want of a notice under Section 90 of the Act.

15. With regard to the statutory notice of sale itself, it is the Defendant's submission that the same was effectively served on the Plaintiff vide its instructions to its Advocate Ms. P.J Kakad & Co. by way of registered post. It was further submitted that a certificate of posting dated 21st May, 2012 was issued by the Advocates. However, the Plaintiff contended that he did not receive the same and that the same was returned to the Defendant when it went uncollected for a period of time. He produced a letter by the Post Master General's office dated 13th December, 2012 showing that the letter had been returned to the Defendant sometimes in August, 2012. I think under the circumstances, it is arguable whether it can be safely said that the Plaintiff did receive the statutory notice. What is clear is that he was served with a copy thereof on 7th September, 2012 by the Legal Manager to the Defendant. I think in the circumstances, the case of ***Kyangavo-vs-Kenya Commercial Bank Limited (2004) KLR*** proves instructive whereKasango J held that:-

"The Plaintiff bore the burden to prove to this court that a letter sent by registered post to his post office box was not received by him. Such confirmation can be made by the postmaster of the particular post office where the Plaintiff receives his mails."

That statement commends itself to this court. The Plaintiff has obtained proof that the said notice was returned to the Defendant after it went uncollected. This is understandable given the various issues that the Plaintiff had to contend with including the fire that razed his office, the loss of the Post Office Box key among others. However, the Defendant has contended that it communicated the notice via the last known address of the Plaintiff thereby effectively discharging its responsibility of service of the notice. The question that arises is who is to blame for the non-delivery of the notice. To my mind, the Defendant may have done all it was required under the Charge. It was for the Plaintiff to collect the Notice from his post office box. It is however, true that when the said Notice was returned to sender, the Defendant should have at least taken further steps to try and effect service of the same on the Plaintiff. It seems that between 10th August, 2012 and 7th September, 2012 the Defendant did nothing. It sat and waited. To my mind therefore, it is arguable whether the statutory right of sale could accrue before the Plaintiff was served with a copy of the notice on 7th September, 2012 by the Defendant's legal manager. It may also be doubtful if the auction sale scheduled for 16th November, 2012 or on any other date by the Defendant could be regular or lawful.

16. In view of the foregoing, I find that the Plaintiff has made out a prima facie case with a probability of success. Having found so, I need not consider whether damages would be adequate. I agree with Hon.Mohamed Warsame J (as he then was) that damages are not an automatic remedy particularly for loss occasioned by breach of the law as contended by the Defendant. In ***Joseph Siro Mosiomo Vs Housing Finance Company of Kenya Nairobi HCCC No 265 of 2007 [2008] e KLR*** the learned judge held:-

"Damages [are] not and cannot be a substitute for the loss, which is occasioned by a clear breach of the law. In any case, the financial strength of a party is not always a factor to refuse an injunction. More so a party cannot be condemned to take damages in lieu of his crystallized right which can be protected by an order of injunction".

17. For all of the foregoing, I will allow the Plaintiff's application in terms of Prayer Nos.3 and 4 of

the motion dated 16th October, 2012.

DATED and **DELIVERED** at Nairobi this 8th day of March, 2013.

.....
A. MABEYA
JUDGE