



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
ENVIRONMENT AND LAND DIVISION
CIVIL CASE NO.29 OF 2012

MAZAO BORA COMPANY LIMITED.....PLAINTIFF

VERSUS

BARCLAYS BANK OF KENYA LIMITED.....1ST DEFENDANT

MUGANDA WASULWA t/a KEYSIAN AUCTIONEERS...2ND DEFENDANT

RULING

The application is brought by way of Notice of Motion made under the provisions of **Order 40 Rules 1(a), 2, 3, 4** and **Order 51 Rule 1** of the **Civil Procedure Rules** and **Sections 1B** and **3A** of the **Civil Procedure Act** and all other enabling provisions of the law.

The applicant seeks the following orders:

1. THAT a temporary injunction do issue restraining the defendants, whether by themselves, their servants, agents or anybody acting on their behalf from foreclosing property title No.LR 11098/132 Nakuru Municipality, selling, advertising for sale by Public Auction, disposing off, offering for sale by private treaty or in any way interfering with the plaintiff's quiet occupation and possession of the suit property pending hearing of the application *inter-partes*.
2. THAT an injunction do issue restraining the defendants whether by themselves, their servants, agents or anybody acting on their behalf from foreclosing property title No.LR.10098/132 Nakuru Municipality, selling advertising for sale by Public Auction, disposing of, offering for sale by private treaty or in any way interfering with the plaintiff quiet occupation and possession of the suit property pending the full hearing hereof and determination of this application.
3. THAT an injunction do issue restraining the defendants whether by themselves, their servants, agents or anybody acting on their behalf from foreclosing property title No.LR.11098/132 Nakuru Municipality, selling advertising for sale by Public Auction, disposing of, offering for sale by private treaty or in any way interfering with the plaintiff's quiet occupation and possession of the suit property pending the full and final hearing and determination of this application.
4. THAT the costs of this application be provided for.

The applicant relies on the grounds on the face of the application and on the supporting affidavit made by

CHARLES NJIHIA NGANGA made on the 19th October, 2012.

The applicant contends that it had executed a mortgage in favour of the respondent which allowed the applicant to enjoy overdraft facilities at the respondent bank.

The applicant avers that it ceased operations in 2002 and by that time, it had fully serviced the overdraft facility. Now eight (8) years down the line, that is in 2012, it received a notice from the respondent's advocates threatening to sell the applicant's properties to recover the sum of Kshs.870,486.63.

The applicant had sought clarification from the respondent on how the debt was accrued. The applicant had also requested the respondent to provide details of the cheque or the instrument used to withdraw a sum of Kshs.121,007.80. The above notwithstanding the applicant paid the above sum of a “*without prejudice*” basis but maintained that the balance demanded as interest violates the provisions of **Section 44(a) of the Banking Act, Cap 488 Laws of Kenya**. The applicant submitted that it has made out a *prima facie* case to warrant the orders sought.

The application was opposed by the respondents who argued that the application ought to mirror what was pleaded in the plaint. That the applicant in its plaint only seeks to challenge the validity of the notification of sale.

Failure to demonstrate that the notification is invalid meant that there was no *prima facie* case made out by the applicant and therefore the court is incapable of granting to the applicant the injunctive orders sought.

The respondent submitted that the applicant was a commercial entity and that the applicant had overdrawn the account and was indeed indebted to the respondent. The respondent further submitted that the applicant had not demonstrated to the court that damages would not be an adequate form of compensation in the event that the property was sold. In the interests of justice the respondent urged the court to disallow the application.

After hearing the arguments and submissions of counsel for both parties, this court finds the following issues for determination:

- i. whether a *prima facie* case has been made out.
- ii. injunctive orders
- iii. costs

This court opines that it is premature to say that all issues have not been properly impleaded by the applicant in the plaint. The applicant is allowed by law to amend its pleadings at any time but before the delivery of judgment. This particular issue shall be left to the parties to canvas at a full trial and for the trial court to deal with.

The law provides that a mortgagee/chargee cannot be restrained solely on the grounds that there is a dispute on the amount that is due on the mortgage. The court can and is not prohibited from granting the said injunction relief if it is shown that the amount claimed is found to be excessive. Refer to the court of appeal decision in Civil Appeal No. 14 of 1995. Reference is also made to the “In diplam Rule” to which the applicant has made reference to as contained in section 44A of the Banking Act which limits the interest recovered in defaulted loans and non performing loans.

This court has perused the annexure marked as “*CNN4*” and concerns with the Applicants instructions that the interest demanded for exceeds the principal amount.

This court finds that the applicant has made out a *prima facie* case with high probability of succeeding. The loan was and can be described as non-performing for over a period of eight (8) years and the interest can be termed as an “**excessive amount**”.

Injunctive orders are equitable and discretionary remedies and are granted in situations where the subject matter is in need of protection. Indeed the property herein stands to be auctioned on the strength of this “**excessive claim**” and is therefore in need of protection.

Counsel for the report submitted that applicant had not demonstrated that damages should not suffice as adequate compensation in the event that the property was sold off by the Bank in exercise of its statutory power of sale.

It is trite law that the applicant must demonstrate that it will suffer irreparable damage if the orders sought are not granted and must also demonstrate that damages would not be adequate compensation.

The law also provides for damages where a mortgagee/chargee irregularly exercises its statutory power of sale.

Counsel for the respondent went on to submit that the respondent had no sentimental value of the property in issue and being a commercial entity its role in heret was the recovery of the debt.

This court shall not belabour the above issue as to whether the applicant can be adequately compensated by way of damages if the property is irregularly sold by the respondent.

This court opines that there are instances where monetary awards may never be adequate compensation.

This court reiterates that the application has made out a *prima facie* case and this court finds that the application has merit and the same is hereby granted as set out hereunder:-

1. The respondent, its servant and or agents or anybody acting on their behalf are restrained from foreclosing property title No. LR 11098/132 Nakuru Municipality, selling, advertising for sale by private treaty or in any way interfering with the applicant's quiet occupation and possession of the suit property pending hearing and determination of this suit.
2. The applicant shall tender into court a written undertaking for security for costs within fourteen (14) days of the date hereof.
3. The applicant shall have the costs of this application.

It is so ordered.

Dated and Signed at Nakuru this 7th day of June, 2013.

A. MSHILA

JUDGE

In the presence of

Mbago holding brief for Ndubi, Advocate for the Applicant

N/A for the respondent.