



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ELC. CASE NO. 64 OF 2013

SIMON GITAU MUGI1ST PLAINTIFF

AGINGO RAPEMO2ND PLAINTIFF

VERSUS

K-REP BANK LIMITED..1ST DEFENDANT

JOHN M. GIKONYO

T/A GARAM INVESTMENTS..2ND DEFENDANT

RULING

Coming up before me for determination is the Notice of Motion dated 11/1/13 brought under section 63(E), 1A and 3A of the Civil Procedure Act, Section 90 of the Land Act, Order 40 Rules 1,2,3 and 4, Order 51 of the Civil Procedure Rules and all enabling provision of the law. It seeks for orders of temporary injunction to issue restraining the Defendants from selling or offering for sale whether by public auction or private treaty or in any way disposing the land parcel known as Kiambaa/Muchatha/T.678 (hereinafter referred to as the “Suit Property”) pending the hearing and determination of this application and the suit. The applicants also sought costs of the application and suit.

The application is premised upon the grounds set out on the face of it together with the Supporting Affidavit of Simon Gitau Mugi sworn on 11/1/13. In the supporting Affidavit, Simon Mugi stated that he borrowed Ksh. 7,500,000/- for the purpose of Local Purchase Order finance overdraft of Ksh. 5 million and completion of construction of properties erected on the Suit Property and L. R. No. Kiambaa/Muchatha/T.679. He stated further that the said amount was released to them in May 2011 and in November 2011 they wrote to the Bank requesting for restructuring of their facilities due to challenges of their business. He further stated that he got a buyer for Kiambaa/Muchatha/T.679 and the Bank allowed him to sell the same which happened and using the proceeds of the sale he cleared all outstanding arrears as at 31/7/12. He then stated that after this was done, the Bank issued a statutory notice on 31/7/2012 claiming intention to sell the two properties. He further stated that when he noted the contradiction, he wrote to the Bank and pointed out that the Bank had accepted his earlier proposal to pay all arrears and requested the Bank to nullify the statutory notice. He stated that while he waited for the Bank to honour the proposal to restructure and release funds for completion on property on the Suit property, he was shocked to see an advertisement for an intended public auction of the Suit Property in the Newspaper issued by the 2nd Defendant and scheduled for 15th January 2013. He stated further that the Bank cannot rely on the demand issued on 31st July 2013 for Ksh. 7,500,000 but should have issued a

fresh notice for Ksh. 2,329,823.66 which it did not do. He further stated that the notification of sale and advertisement by the 2nd Defendant was misconceived and a nullity *ab initio* and should be prohibited.

The Application is contested. The 1st Defendant filed the Replying Affidavit sworn by Josephine Musembi dated 12th February 2012. In it, she averred that sometime on 6th April, 2011, Pharmatrade Pharmacy Limited was granted a facility by the 1st Defendant/Respondent Bank in the nature of a term loan for Ksh. 2.5 million secured by a charge over the Suit Property and an overdraft facility for Ksh. 5 million secured by a legal charge over Kiambaa/Muchatha/T.679. She further indicated that the charge over the Suit Property expressed the chargors as the 1st Plaintiff/Applicant and one Hannah Wairimu Nganga. She further indicated that the principal loan secured by the Suit Property was disbursed to the said Pharmatrade Pharmacy Limited but that the debtor paid the same intermittently such that the account was in arrears. She further stated that on account of the default, the 1st Defendant issued a statutory notice dated 2/7/12 demanding the payment of the outstanding cumulative sum of Ksh. 7,349,343.86 as at 30/7/12 within 3 months. She stated further that the Principal Debtor Pharmatrade Pharmacy Limited by their letter dated 2/8/12 sought the indulgence of the 1st Defendant which was not accepted. She further indicated that in the meantime, the 1st Defendant allowed part payment of the facilities and agreed to allow the sale of Kiambaa/Muchatha/T.679 by private treaty which proceeds were utilized in clearing part of the outstanding overdraft facility. She further pointed out that there remained an outstanding amount together with another amount in respect of the term loan which sums are accruing interest to date. She further stated that the 3 month statutory notice lapsed on 2/10/12 as a result of which the 1st Defendant issued instructions to Garam Investments for the sale of the Suit Property in order to recover the outstanding sums.

A further Affidavit was filed by the 1st Plaintiff/Applicant sworn on 28/3/13 in which Simon Gitau Mugi stated that as at the time when they received the statutory notice he was up to date with his payments. He further stated that he had presumed that since the 1st Defendant had accepted their letter of 2/8/11 by releasing the title of Kiambaa/Muchatha/T.679, they were processing a further loan of Ksh. 700,000/- so as to enable them finish the construction on the Suit Property. He further stated that the statutory notice was superceded by the agreement to sell Kiambaa/Muchatha/T.679 as proceeds therefrom were used to settle the overdraft facility. He further argued that demand should have been issued since the demand of 2/7/10 was for two properties and the outstanding amount had changed. As such, he swore, the 1st Defendant should have issued a new statutory notice which was never done.

Both the Applicants and the 1st Defendant/Respondent filed their written submissions which have been read and taken into account in the Ruling.

The applicable principles for the grant of an interlocutory injunction such as the one sought herein by the Applicants was well enunciated in the celebrated Case of *Giella v. Cassman Brown [1973] EA 358* 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 be normally 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.”

Have the applicants established a *prima facie* case with a probability of success? In other words, have they demonstrated that they have a genuine and arguable case? A careful analysis of the facts of this case show that the main issue for determination in this suit was the validity or otherwise of the Statutory Notice dated 2/7/12 issued by the 1st Defendant to the Applicants. On the one hand, the Applicants argue that the said statutory notice was overtaken by the subsequent sale of Kiambaa/Muchatha/T.679 and the application of the proceeds of sale therefrom towards the total outstanding loan, thereby reducing the amount of debt owed by them to the 1st Defendant. They argue that the 1st Defendant could therefore not

rely on that statutory notice in proceeding to instruct the 2nd Defendant to sell the Suit Property by public auction.

On their part, the 1st Defendant argued that they could still rely on the statutory notice issued on 2/7/12 because there was still an outstanding loan balance which remains to date. The question therefore remains - does a new statutory notice require to be sent to debtors upon the happening of events such as part – payment or release of some securities?

Section 90 (2) of the Land Act is instructive. It states that the notice required in subsection (1) shall adequately inform the recipient of the following matters:-

- a. The nature and extent of the default by the charger.
- b. If the default consists of non-payment of any money due under the charge, the amount that must be paid to rectify the default and the time, not being less than 3 months by the end of which the payment in default must have been completed.

Should the 1st Defendant be compelled to issue a fresh 3 months statutory notice each time a debtor settles in part the outstanding debt owed? Would such an outcome not be abused by debtors seeking to forestall or defeat the exercise of the statutory power of sale vested in lenders by law? Did the Applicants not know all along that the 1st Defendant required full payment of the entire outstanding debt as notified to them through the statutory notice issued on 2/7/12?

To my mind and in light of the foregoing, the Statutory notice issued by the 1st Defendant indicated the entire outstanding debt and demanded that the same be fully settled to forestall the exercise of the statutory power of sale. I find that the partial settlement of the debt through the sale proceeds of one of the charged securities did not in any way vitiate the statutory notice. The Applicants were fully aware that there was an outstanding balance still remaining and yet they did not settle the same. To that extent therefore, I find that the 1st Defendant was not obliged to issue a fresh statutory notice to the Applicants. To that extent, I find that the Applicants have not established a *prima facie* case with a probability of success. Having arrived at that conclusion, I do not see the need in interrogating whether the other two conditions for the grant of an interlocutory injunction have been met.

In light of the foregoing, this application is dismissed. Costs shall be in the cause.

SIGNED AND DELIVERED AT NAIROBI THIS 19TH DAY OF JULY 2013.

MARY M. GITUMBI

JUDGE