



East Africa Vantor Co Ltd v Agricultural Finance Corporation & another (Environment & Land Case 4A of 2020) [2022] KEELC 142 (KLR) (9 June 2022) (Ruling)

Neutral citation: [2022] KEELC 142 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU
ENVIRONMENT & LAND CASE 4A OF 2020**

**YM ANGIMA, J
JUNE 9, 2022**

BETWEEN

EAST AFRICA VENTOR CO LTD PLAINTIFF

AND

AGRICULTURAL FINANCE CORPORATION 1ST DEFENDANT

LEGACY AUCTIONEERING SERVICES 2ND DEFENDANT

RULING

A. The Plaintiff's Claim

1. By a plaint dated October 30, 2016 the Plaintiff sought the following reliefs against the Defendants:
 - a. An injunction restraining the 1st and 2nd Defendants, their agents, servants, employees, officers and or any other person acting on their instructions, control and directions from auctioning, selling, transferring, alienating or in any other manner whatsoever from disposing parcels of land numbers Sipili Donyoloip Block 1/9010 and Sipili Donyoloip Block 1/9012.
 - b. Costs of this suit and interest thereon.
 - c. Any other relief.
2. The Plaintiff pleaded that it was the registered proprietor of Title Nos. Sipili Donyoloip Block 1/9010 and Sipili Donyoloip Block 1/9012 (the suit properties) which it had charged to the 1st Defendant in 2014 in order to secure the payment of a loan of Kshs.10,000,000/= (the loan facility) it had obtained from the 1st Defendant. The Plaintiff further pleaded that it serviced the said loan regularly until 2015 when its farm was invaded by wild animals and crops destroyed with the consequence that is defaulted in its financial obligations.



3. It was the Plaintiff's case that sometime in October, 2016 the 1st Defendant irregularly advertised the suit properties for sale without issuing and serving the mandatory statutory notice of 90 days under Section 90 (2) of the Land Act; a valuation under Section 97 of the Land Act; and a notification of sale as required by law. It was contended that the intended sale was unlawful and merely intended to deny it a right to redeem the suit properties hence the suit.
4. In its application for interim orders dated October 30, 2016 the Plaintiff contended that, in any event, the Defendants' intended to sell the suit properties valued at Kshs.75 million at a gross undervalue. It was further contended that the 1st Defendant had grossly overstated the outstanding loan arrears at Kshs.12,599,983.00. The Plaintiff did not, however, indicate the amount it considered to be truly outstanding on the loan facility.

B. Defendants' Response

5. The Defendants filed a joint statement of defence dated 8.11.2016 in response to the suit. The 1st Defendant conceded having granted the Plaintiff the loan facility on the security of the suit properties. It was pleaded that since disbursement of the amount in 2014 the Plaintiff had never paid a single cent towards servicing the loan facility and that it was constrained to issue the relevant statutory notices for realization of its security in 2016 when it became clear that the Plaintiff had no intention of servicing the loan facility.
6. The 1st Defendant pleaded that it complied with all legal and statutory requirements for valuation of the securities by issuing the statutory notices and that its statutory power of sale had truly arisen hence the Plaintiff as a defaulter was not entitled to the equitable remedy of injunction. In its replying affidavit in response to the Plaintiff's application for interim orders, the 1st Defendant exhibited copies of the 90-day statutory notice, notification of sale and a copy of a valuation report for one of the suit properties in a bid to demonstrate its compliance with statutory requirements for the sale of the suit properties.

C. Summary of Evidence at the Trial

a. The Plaintiff's Evidence

7. At the trial hereof the Plaintiff called its director, Geoffrey Wahome, as the sole witness. He adopted his witness statement filed on 1.11.2016 as his evidence in-chief and produced the documents in the Plaintiff's trial bundle as exhibits. PW1 was aggrieved by the 1st Defendant's recovery process mainly on the grounds that statutory notices were merely dropped at their office without being personally served on the directors; that the suit properties were valued at Kshs.75 million whereas the 1st Defendant had proposed to sell them at Kshs.12 million; and that the timelines given in the notices were not "proper" in law.
8. During cross examination PW1 admitted taking the loan facility as well as defaulting thereon. He further stated that apart from a deposit of Kshs.200,000/= made pursuant to a court order, the Plaintiff had not paid any portion of the outstanding loan. During re-examination by the Defendants' advocate PW1 conceded receipt of the 90 - day statutory notice annexed to the application for interim orders but denied receipt of the notification of sale.

b. The Defendants' Evidence

9. The 1st Defendant's Branch Manager, Nyahururu, Titus Chepkonga, testified on behalf of the Defendants as the sole witness (DW1). He adopted his witness statement dated 11.01.2019 as his evidence in-chief and produced the documents in the list of documents dated 12.2.2021 as exhibits. It



was contended by DW1 that upon default on the loan facility, the Plaintiff was served with a 90 – day statutory notice dated 3.6.2016 demanding payment of Kshs.11,878,860/= under the loan facility.

10. It was the evidence of DW1 that upon the Plaintiff's failure to settle the debt, a notification of sale was issued and the suit properties valued with a view to selling them under the 1st Defendant's statutory power of sale. It was his evidence that parcel 9012 had an open market value of 17.2 million with a forced sale value of Kshs.12.04 million whereas parcel 9010 had an open market value of 6.8 million with a forced sale value of Kshs.4.8 million. It was the Defendant's case that the sale could not take place due to an interim injunction issued in the proceedings.

D. The Issues for Determination

11. The court has considered the pleadings, evidence and documents on record in this matter. The court is of the opinion that the following issues arise for determination:
 - a. Whether the 1st Defendant's statutory power of sale had arisen prior to the intended sale.
 - b. Whether the Plaintiff is entitled to the injunction sought.
 - c. Who shall bear costs of the suit.

E. Analysis and Determination

a. Whether the 1st Defendant's statutory power of sale had arisen prior to the intended sale

12. The court has considered the submissions and material on record on this issue. Whereas the 1st Defendant contended that it had complied with all the legal requirements for the sale of the suit properties, the Plaintiff contended otherwise. The Plaintiff contended that the intended sale was illegal because the 90 - day statutory demand notice was not given; that a notification of sale was not issued; and that there was no proper valuation of the suit properties, or that the Defendants intended to sell them at a gross undervalue.
13. The court has considered the material on record on the issue of the 90 - day statutory notice. Whereas the Plaintiff's pleading was that it was never served with such notice that contention was contradicted by the Plaintiff's witness statement and the evidence tendered at the trial. For instance, on page 9 of the Plaintiff's trial bundle PW1 stated that:

“While I was waiting for the bank's response to my application instead of receiving a positive response from the 1st Defendant over the re-scheduling the said relationship manager of the 1st Defendant hand delivered to me loan default notices. Attached hereto and marked “GMW4” is a copy of the letters from the bank.”
14. A closer look at the document marked GWM4 on page 26 of the Plaintiff's trial bundle reveals that it is a copy of the 90 – day statutory notice dated March 3, 2016 demanding Kshs.11,878,860/= from the Plaintiff. The record further shows that during both cross-examination and re-examination PW1 admitted receipt of the said notice but contended that it was not properly served because it not personally served upon him or brother who was co-director of the company. The court finds nothing irregular about the said notice since in his witness statement, PW1 stated that it was hand delivered to him by the 1st Defendant's Relationship Manager. The court also finds nothing wrong with the timeline in the notice which gave the Plaintiff three (3) months from the date of service to pay the outstanding loan. The court finds and holds that the Plaintiff was duly served with a valid statutory notice under Section 90 (2) of the *Land Act*.



15. The Plaintiff also disputed service of a notification of sale prior to the intended sale of the suit properties. The Defendant's evidence on the issue of the notice was a certificate of service dated 7.9.2016 by B.K. Sila who was an auctioneer. It was stated that the auctioneer served a 45 – day notice of redemption upon the Plaintiff's secretary, one Diana on 26.8.2016 at Nairobi Upper Hill Hotel on the instructions of PW1. The court has noted that PW1 did not deny at the trial having authorized the Secretary to receive the notification of sale. It was not denied that the said Diana was working at the Plaintiff's known place of work or business at Nairobi Upper Hill Hotel. The court is satisfied on a balance of probabilities that the Plaintiff was duly served with a notification of sale prior to the intended sale of the suit properties in 2016.
16. The court has noted from the Plaintiff's application for interim orders that the Plaintiff admitted that a 45 – day notification of sale was issued by the Defendants on October 10, 2016 but contended that the notices were defective and unlawful. At the trial hereof, the Plaintiff did not explain in what manner the said notification was defective or unlawful. The court is thus satisfied that the Plaintiff was duly served with notifications of sale and given an adequate opportunity to redeem the suit properties.
17. The court has considered the material on record on the issue of valuation of the suit properties prior to the intended sale. During cross examination by the Defendants' advocate, PW1 stated that he was not aware if the Defendant had undertaken any valuation of the suit properties. The Defendants contended that the 2 suit properties were valued at Kshs.17.2 million and 6.8 million respectively and that the failure to produce the second valuation was merely an oversight.
18. It is evident from the material on record that the 1st Defendant undertook a valuation of parcel 9012 but there is really no evidence to justify a finding that it valued parcel 9010 as well. In the premises, the court is of the opinion that the intended sale of parcel 9010 was irregular for being in contravention of Section 97 of the *Land Act*. However, in view of the passage of time since the valuation of parcel 9012 was undertaken in 2016 the 1st Defendant shall be obligated to undertake a valuation of both suit properties should it intend to realize the securities.

b. Whether the Plaintiff is entitled to the injunction sought

19. The court has already found that the 1st Defendant's statutory power of sale had arisen with respect to the loan facility. The Plaintiff's default is admitted on the basis of the material on record. The Defendants duly issued the 90 – day statutory notice of redemption as well as the requisite notification of sale. The Plaintiff is thus not entitled to the equitable remedy of injunction because it has been in default since 2014. At the trial, the Plaintiff admitted that it had not serviced the loan facility save for the payment of a paltry Kshs.200,000/= which was done on the basis of a court order. Even though the Plaintiff is not entitled to the equitable remedy of injunction, Defendants nevertheless owe it a duty of care under Section 97 of the *Land Act* to sell the suit properties at the best obtainable price.
20. The court is thus inclined to direct that should the 1st Defendant decide to continue with realization of its securities then it must undertake a fresh valuation for parcel 9012 since the last valuation on record is dated 2016 as well as for parcel 9010 because there is no evidence on record to demonstrate its valuation at any given time. The court is also inclined to grant the Plaintiff one more chance to redeem the suit properties by directing the 1st Defendant to issue a fresh notification of sale of the suit properties.

c. Who shall bear costs of the suit

21. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason,



directs otherwise. See *Hussein Janmohamed & Sons v Twentsche Overseas Trading Co. Ltd* [1967] EA 287. The court is of the opinion that since the parties have partly failed and partly succeeded, the appropriate order to make in the circumstances is that each party shall bear its own costs.

F. Conclusion and Disposal

22. Save for the issue of the valuation with respect to parcel 9010, the court finds no merit in the Plaintiff's suit. The court finds and holds that the Plaintiff is not deserving of the equitable remedy of injunction since it has been in default of the loan facility since 2015 and has not made reasonable efforts to pay off the loan. Accordingly, the court makes the following orders for disposal of the suit:
- a. The Plaintiff's suit be and is hereby dismissed.
 - b. Should the 1st Defendant be minded in selling the suit properties it shall conduct a prior valuation of both of them for reasons given in the judgment. Additionally, the 1st Defendant shall accord the Plaintiff another opportunity to redeem the suit properties by issuing a notification of sale.
 - c. The parties shall bear their own costs.

JUDGMENT DATED AND SIGNED AT NYAHURURU THIS 9TH DAY OF JUNE, 2022 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.

In the presence of:

Ms. Ndegwa for the Plaintiff

Ms. Mutsili for the Defendants

C/A - Carol

Y. M. ANGIMA

JUDGE

