



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 515 of 2002

SALIM MANJI 1ST
PLAINTIFF

NAVIDA SALIM MANJI 2ND
PLAINTIFF

VERSUS

SOUTHERN CREDIT BANKING CORPORATION LTD.
..... DEFENDANT

R U L I N G

Before me is application for an interlocutory injunction under Order XXXIX Rules 1, 2 and 3 of the Civil Procedure Rules Section 52 and 59 of the Indian Transfer of Property Act (1882) of India, Rule 15 of the Auctioneers Rules 1990 and Section 3A of the Civil Procedure Act. The application is by the plaintiffs against the defendant. The background is as follows: In 1998, a company called House of Manji Ltd. (**hereinafter called the Borrower**) was granted an overdraft facility by the defendant to the tune of Kshs.30,000,000.00. The said facility was secured by a charge over **L.R. No.214/303** Nairobi Area registered in the names of the plaintiffs. The said facility was subsequently converted into a term loan on the same security.

The borrower defaulted in the repayment and the defendant sought to realize the security. The plaintiffs sought an order of injunction to restrain the defendant from **inter alia** selling the said property in exercise of its statutory power of sale. That was on 26.4.2002 when the application was lodged. That application was appurtenant to a plaint which was filed on the same date. The plaintiffs sought the following orders of the court:-

1. An injunction do issue restraining the defendants whether by themselves, their agents or whosoever from advertising for sale, selling, alienating or transferring or otherwise dealing in L.R. NO.214/303 pending the determination of this suit.

2. All further registration or change in registration in the ownership occupation or possession or any kind of right or interest in the suit property in any land registry and all registering authorities be prohibited until further orders of the court.

The reasons for the application were as follows:-

1. The defendant has served the plaintiff with statutory notices giving intention of the sale.

2. The power of sale has not arisen as no monies are outstanding under the secured overdraft account.
3. The purported sale is contrary to the terms of the mortgage and terms of borrowing.
4. Alternatively, the mortgage stands discharged as the defendant has breached the terms of the mortgage instrument and letter of offer to the detriment of the plaintiffs as guarantors.

That application was heard by Osiemo, J. and allowed on 6/6/2002. The defendant appealed to the Court of Appeal against the said order of Osiemo, J. The Court of Appeal allowed the appeal and set aside the injunction orders granted by Osiemo, J. This was on 31.3.2006.

With the injunction orders out of the way, the defendant has again sought to realize the security. The plaintiffs have again moved the Court for primarily an order of injunction to restrain the defendant from advertising for sale, selling by public auction or private treaty or otherwise howsoever alienating, conveying, transferring or in other manner whatsoever interfering with the plaintiff's property known as **L.R. NO.214/303** situated in the city of Nairobi.

The case of **Giella v. Casman Brown & Co. Ltd. [1973] E.A.358** set out the conditions for the grant of interlocutory injunctions. These are: Firstly an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated in damages; and thirdly, if the court is in doubt, it will decide an application on the balance of convenience.

Have the plaintiffs met the said conditions? From the material on record and the submissions of the plaintiff's advocate, the plaintiffs make the following principle complaints against the defendant.

1. That the intended auction is for recovery of an alleged debt amounting to 71,433,402.95 together with interest thereon at 23% p.a. The alleged debt is grossly excessive and not properly due and payable by the plaintiffs under the terms of the mortgage and the contract of lending.
2. The intended sale is illegal in that:
 - (a) The defendant has not formerly demanded the alleged debt of Kshs.71,483,402.95 from the plaintiff at all.
 - (b) The defendant has not served any and/or a proper and valid statutory notice upon each and/or any of the plaintiffs.
 - (c) In any event the purported Statutory Notice given on 13.12.2001 is outdated and the defendant cannot validly exercise its power of sale on the basis of the said notice.
 - (d) The purported Statutory Notice was only served upon the 1st plaintiff and is thus defective, invalid and of no consequence whatsoever.
 - (e) The Auctioneers have not served the plaintiffs with the mandatory Notice of Forty five (45) days prior to the intended Auction, neither (have they) issued a Proper and valid Notification of Sale in Accordance with the Auctioneers Rules.
3. The plaintiffs' liability under the mortgage is limited to Kshs.30,000,000.00 only and the defendant is not entitled to the excessive monies it alleges to be due and owing from the plaintiffs and the alleged debt is excessive, illegal and constitutes a breach of the terms of the mortgage and/or the contract of lending.
4. The Statutory Power of Sale which the defendant has threatened to exercise is not exercisable neither has it accrued to the defendant under the charge document.

5. The defendant has not furnished the plaintiffs with proper and accurate statement of account and the justification for the excessive monies being demanded.
6. The defendant has not conducted a current and/or proper valuation of the suit property and is colluding to sell the plaintiffs' property hurriedly at a throw away price through a pre-arranged sale.
7. That the plaintiffs shall suffer irreparable and irredeemable loss and damage unless the injunction is granted.
8. That it will be in the interests of justice and equity to preserve the suit property pending the hearing and determination of the suit and/or until the defendant issues a proper notice.

The defendant on its part primarily contends that the issues raised by the plaintiffs are res judicata. With regard to the challenge made against the Statutory Notice of Sale, the defendant contends that the notice it issued on 13.12.2001 was valid and it was not necessary to issue any fresh notice. With regard to the challenge made against the Auctioneer's Notices, the defendant contends that the same are valid and on the complaint against the amount demanded the defendant contends that that constitutes a dispute as to the amount due which is not a good basis for granting an injunction. The defendant further contends that as the prayers sought in the application are different from the ones sought in the plaint the application is incompetent and further that as the application violates the principle that litigation should come to an end it is an abuse of the process of the court and should be dismissed with costs.

I have given the application due consideration. I am alive to the fact that at this stage I am not required to adjudicate with finality on the facts and Law urged by the parties lest I put the trial judge in a bind. However I have found as follows on the major issues in contention.

First on the alleged illegality of the intended sale: It is the plaintiff's contention that the sum sought to be recovered of over 71 million, being substantially more than the original sum demanded in the initial statutory notice, ought to have been demanded a fresh in another statutory notice. This argument in my view is not valid in law. Under the relevant statute only one notice is envisaged. The plaintiffs' do not allege that any payments were made subsequent to the original demand. It was not therefore necessary to serve a fresh statutory notice of sale. A related complaint made by the plaintiffs is that no proper and valid statutory notice was served upon each and/or any of the plaintiffs. I have perused the statutory notice dated 13.12.2001, exhibited by the plaintiffs' as "SM2". This notice gave the plaintiffs the requisite period within which they were to redeem the mortgage. The notice is addressed to both plaintiffs. In my view this notice is valid. But was it served upon the two plaintiffs? The plaintiffs themselves put this beyond controversy. In their Chamber Summons dated 26.4.2002 and filed on the same date, the plaintiffs admitted being served with the statutory notice of sale and cannot now be heard to challenge service of the same.

Secondly, the plaintiffs complain that the sum sought to be recovered of KShs.71,483,402.95 together with interest thereon at 23% p.a. is grossly excessive and not properly due and payable under the terms of the mortgage. This complaint is related to the plaintiffs' further complaint that their liability under the mortgage is limited to KShs.30,000,000.00 only and the defendant is not entitled to the excessive monies it alleges to be due and owing. This issue in my view was settled by the Court of Appeal in Nairobi C.A. No.201 of 2002 (Supra). At page 9 of the judgment the Learned Judges found as follows:-

"Furthermore, the expression '*Mortgage Debt*' is defined in Clause 1(b) of the Mortgage as being the revolving overdraft, as so defined and outstanding interest thereon. We consider that on a true construction of the documents it is not arguable, with a probability of success, that the Mortgage Debt as so defined excludes credit and other facilities which are not an overdraft account such as a fixed loan account".

It is clear therefore that the plaintiffs' liability under the mortgage is not limited to KShs.30,000,000.00 only. I have perused the Mortgage document on my own. Recital 2 at page 1 of the Mortgage reads:

“(2). The Lender has at the joint and several requests of the Borrower the Mortgagors and the Guarantors agreed to make available to the borrower revolving overdraft and credit and other facilities not at any time exceeding a sum of Kenya shillings Thirty Million (KShs.30,000,000.00) (hereinafter called “the Revolving Overdraft) upon having repayment thereof with interest thereon and other moneys as hereinafter provided secured by way of legal mortgage of the Mortgaged Property”

(emphasis mine)

AND Clause 1(b) at page 2 of the Mortgage provides:

“1. The Borrower covenants and agrees with the Lender:

(a)

(b) During the continuance of this security to pay to the Lender (*as well after as before any judgment is obtained*) interest on the revolving overdraft facility or on so much thereof as shall for the time being remain owing (*hereinafter called “the Mortgage Debt”*) at such rate or rates as the Lender shall in its sole discretion determine with full power to the Lender to charge different rates for different accounts such interest to be calculated on the respective daily balances and debited monthly by way of compound interest both before and after any demand.”

In the light of the provisions of the Mortgage the sum due by the plaintiffs to the defendant could not have remained constant at KShs.30,000,000.00. The plaintiffs were liable to also pay “*interest thereon and other moneys.*” It is not enough for the plaintiffs to merely allege that the sum sought to be recovered is grossly excessive and not properly due without explanation.

I also find as being without merit the plaintiffs’ complaint that the defendant has not furnished them with proper and accurate statement of account and the justification for excessive monies being demanded.

The third principal complaint made by the plaintiffs relates to the Notices served by the Auctioneers and the want of a current valuation report. With respect to the notices I find on a prima facie basis that they may not have been strictly in compliance with the Auctioneers’ Rules. However, the sale was stopped. In my view non-compliance with the Auctioneers’ Rules is now merely academic. If this application were to turn on this point I would express my humble opinion that non-compliance with the Auctioneers’ Rules would be a mere irregularity that would not form the foundation for an order of temporary injunction. This is because the further period provided under the said Rules appear to accord a mortgagor or chargor additional period to redeem the charged property which in effect extends the statutory period provided under the Registered Land Act or the Transfer of Property Act. A comprehensive consideration of this point is not however, necessary in this application.

With regard to the requirement for valuation, it appears as if the Auctioneers were alive to the same as in the Notification of Sale dated 7.4.2006 they expressly stated that a valuation was to be done to determine the reserve price. The plaintiffs’ complaint that the defendant is colluding to sell the plaintiffs’ property hurriedly at a throwaway price through a pre-arranged sale is in my view a red herring.

The fifth principal complaint made by the plaintiffs is that they will suffer irreparable and irredeemable loss and damage unless the injunction is granted. This complaint is related to the further complaint that it will be in the interests of justice and equity to preserve the suit property pending the hearing and determination of the suit and/or until the defendant issues a proper notice.

The plaintiffs themselves offered their property for mortgage purposes. The value of the property is clearly ascertainable. It cannot be said that loss of such property whose value is clearly ascertainable is irredeemable or irreparable should it turn out that the property ought not to have been sold.

The plaintiffs’ advocate cited several authorities and so did the advocate for the defendant. For that I am grateful to them. I have not found it necessary to cite the cases in this ruling but have kept the

principles enunciated therein in mind in preparing this ruling. The facts in the said cases however related to different circumstances.

Turning back to the application at hand, it is obvious that I have found against the plaintiffs on all their primary complaints. In the end I find that the plaintiffs have not shown a prima facie case with a probability of success at the trial. The defendant is seeking to exercise a statutory power of sale which in my view has arisen. The power is properly exercisable as the due statutory notice has been served upon the plaintiffs. The complaints with regard to the amount demanded by the defendant is not a ground for restraining the defendant from exercising its statutory power of sale as such a dispute is merely a dispute as to the exact amount owed under the mortgage. I see no other legal right of the plaintiffs that is threatened by an unlawful action on the part of the defendant to justify restraint by way of the injunction sought. I am fortified in this ruling by the decision of the Court of Appeal on an application in this suit similar to the present one. Having found that the plaintiffs have no prima facie case with a probability of success, I should not strictly have even considered the issue of adequacy of damages. I need not also consider the issue of convenience.

In the premises, the application dated 20.4.2006 and filed on the same date is dismissed with costs to the defendant.

Orders accordingly.

DATED AT NAIROBI THIS 29th DAY OF MAY 2006.

F. AZANGALALA

JUDGE

29.5.2006

DATED AND DELIVERED ON 29TH DAY OF MAY, 2006.

M. KASANGO

JUDGE

29.5.2006

Read in the presence of:-