



Thuma Distributors Limited v Kenya Commercial Bank Limited (Commercial Case E312 of 2022) [2023] KEHC 2316 (KLR) (Commercial and Tax) (10 March 2023) (Ruling)

Neutral citation: [2023] KEHC 2316 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E312 OF 2022**

DAS MAJANJA, J

MARCH 10, 2023

BETWEEN

THUMA DISTRIBUTORS LIMITED PLAINTIFF

AND

KENYA COMMERCIAL BANK LIMITED DEFENDANT

RULING

1. Before the court for determination is the Plaintiff's Notice of Motion dated August 3, 2022 that has been filed, *inter alia*, under Order 40 Rule 1, 2,10 and Order 31 Rule 1 of the [Civil Procedure Rules](#), section 90 (1) of the [Land Act](#), 2012 and section 103 of the [Land Registration Act](#), 2012. The Plaintiff primarily seeks an order that pending hearing and determination of this suit, the Court grant a temporary order of injunction restraining the Defendant ("the Bank") from selling by public auction or otherwise interfering with the Plaintiff's occupation and ownership of title of the following parcels of land; Land Reference Number Nairobi/Block 119/1838, Nairobi/Block 82/1716, Makuyu/Makuyu/Block1/2087, Makuyu/Makuyu/Block 1/2051, Makuyu/Kimorori/Block 111/2234, Kajiado/Kaputiei North/42535, Kajiado/Kaputiei- North/26763, Ruiru/Kiu Block 2/T.1267("the suit properties")
2. The application is supported by the facts on its face and the supporting affidavit and further affidavit by James Maina Thuku, the Plaintiff's director, sworn on August 3, 2022 and October 12, 2022. It is opposed by the Bank through the Grounds of Opposition dated August 26, 2022 and the replying affidavit of its Sarit Center Branch Manager, Elizabeth Ngugi, sworn on September 9, 2022. The parties have also supplemented their arguments by filing written submissions.
3. Before I consider the parties' arguments, a brief background of the facts gleaned from the Plaintiff's depositions is necessary. The Plaintiff, as chargor, offered the suit properties as security for SME loans, overdraft and working capital facilities it took out with the Bank to facilitate its business. When the



Plaintiff defaulted in repaying the facilities, the Bank has evinced its intention to realize the securities. This prompted the Plaintiff to file this suit and the instant application to forestall the sale of the suit properties.

4. The Plaintiff avers that the Bank has grossly undervalued the suit properties and failed to adhere to the requirement of the Land Registration Act, 2012 and the Land Act, 2012 particularly section 90 and 96(2) when giving statutory notices for realization of the securities. The Plaintiff admits indebtedness but asserts that this situation was caused by effects of the Covid-19 pandemic in that its contract with Kenya Breweries Limited was terminated and that it had sought to restructure its loans with the Bank.
5. The Plaintiff's deponent states that the suit properties are his home and those of his siblings and are of great sentimental value to him. That the suit properties reflect the crystallization of his labour and that unless preserved by an order of the court, the Bank will treat the same as commodities of sale with blatant disregard to law and procedure as already demonstrated above.
6. The Bank's opposes the application. It avers that its statutory power of sale under section 90 of the Land Act, 2012 has crystallized hence the court should not issue an injunction. It contends that the application is an abuse of the court process and that the Plaintiff has failed to meet the basic threshold for the grant of injunctive relief.
7. The Bank states that when the Plaintiff failed to settle the loans, it issued and served the mandatory 90-day statutory notice under section 90(1), (2) and (3)(e) of the Land Act, 2012 on the Plaintiff, its directors, guarantors and/or chargors, demanding Kshs 103,927,732.27 being the outstanding arrears/ debt as at December 8, 2021 in a bid to exercise its statutory power of sale. The Bank asserts that the statutory notice was duly served upon the Plaintiff, its directors, guarantors and/or chargors by way of registered post.
8. The Bank further states that it issued and served the Plaintiff, its directors plus guarantors and/or chargor(s) with the 40-day notice of intention to sell dated July 6, 2022, demanding the sum of Kshs 24,489,245.47 in outstanding arrears and the total outstanding debt standing at Kshs 108,633, 638.09 as at June 3, 2022. Again, the Bank avers that this notice was duly served upon the Plaintiff, its directors, the guarantors and/or chargor(s) by registered post.
9. Thereafter the Bank states that it instructed Ark Consultants Limited to value one of the suit properties; Makuyu/Kimorori Block III/2234. It asserts Plaintiff's allegation that the suit property was undervalued is baseless and a tactic by it to evade and/or postpone the realization of the securities by the Bank. The Bank contends that the Plaintiff has not been diligent in making payments towards settlement of its loans and that in a show of good will, the Bank accepted the Plaintiff's request to restructure its loans due to the negative effects of the Covid-19 pandemic but the Plaintiff failed to adhere to the terms of the restructure.

Analysis and Determination

10. The main issue for consideration is whether the Plaintiff has made out a case for grant of an order of injunctive relief as ordained in *Giella v Cassman Brown* [1973] EA 348. It is now trite and the parties have submitted as much that in order to succeed in an application for an injunction order, a party must demonstrate that it has a *prima facie* case with a probability of success, demonstrate irreparable injury which cannot be compensated by an award of damages if a temporary injunction is not granted, and if the court is in doubt show that the balance of convenience is in their favour. These three condition are to be applied as separate, distinct and logical hurdles which the application is expected to surmount sequentially (see *Nguruman Limited v Jane Bonde Nielsen and 2 Others* NRB CA Civil Appeal No. 77 of 2012 [2014] eKLR). This means that if an applicant does not establish a *prima facie* case then



irreparable injury and balance of convenience do not require consideration. On the other hand, if a *prima facie* case is established, then the court will consider the other conditions.

11. The first hurdle the Plaintiff must surmount is to establish a *prima facie* case with a probability of success. The Court of Appeal in *Mrao Ltd v First American Bank of Kenya Limited and 2 Others* [2003] eKLR explained that it is, “a case in which on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter.”
12. In its plaint, the Plaintiff raises several issues that if established at this stage would constitute a *prima facie* case. It states that it was not served with the 90-day statutory notice as required under section 90 of the *Land Act*, 2012, that the valuation conducted on the suit properties is at a gross undervalue, that the Plaintiff is being treated as a defaulter which it is not, that the Bank is purporting to sell the suit properties by public auction knowing that the Plaintiff is ready and willing to pay his loan, failing to give proper computation of the amount and the interest that is due and owing to the Bank by the Plaintiff, failing to factor in amounts already paid in the computation of arrears and failing to act in good faith when indeed the Plaintiff has called on the Bank to do so.
13. Having evaluated the grounds raised by the Plaintiff against the Bank’s response, I am unable to find in favour of the Plaintiff, at least on a *prima facie* basis, for a number of reasons. First, on the ground that the Plaintiff was never served with the 90-day statutory notice, the Bank has annexed a copy of a duly stamped schedule from General Post Office-Nairobi, as proof of the said postage on December 31, 2021. The said schedule indicates that the said Notice was sent to, *inter alia*, the Plaintiff though the address, 18017-00500 NRB, the same address that is indicated in the Letters of offer and Charge documents and which the Plaintiff does not deny belongs to it. In *Nyagilo Ochieng & Another v Fanuel Ochieng & 2 Others* [1995-1998] 2 EA 260, the Court of Appeal held that the burden to establish service of the statutory notice rests on the chargee. In this case, I find that the Bank has discharged this burden by showing that it issued and sent to the Plaintiff the 90-day statutory notice dated December 22, 2021 by registered post.
14. Indebtedness and default is a condition precedent for issuing the statutory notice. The Plaintiff states that it should not be treated as a defaulter. *Black’s Law Dictionary* (11th Ed.) defines a ‘defaulter’ as someone who defaults and defines ‘default’ as ‘the failure to pay a debt when due’. The Plaintiff has admitted in its pleadings and the Bank has demonstrated by way of evidence that the Plaintiff has failed to repay its loan when it fell due and that the same remains unpaid to date. The Plaintiff is the simple and classic definition of a defaulter and it cannot fault the Bank or anyone else for terming or treating it as such. Once the chargor defaults, the chargee is entitled to commence the process of exercising its statutory power of sale by issuing the requisite statutory notices.
15. Turning to the issue of valuation of the suit properties, under section 97 of the *Land Act*, 2012 the chargee has a duty of care to the chargor to obtain the best price reasonably obtainable at the time of sale and in that regard, it is required to ensure a forced sale valuation is obtained. Under Rule 11(b) (x) of the *Auctioneers Rules*, a professional valuation of the reserve price must be carried out not more than 12 months prior to the proposed sale.
16. The Plaintiff’s charge against the Bank is that the suit properties have been undervalued. It questions the valuation of the suit properties at the time of obtaining the facilities against this period of default. Whereas the Plaintiff may have an arguable case about the drop in the values of the suit properties, the Bank’s valuation is a professional valuation. A valuation report is based on the professional and expert opinion of a duly qualified valuer who assessed the value of land based on accepted parameters. In order to displace a professional valuation, the Plaintiff must produce clear evidence that the valuation



is wrong or at least doubtful. Mere assertions or statements will not do (see [Palmy Company Limited v Consolidated Bank of Kenya Limited](#) ML HCCC No. 527 of 2013 [2014] eKLR). I hold that the Plaintiff's assertions do not elevate its case to a prima facie case with a probability of success.

17. Moreover, were the Bank to dispose of the suit properties at an under-value, the difference in value can be ascertained and paid by way of damages. At any rate, the Plaintiff has not suggested that in the event that it is successful in the substantive suit, but that such success is attained after the suit properties have been disposed of, the Bank may be unable to compensate it (see [Omega Foundation v Chase Bank of Kenya](#) KSM HCCC No. 69 of 2018 [2018] eKLR).
18. The Plaintiff complains that the Bank intends to exercise its statutory power of sale and it is willing to pay the loan. On this issue I find that the Plaintiff has been given the opportunity to rectify the default and redeem the securities when the statutory notices were issued and served upon it. The overwhelming evidence is that the Plaintiff is indebted and as I have found, the Bank's statutory power of sale has crystallized and arisen and the court cannot interfere with the exercise of the Bank's statutory power of sale where it has been demonstrated there has been default and the chargor has been issued the appropriate demands to rectify the default and has been served with the requisite statutory notice under sections 90(1) and 96(2) of the [Land Act](#), 2012 and has failed to rectify the default and/or redeem the security.
19. Coupled with the previous issue is the concern by the Plaintiff that the Bank has failed to give it proper computation of the amount and the interest that is due and owing to the Bank by the Plaintiff and failed to factor in amounts already paid in the computation of arrears. The Bank has produced the Plaintiff's statements of accounts showing the pending loan arrears which indicate the principal and interest owing at least as at August 4, 2022. The Bank's statements of account enjoy a presumption of validity under section 176 of the [Evidence Act](#) (Chapter 80 of the Laws of Kenya) and therefore the Plaintiff has the obligation to point out the errors it claims from these statements to rebut their presumption.
20. Further, even if I accept that there may be some errors in the accounts, it would only go to reduce the amount due in view of the Plaintiff's admitted indebtedness. The general principle is that a dispute in interest or the amount owed is not a basis for granting an injunction restraining the chargee from exercising its statutory power of sale. This is what the Court of Appeal stated in [Civil Servants Housing Co. Ltd and Another v Lavuna and Others](#) [1995] LLR 366 (CAK) that, "...A court should not grant an injunction restraining a mortgagee from exercising its statutory power of sale solely on the ground that there is a dispute as to the amount due under the mortgage..."
21. The Plaintiff's director has also stated that the suit properties are his home and those of his siblings and are of great sentimental value to him. That the suit properties reflect the crystallization of his labour and that unless preserved by an order of the court, the Bank will treat the same as commodities of sale with blatant disregard to law and procedure as it has demonstrated above. I hold that the Plaintiff must have been well aware that in obtaining the credit facilities from the Bank and securing the same with the suit properties, they would have to be sold in case of default. Once a property is offered as a security, it indeed, becomes a commodity for sale as stated by the Plaintiff, but in any case, there is no commodity for sale whose loss cannot be compensated adequately in damages (See [Paul Gatete Wangai & 13 others v Capital Realty Ltd & another](#) MKS ELC Case No. 123 of 2019 [2020] eKLR).
22. Finally, the Bank, having issued the requisite statutory notices and given the Plaintiff a chance to rectify its default and redeem the securities, cannot be deemed to have acted in bad faith as contended by the Plaintiff. If anything, I find that the Bank has been indulgent with the Plaintiff. I therefore find that the Plaintiff has failed to demonstrate a prima facie case with a probability of success. The inquiry as to



whether the Plaintiff is entitled to an injunction ends at this point in line with the dicta in *Nguruman Limited v Jane Bonde Nielsen and 2 Others (Supra)*.

Disposition

23. The Plaintiff's application dated August 3, 2023 is dismissed with costs to the Defendant.

DATED AND DELIVERED AT NAIROBI THIS 10TH DAY OF MARCH 2023.

D S MAJANJA

JUDGE

Court of Assistant: Mr M Onyango

Mr Macharia instructed by K Macharia and Company Advocates for the Plaintiff.

Mr Chege with Ms Aisha instructed by Amolo and Gacoka Advocates for the Defendant.

