**Seahawk General Logistics Limited & 2 others v Stanbic Bank Kenya Limited & another (Commercial Case E485 of 2020) [2023] KEHC 22036 (KLR) (Commercial and Tax) (5 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22036 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**COMMERCIAL AND TAX**

**COMMERCIAL CASE E485 OF 2020**

**DAS MAJANJA, J**

**SEPTEMBER 5, 2023**

**BETWEEN**

**SEAHAWK GENERAL LOGISTICS LIMITED ..... 1ST PLAINTIFF**

**MATRIX LOGISTICS LIMITED ..... 2ND PLAINTIFF**

**DAN WANZALA SAMUEL ..... 3RD PLAINTIFF**

**AND**

**STANBIC BANK KENYA LIMITED ..... 1ST DEFENDANT**

**NORTH RIFT DAIRIES LIMITED ..... 2ND DEFENDANT**

**RULING**

1. Before the court for determination is the Plaintiffs' Notice of Motion dated 31.07.2023 filed, inter alia, under Order 40 Rule 1(a), 2, 4 and 10 of the Civil Procedure Rules. The Plaintiff primarily seeks an order restraining the 1st Defendant ("the Bank") from the following properties; LR No. 7583/237 Mwitu Road Estate, Karen ("the Karen Property"), Title No. Ngong/Ngong/ 55819, Merisho Area, Kajiado and Kajiado/Kaputei North/42870, 42872, 42873, 42874, 42875,42876, 42877, 42878, 42879, 42880, 42881, 42882, 42883, 42884, 42885, 42886, 42887, 42888, 42889, 42923, 42894, 42925, 42926, 42927, 42928, 42929 and 42930 ("the suit properties") in exercise of its statutory power of sale pending the hearing and determination of the suit.

2. The application is supported by the 3rd Plaintiff's supporting and supplementary affidavits sworn on 31.07.2023 and 14.08.2023. The 1st Defendant ("the Bank") opposes it through the replying affidavit of its officer, Collins Sabatia Khasiani, sworn on 03.08.2023 and by the 2nd Defendant through

the replying affidavit of its director, Emily Cherotich Ego, sworn on 9th August 2023. The parties supported their respective positions by making brief oral arguments.

3. The main issue for consideration is whether the Plaintiffs have made out a case for grant of an order of injunctive relief as ordained in *Giella v Cassman Brown* [1973] EA 348. In order to succeed in an application for an interlocutory 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. The court must apply these three conditions as separate, distinct and logical hurdles which the applicant 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).

4. 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." The *prima facie* case must flow from what is pleaded in the plaint as this is the case a plaintiff expects to prove at the trial.

5. Before I proceed further with this inquiry, it is important to point out that the court has already adjudicated on the Plaintiffs' application for injunction seeking to restrain the Bank from exercising its power of sale in respect of the suit properties. By a ruling dated 15.04.2021, the court (Mabeya J.) dismissed the application with costs ("Ruling No. 1"). Among the issues the court determined is that the Bank could not be compelled to accommodate the Plaintiffs by way of permitting them to dispose of the charged properties by private treaty. The court also found that the Plaintiffs had been served with all the requisite statutory notices under the *Land Act*, 2012 as a prerequisite for the exercise of its statutory power of sale. The court also dismissed the Plaintiffs' allegation that the suit properties would be sold at an undervalue and lastly and having found that the Plaintiffs were indebted to the Bank and were unlikely to adhere to any arrangement to resolve the debt, the court declined to exercise its powers under section 104(2) of the *Land Act* to suspend the Bank's remedies.

6. Following Ruling No. 1, the Plaintiffs approached the Bank for consent to sell the Karen Property by private treaty. Upon consent by the Bank, the 1st Plaintiff and the 2nd Defendant entered into an agreement dated 29.07.2021 for the sale of the Karen Property at a price of Kshs. 80 million ("the Sale Agreement"). Under the said agreement, the deposit of Kshs. 10 million would be paid in a suspense account with the Bank and the balance to be paid to the same suspense account and released to the 1st Plaintiff's loan account upon successful registration of the discharge of charge and transfer in favour of the 2nd Defendant. The completion date was set at 90 days from the date of execution.

7. The essence of the Plaintiffs' case is that it accuses the Bank of sabotaging the Sale Agreement despite having given assurances as late as 30.05.2023 that it would support the sale. It accuses the Bank of purporting to advertise the property for sale without issuing statutory notices required under the *Land Act*, 2012, illegally debiting the loan account with Kshs. 30 million being monies paid into the loan account under the sale agreement and illegally paying the 2nd Defendant Kshs. 20 million debited from the Plaintiff's loan account, manipulating the valuation of the suit property by lowering it to Kshs. 67 million in order to allow the 2nd Defendant to bid for it and colluding with the 2nd Defendant to finance its acquisition of the Karen Property.

8. As regards the 2nd Defendant, the 1st Plaintiff states that while the agreement was to be completed by 29.10.2021, the parties agreed that the completion dated would be extended to 29.01.2022. However, the 2nd Defendant failed to complete causing the 1st Plaintiff to issue a completion notice dated

03.03.2022. It finally wrote to the 2nd Defendant the letter dated 27.10.2022 confirming that it had formally rescinded the agreement for want of compliance with the completion notice. The Plaintiff avers that the Bank was aware that the Sale Agreement had been rescinded. It accuses the 2nd Defendant of attempting to utilise the Karen Property as security for financing its purchase through the Bank and the despite occupying the said property for more than 18 months it failed to pay rent.

9. It is noteworthy that in the Amended Plaint, the Plaintiffs only seek relief against the Bank. As regards the Sale Agreement, they pray for a declaration that it compromised and extinguished any and all statutory notices issued by the Bank affecting the suit properties. Second, that the court issues a permanent injunction restraining the Bank from exercising its statutory power of sale in respect of the suit properties. Last, that the court declare that the Bank's action of debiting the loan account with Kshs. 30 million and paying out Kshs. 20 million from the 1st Plaintiff's loan account is illegal and unlawful and that the court does order reversal of the aforesaid transactions.

10. The Bank opposes the application and urges the court to dismiss the application. The Bank avers that after Ruling No. 1 was dismissed, the Plaintiffs approached it and requested to be allowed to sell the Karen Property by private treaty so that the proceeds of the sale could be applied towards settlement of the loan. The Bank states that it suspended any recovery for a period of two years pending completion of the Sale Agreement which has since been rescinded. That it issued a 21-day notice dated 24.04.2023 notifying the Plaintiffs that it was withdrawing its consent to the sale to enable it exercise its power of sale to which the Plaintiff's responded by the letter dated 15.05.2023 and confirmed that it had rescinded the Sale Agreement.

11. As regards the money paid by the 2nd Defendant, the Bank states that the sum of Kshs. 30 million was paid into a suspense account as provided under the Sale Agreement. The Bank took the position that the since the Sale Agreement was rescinded, it would be entitled to hold onto the Kshs. 10 million being the deposit amount and release the sums over and above the aforesaid amount to the 2nd Defendant. It denies that the 1st Plaintiff is entitled to this amount.

12. The Bank avers that loan amount remains unpaid and is not in dispute and currently stands at Kshs. 106,584,560.00. It maintains that it is entitled to exercise its statutory power of sale.

13. The 2nd Defendant opposes the application and denies the allegations that it has colluded with the Bank to deprive the 1st Plaintiff of the benefit of sale of the Karen Property. It confirms that the 1st Plaintiff rescinded the Sale Agreement but blames the 1st Plaintiff for frustrating completion. The 2nd Defendant points out that when it sought out financing to purchase the said property from the Bank, the 1st Plaintiff acceded to this proposal by extending the completion date through a letter dated 02.11.2021 and that it duly informed it that the Bank has in fact agreed to provide the loan facility subject to providing the usual documentation. The 2nd Defendant affirms that it paid the Bank Kshs. 30 million which was held in the suspense account and not the 1st Plaintiff's account as alleged by the Plaintiff.

14. From a brief narration of the issues raised, I am of the firm view that the Plaintiffs have not made out a case for the grant of an interlocutory injunction. The Plaintiffs do not deny that they are indebted to the Bank. This means that the Bank is entitled to exercise its statutory power of sale by issuing the requisite statutory notices under the *Land Act*, 2012. Ruling No. 1 settled the issue of service of the notices by holding that the Plaintiffs were duly served. The court observed that, "[19] From the exhibits produced, there was evidence that a 3 months' statutory notice was issued on 12/06/2019 under section 90 of the *Land Act*. There was no cogent evidence that it was complied with. The payment contended by the plaintiffs was made one year later. In the premises, there was no requirement and or obligation to re-issue the notice once again once default persisted."

15. The position regarding the statutory notices has not changed save that the Plaintiffs now argue that the Bank by consenting to the sale of the Karen Property by private treaty compromised and extinguished the statutory notices. I have read and re-read the correspondence between the parties and there is nothing in the interaction between the parties that supports the Plaintiffs' argument. All the Bank did was to suspend the exercise of its remedies as chargee in order to give the Plaintiffs an opportunity to dispose of the Karen Property in order to settle the debt or part thereof. The Bank was not privy to the Sale Agreement and did not at any time rescind the notices it had already issued. Once the transaction failed, the Bank notified the Plaintiffs that it would proceed with the exercise of its right to sell the said property which had already accrued. As the court noted in Ruling No. 1, there was no need and there is no legal requirement to issue any further notices as the Plaintiffs have had ample time redeem the suit properties (see *Nyando Enterprises Limited v Barclays Bank Kenya Limited* [2018] eKLR and *Executive Curtains & Furnishings Ltd vs. Family Finance Building Society* [2007] eKLR).

16. The Plaintiffs have alleged collusion between the Bank and the 2nd Defendant based on the manner it dealt with the Kshs. 30 million it was holding on the account. While it is not the province of this court at this stage to engage in a mini-trial of what are serious allegations, the court must of course determine whether there is a *prima facie* case in relation to the grant of the injunction sought (see *Nguruman Limited v Jane Bonde Nielsen and 2 Others* (supra)). From the evidence, the 1st Plaintiff was not entitled to the Kshs. 30 million paid to the Bank by the 2nd Defendant. That sum under the Sale Agreement was to be deposited in a suspense account pending completion of the sale and registration of the transfer of in favour of the 2nd Defendant. As this did not happen, the Bank retained the Kshs. 10 million and paid over to the 2nd Defendant the Kshs. 20 million.

17. Even if I were to accept the 1st Plaintiff's position that it is entitled to the Kshs. 30 million, I would still deny the Plaintiffs an injunction as damages equivalent to that amount would be an adequate remedy. In the event the suit succeeds as prayed, the Bank would be in a position to refund the money. Moreover, even if the 1st Plaintiff is given credit for the Kshs. 30million, it would still remain indebted to the Bank to the tune of Kshs. 70 million. I find therefore that there is no *prima facie* case with a probability of success on this point.

18. The last issue the Plaintiffs complain about, is the undervaluation of the Karen Property. In line with its duty under section 97 of the *Land Act* and Rule 11(b)(x) of the *Auctioneers Rules*, the Bank commissioned Ebony Estates Limited to ascertain the forced sale value of the Karen Property. The report established the market value and forced sale value at Kshs. 85,000,000.00 and Kshs. 63,750,000.00 respectively. A valuation is professional opinion and merely because another valuer or a party without the requisite professional knowledge takes a different view of the value of the property is not a sufficient ground to impugn the exercise of the chargee's power sale. Section 97 of the *Land Act* imposes on the Bank the duty of care to obtain the best possible price in the circumstances. In doing so, the Chargee is obliged to value the suit property before sale. If there is breach of that duty, then the Bank is liable to pay damages which is represented by the difference between the sale price and the putative forced sale value and which is the statutory remedy provided for in section 99(4) of the *Land Act*. I therefore hold that there is no *prima facie* case on this basis.

19. Ultimately, the Bank has complied with all the statutory prerequisites to enable it sell the suit properties. The purpose of the sale of the Karen Property by private treaty was to settle the 1st Plaintiff's liability. The 1st Plaintiff has rescinded the sale paving the way for Bank to proceed with the exercise of its remedies. The Plaintiffs have a right and indeed an opportunity to redeem the said property hence it cannot be said the Bank has clogged their equity of redemption.

20. The Plaintiffs have not established a *prima facie* case with a probability of success. In line with the dicta in *Nguruman Limited v Jane Bonde Nielsen and 2 Others* (supra), the inquiry comes to an end with dismissal of the application.

21. The Plaintiffs' application dated 31.07.2023 is dismissed with costs to the Defendants. The interim orders in force are discharged and the amount of Kshs. 1,000,000.00 deposited in court shall be released to the 1st Defendant and credited to the 1st Plaintiff's loan account.

**DATED AND DELIVERED AT NAIROBI THIS 5TH DAY OF SEPTEMBER 2023.**

**D. S. MAJANJA**

**JUDGE**

Court of Assistant: Mr M. Onyango

Mr Marete instructed by Kithinji Marete for the Plaintiff.

Mr Maondo instructed by Mulanya Maondo Advocates for the 1st Defendant.

Mr Waudo instructed by Migos-Ogamba & Waudo Advocates for the 2nd Defendant.