REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

COMMISSIONER & ADMIRALTY DIVISION

COMMERCIAL CASE NO. 11 OF 2020

STEPHEN NJIHIA MBUGUA.....PLAINTIFFF

-VERSUS-

1. MAKURI ENTERPRISES

2. HOUSING FINANCE COMPANY LIMITED.....DEFENDANTS

RULING

1. Before me for determination is a Notice of Motion Application dated 11th February, 2020 filed contemporaneous with a Plaint initiating the suit herein. The application has been taken out by Stephen Njihia Mbugua, (hereinafter referred to as the Plaintiff/Applicant), whereof he sought for the following orders:

a) Spent;

b) Spent;

c) That pending the hearing and determination of this suit *inter partes*, this Honourable Court be pleased and do hereby issue an Order of temporary injunction restraining the Defendants, whether by themselves, their servants, representatives and/or agents from trespassing onto, advertising for selling, selling, transferring or disposing off all that parcel of land known as KWALE/GAU KINONDO/558/UNIT 11.

d) Any other or further order that this court deems fit to grant.

e) That the costs of this application be provided for.

2. The application is premised on the nine (9) grounds on the face of the application. It is further supported by the supporting affidavit sworn by the Plaintiff/Applicant on 11/2/2020.

3. The Defendants are opposed to the application and in doing so the Defendants rely on a replying affidavit sworn on 26th May, 2020 by Amos Aachira Mwangi, the 2nd Defendant's Manager, Mombasa branch.

4. In brief, the facts of the suit is that the Plaintiff/Applicant avers that he has had a long standing business relationship with the 2nd Defendant and obtained a loan facility in the year 2010 which was secured by a charge over the subject property.

5. It is also averred that the Plaintiff/Applicant continued servicing the loan facility and has honoured any demand by the 2nd Defendant for payment off the loan facility. The Plaintiff/Applicant further avers that he was astonished to see that the 2nd Defendant has through the 1st Defendant arranged to dispose of the subject property by way of public auction even without issuing the requisite statutory notice. As such, the Defendants have not complied with the Provisions of Section 96(2) of the Land Act which enjoins a chargee to issue statutory notices before exercising the statutory power of sale. Finally, the Plaintiff/Applicant deposited that he has cleared all the outstanding arrears and there is no basis upon which the subject property should be auctioned. Therefore, the malicious actions by the Defendants (sic) can only be intervened by this court granting the orders sought.

6. On the other hand, the brief facts of the Defendant/Respondents' case is that the Plaintiff/Applicant has not been servicing the loan facility

as alleged. However, according to the 2nd Defendant, the Plaintiff was advanced a loan facility of Kshs. 12,434,290/= which was secured by a charge dated 31/12/2015 over the subject property and not 2010 as alleged by the Plaintiff. That the Plaintiff has continued to default and was consequently listed with the Credit Reference Bureau vide a notice and certificate of posting dated 24/1/2020 in line with the Credit Reference Bureau Regulations, 2013.

7. The 2nd Defendant further avers that as at 28/1/2019, the Plaintiff had arrears of Kshs. 640,939.75 and a total outstanding sum of Kshs. 10,966,978.50. The Defendant then issued a three months statutory notice dated 28/1/2019, a demand which was not headed by the Plaintiff.

8. It is contended that on failure to meet the demands made on the statutory Notice, the 2nd Defendant issued a statutory Notice dated 29/4/2019 pursuant to terms of Section 96(2) of the Land Act and thereafter proceeded to carry out a valuation of the suit property on the 14/10/2019. Then on 19/11/2019, the 2nd Defendant instructed the 1st Defendant to put up the suit properties for sale. Consequently, the 1st Defendant vide a letter dated 21/11/2019 issued the requisite 45 days redemption notice and thereafter the subject property was advertised for sale on 28/1/2020 and 6/2/2020.

9. The Deponent however concedes that a meeting was held between the Plaintiff and the 2nd Defendant's representatives and the Plaintiff was explained to the implications of all the statutory notices forwarded to him. It was then agreed that the 2 nd Defendant's action was to be suspended on condition that all the arrears together with the auctioneer's fees as well as the valuation fees were to be met by the Plaintiff. The Defendant also avers that the Plaintiff was not amenable to the terms that he was to meet the costs for auctioneers and it somehow depicts an ambiguous scenario.

10. It is also averred that the allegations by the Plaintiff that he has cleared all his outstanding arrears are untrue because the statement of accounts show that the Plaintiff was in arrears to a tune of Kshs. 179,101.14. On that basis, the Defendant seeks that the court to dismisses the Plaintiff's Application.

11. On 18/2/2020 when the application was fixed for hearing, parties were directed to canvass the application by way of written submissions. The Plaintiff/Applicant was granted 14 days to file and serve his submission and 14 days upon service the Defendant was equally directed to file and serve submissions 14 days upon service by Plaintiff. None of the parties complied with the court's directions and on 9/11/2020 when the court reconvened, M/s Omari counsel for the Plaintiff/Applicant informed the court she had not been able to compile and file her submissions owing to health issues she had. She then sought the court's indulgence by extending the time for filing the submissions with 7 days. There was no objection raised to the request and the time for filing the submissions was duly extended.

12. On 30/11/2020, the date set to confirm filing submissions, M/s Mango counsel for the Defendant told the court that she was unable to file her submissions given that the Plaintiff had not filed his. The Plaintiff was unrepresented. At the request of M/s Mango a ruling date was fixed and parties granted the liberty to file their submissions. Nonetheless, none of the parties has filed submissions to date and I have to proceed and write this ruling based on the evidence on face of the application as well as the response thereof.

Analysis and Determination

13. I have very carefully considered the Notice of Motion herein, the affidavit in support and the replying affidavit thereof. I find that the sole issue arising for consideration is whether on the evidence and material placed before court, the Plaintiff has satisfied the conditions upon which a temporary injunction can be granted?

14. In applications for an interlocutory injunction the burden of proving to prove the satisfaction of the court that the same should be granted resides with the Applicant. It is also noteworthy that an injunction is a discretionary remedy, and is granted on the basis of evidence and sound legal principles.

15. Needless to say, it is now well settled in law that the grant of injunctive reliefs is a discretionary exercise predicated upon 3 interdependent and sequential limbs to wit: that the claimant has established a *prima facie* case with a probability of success; once established, the claimant ought to prove that an award of damages would be insufficient to alleviate any damage caused; and finally, when in doubt, the court would decide the application on a balance of convenience. See **(**case of **Giella vs. Cassman Brown & Co. Ltd [1973] EA 358).**

16. That being the case, the first inquiry that this Court must make is to assess whether the Plaintiff/Applicant has established a *prima facie* case with a probability of success. As to what constitutes a *prima facie* case, the Court of Appeal offered guidance in the case of ***Mrao Limited –vs- First American Bank Ltd & 2 Others [2003] eKLR 125*** where Bosire J A observed as follows: -

> ***"So what is a prima facie case?***
>
> ***I would say that in civil cases, it is a case 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 as to call for an explanation or rebuttal from the latter…But as I earlier endeavored to show, and I cite ample authority for it, a prima facie case is a more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the Applicant's case upon trial. That is clearly a standard, which is higher than an arguable case."***

17. The same Court of Appeal in the case of ***Nguruman Limited – vs- Jan Bonde Nielsen & 2 Others [2014] eKLR,*** expounded on the ingredients of a *prima facie* case when they stated as follows: -

> ***"The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected***

which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a prima facie case has been established, the Court does not hold a mini trial and must not examine the merits of the case closely. All that the Court is to see is that the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title. It is enough if he can show that he has a fair and bonafide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as it is otherwise put, on a preponderance of probabilities."

18. In the matter before me, it is not in dispute that the Plaintiff/Applicant obtained a credit facility from the 2nd Defendant and offered the subject suit property as security thereof. Although the Plaintiff avers that he procured the loan facility in the year 2010, the Defendant disagreed with those averments and annexed a charge document showing that the Loan facility was advanced to the plaintiff sometimes in the year 2015. Since the Plaintiff did not furnish the court with any of the copy of the charge document, I will consider the one annexed by the 2nd Defendant as "AMW-3" as the one the parties executed. The Charge document shows that the sum of Kshs. 12,434,290/= was to be secured by the Plaintiff.

19. However, what I understood the Plaintiff to be protesting was that he has paid the outstanding balance and there is no justification by the Defendants' actions in advertising the property for sale and more so the fact that no statutory notice was served upon him. The Defendants however insist that all the requisite statutory notices as required by the law were sent to the Plaintiff via registered post. At paragraph 25 of the Replying Affidavit the 2nd Defendant is categorical that the Plaintiff was in arrears of upto the tune of Kshs. 179,101.14 as at 29th February, 2020.

20. At this juncture, what is to be considered first is whether the said statutory notices meet the requirements of Section 90 of the Land Act, 2012 which Section provides as follows: -

"90. Remedies of a Chargee

(1) ***If a Chargor is in default of an obligation, fails to pay interests or any other periodic payment or any part thereof due under any Charge or in the performance or observation of any covenant, express or implied, in any Charge, and continues to be in default for one month, the Chargee may serve on the Chargor a notice in writing to pay the money owing or to perform and observe the agreement as the case may be.***

(2) ***The Notice required by sub-section (1) shall adequately inform the recipient of the following matters: -***

(a) ***The nature and extent of default by the Chargor;***

(b) ***If the default consists of the non-payment of any money due under the Charge, the amount that must be paid to rectify the default and the time, being not less than three months, by the end of which the payments in default must have been completed;***

(c) ***If the default consists of the failure to perform or observe any covenant, express or implied, in the Chargee, the thing the Chargor must do or desist from doing so as to rectify the default and the time, being not less than two months, by the end of which the default must have been rectified;***

(d) ***The consequences that if the default is not rectified within the time specified in the notice, the Chargee will proceed to exercise any of the remedies referred to in this section in accordance with the procedures provided for in this sub-part; and***

(e) ***The right of the Chargor in respect of certain remedies to apply to the Court for relief against those remedies***.

21. My understanding of the law in this provision is that in the event of default by the chargor then the chargee must issue a statutory notice pursuant to Section 90 of the Land Act, 2012 and clearly specify the amount in arrears as at the specified date and the fact that the Chargee would be entitled to exercise its statutory power of sale over the charged property if the default was not remedied within a period of three months.

22. In the present case, the 2nd Defendant holds the position that the Plaintiff was served with a statutory notice dated 28/1/2019 and the amount in arrears then as indicated in the said notice was Kshs. 640,939.75. Under paragraph 25 of the Replying affidavit, it is averred that the statement of accounts reflected that the Plaintiff was in arrears of Kshs. 179,101.14 as at 29/2/2020. Therefore, it cannot be said that that the statutory notice issued on 28/1/2019 was the proper notice under Section 90 of the Land Act for the reason that it specified amounts which were not the real and current debt owed by the Plaintiff. The amount in arrears as described under paragraph 25 of the replying affidavit, which I believe is the current amount the Plaintiff is indebted, is not in consonant with the amount claimed in the statutory notice dated 28/1/2019. And even without further investigations it suffices to state that the statutory notice is ex facie defective for want of form. In my view, this failure to comply with Section 90(1) of the Act is of itself sufficient to support the grant of an injunction, for failure to comply with statutory provisions in my view, *ipso-facto*, gives rise to a *prima facie* case with a serious chance of success.

23. In the affidavit sworn in support of the application, the contentions by the Plaintiff were that the 2nd Defendant had not issued a Notification of Sale of the suit property contrary to Section 96(2) of the Land Act. The said Section provides as follows: -

"96. (1) ***Where the Chargor is in default of the obligation under a Charge and remains in default at the expiry of the time provided for the rectification of the default in the notice served on the Chargor under Section 90(1); a Chargee may exercise the power to sell the charged land.***

(2) ***Before exercising the power to sell the charged land, the Chargee shall serve on the Chargor a notice to sell in the prescribed form and shall not proceed to complete any contract for the sale of the charged land until at least forty days have elapsed from the date of the service of that notice to sell."***

24. It is discernable from the reading of the above section that the Notification of sale contemplated under Section 96(2) can only be issued after the Chargor has issued a proper statutory notice as under Section 90(1) of Land Act. Having established that the Statutory notice earlier issued was not the proper notice in claiming the current amount in arrears, it then follows that all the other notices earlier issued fall defective in the same manner. Invariably as it were, if the sale of the suit property is carried through in the absence of a proper notice to sell it, it will amount to a clog on the Chargor's equity of redemption.

25. While it is obvious that the outstanding amount is disputed and the question on whether the Plaintiff is to meet the auctioneer's fees and the valuation expenses, my view is that these issues need to be determined at the hearing of the main suit and after evidence has been adduced in the same regard and not at an interlocutory stage.

26. In light of the discussions above, the upshot of my finding is that I am inclined to grant an injunction to restrain the sale of the suit property as long as a proper notice to sell the property and a Notification of Sale under Section 96(2) of the Land Act have not been issued. Thus, the 2nd Defendant is at liberty to comply.

27. In light of the circumstances of this case, I think it is in order that each party should bear their own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA ON THIS 2ND DAY OF FEBRUARY, 2021.

D. O. CHEPKWONY

JUDGE

Order

In view of the declaration of measures restricting court operations due to the **COVID-19** pandemic and in light of the directions issued by His Lordship the Chief Justice on **15th March 2020,** this Ruling has been delivered to the parties online with their consent. They have waived compliance with **Order 21 Rule 1** of the Civil Procedure Rules which requires that all judgments and rulings be pronounced in open Court.

JUSTICE D.O. CHEPKWONY