



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL CASE NO. E007 OF 2021

BETWEEN

LABUENA CONSTRUCTION LIMITED..... PLAINTIFF

AND

ADM CONSULTING LIMITED.....1ST DEFENDANT

VICTORIA COMMERCIAL BANK LIMITED.....2ND DEFENDANT

RULING

1. The facts giving rise to this case are fairly straight forward and are set out in the Plaintiff dated 6th January 2021 and the parties' depositions on record. By an agreement dated 5th June 2020, the 1st Defendant contracted the Plaintiff to complete construction of 2 residential houses on Plot LR No. 2327/330 located at Karen Hardy, Karen ("the suit property") at an agreed sum of KES 25,000,000.00.
2. It is not in dispute that the 2nd Defendant ("the Bank") advanced money to the 1st Defendant secured by the following charges over the suit property; a First Legal Charge dated 26th August 2015 for KES 150,000,000.00, a Further Charge dated 22nd July 2016 for KES 50,000,000.00, a Second Further Charge dated 3rd July 2017 for KES 30,000,000.00 and a Third Further Charge dated 5th September 2018 for KES 95,000,000.00.
3. The gravamen of the Plaintiff's case is that before entering into the agreement with the 1st Defendant and upon realizing that the suit property was encumbered by the Bank, it sought and received assurances from the Bank that the construction project was properly capitalized and it would be paid for any work undertaken. The Plaintiff alleges that following those assurances by the Bank, it completed the works valued at KES 11,579,512.98. The Plaintiff now demands from the Defendants the value of the works including interest thereon amounting to KES 16,640,129.55 which remains unpaid.
4. At para. 16 of the Plaintiff, the Plaintiff states that, "*it is enjoying a contractor's lien over the property at the moment but the same is being threatened by auction of the property by the 2nd Defendant.*" It therefore seeks an injunction restraining the Bank from exercising its power of sale on the basis of the contractor's lien, legitimate expectation and the right to be served with a statutory notice as a party in possession of the suit property.
5. When the Bank advertised the suit property for sale by public auction, the Plaintiff moved the court by the Notice of Motion dated 6th January 2021, inter alia, under **Order 40 rule 1 and 4** of the **Civil Procedure Rules**, seeking an injunction pending hearing and determination of the suit restraining the Bank from selling the suit property in exercise of its statutory power of sale.
6. The application is supported by the affidavit and supplementary affidavit of the Plaintiff's director, Timothy Mwendwa Mutui, sworn on 6th January 2021 and 3rd February 2021 respectively reiterating the contents of the plaintiff which I have set out above. The application is also supported by the 1st Defendant through the affidavit of its director, Ashviner Dhariwal Mann, sworn on 13th February 2021.
7. The Bank has opposed the application through the affidavit and further affidavit of its Senior Legal Officer, Clement Gitau, sworn on 25th January 2021 and 11th February 2021 respectively.

8. The parties through their respective counsel made oral submissions supplemented by written submissions accompanied by several authorities which I have considered.

9. The Plaintiff submits that its case is based on the contractor's lien as I have outlined in the introduction and on the fact that the Bank represented to it that all bills due from the 1st Defendant would be paid by it when entering into the agreement with the 1st Defendant. In the circumstances, it submits that the Bank should be restrained from exercising its statutory power of sale until it is paid the amount due to it from the 1st Defendant. The 1st Defendant supports the alleged misrepresentation made by the Bank and urges the court to grant the injunction. The Plaintiff and 1st Defendant submit that the Plaintiff has established a prima facie case with probability of success.

10. The Bank denies the Plaintiff's claim and submits that it has not established a prima facie case with a probability of success. It denies that a contractor's lien exists because the debt owed by the 1st Defendant to the Plaintiff had not been ascertained by a court of law and the debt due to the Plaintiff has not been admitted by the 1st Defendant. The Bank further argues that the even if there was lien in existence, it cannot supercede the Bank's registered interest in the suit property so as to entitle the Plaintiff to be paid first from the proceeds of sale of the suit property.

11. The parties are agreed that in deciding whether or not to issue an injunction, the court is guided by the principles settled in **Giella v Cassman Brown [1973] EA 358**. In order to succeed, the Plaintiff must show that it has a prima facie case with a probability of success, demonstrate that it will suffer irreparable damage which cannot be compensated by an award of damages if the injunction is not granted and if the court is in doubt, show that the balance of convenience is in its favour. These principles were reiterated by the Court of Appeal in **Nguruman Limited v Jane Bonde Nielsen and 2 Others NRB CA Civil Appeal No. 77 of 2012 [2014] eKLR** where the Court further added that the three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially.

12. As to what constitutes a prima facie case, 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." In this case, the Plaintiff must demonstrate the Bank's intended action of exercising its statutory power of sale violates the contractor's lien it is asserting over the suit property.

13. The nature of the contractor's lien in relation to a chargee's interest, in this case the Bank, is neither new or novel in this jurisdiction. In simple terms, a contractor's lien is the right of a contractor to retain possession of the property it has worked on until its debt has been cleared by the client. In **Spentech Engineering Limited v Methode Limited and 2 Others ML HCCC No. 189 of 2017 [2017] eKLR** Onguto J., explained the nature of the contractor's lien as follows:

[36] It is normal for construction and property sites to be handed over to contractors. A contractual license to possession in a building contract however exists simply to enable a contractor to perform and fulfill his obligations to the employer or developer. The employer or developer has in turn an obligation to pay the contractor for performing his obligations. If the arrangement goes beyond payment and grants the contractor interest in the property, then there is need to do more to let the world be aware of such interest. This may be achieved through a simple registration of any claim on the property against the title register. This is not the case in the present suit. It would be stretching one's imagination too far to make the assumption that a contractor on site also has interest in the land besides his right to be paid for performing his obligation to build.

14. While the contractor has a right to be paid for work done, that right which is against its employer does not extend to an interest in the property unless that interest is duly registered in order to bind a third party. Since the lien is an unregistered interest, it cannot supersede the Bank's registered interest. The court in **China Wu-Yi Company Limited v Suraya Property Group Limited and 2 Others ML HCC No. 76 of 2019 [2020] eKLR** reached this conclusion and observed that:

The builder's lien is based on the construction services it rendered to the 1st Defendant. From the undisputed facts, it is clear that the liens are exercisable only in respect of 1st Defendant and not the Bank Since the Bank is a chargee and therefore a proprietor whose interests are registered, in order to succeed in its claim, the Plaintiff must show that its interest falls within any provisions of the LRA that would defeat the Bank's interest. In this instance, as I have stated above, the purchaser's lien is against the vendor and not the Bank while the builder's lien is against the developer. In both cases, the claims are against the 1st Defendant. The Plaintiff does not have any registered or other interest that would defeat the Bank's charges.

15. I need not belabor the point any further save to state that the Plaintiff has not established any proprietary interest, duly registered, in the suit property that would defeat the Bank's right to exercise its power of sale upon default by the 1st Defendant. In any case, the right of lien is against the 1st Defendant and not the Bank.

16. The Plaintiff also anchored its case on certain representations made to it by the Bank. According to the Plaintiff's deposition in support of the application, the Bank represented to the Plaintiff that the project was properly capitalized and that if it undertook the construction, it would be paid. The 1st Defendant supports this position and confirms that position that the Bank monitored the progress the Plaintiff was making in completing the project and gave certain assurances regarding funding. The Bank denies that it gave any undertaking that it would fund the project or made any representations as alleged.

17. The nature of the representation by the parties is a matter of dispute and will no doubt be resolved at the hearing of the suit. The question the court must resolve is whether the representations in any way affect the Bank's exercise of its statutory power of sale. It must be borne in mind that the Plaintiff is not a party to or privy to the agreements or charges between the 1st Defendant and the Bank, it cannot therefore seek relief in respect thereof. Further, the Plaintiff does not allege that the representation was in respect of the suit property. Even if the Plaintiff's allegations were true, the only conclusion is that the Bank would be undertaking to pay the amount due to the Plaintiff. There is nothing

about the Bank forbearing to exercise its power of sale on account of the debt due to the Plaintiff by the 1st Defendant.

18. I therefore find and hold that the Plaintiff has not established a prima facie case with a probability of success as it does not have any proprietary interest in the suit property. At any rate, the contractor's lien it is asserting cannot defeat the Bank's registered interest. Furthermore, there is no evidence that the Bank represented to the Plaintiff that it would not exercise its statutory power of sale on account of the 1st Defendant's debt to the Plaintiff. In these circumstances, the court cannot restrain the Bank, as chargee, from exercising its statutory power of sale. No purpose will be served by proceeding on any further inquiry in light of the *dicta* in *Nguruman Limited v Jane Bonde Nielsen and 2 Others (Supra)*.

19. I dismiss the Notice of Motion dated 6th January 2021 with costs to the 2nd Defendant. The interim orders in force are now discharged and the sum deposited in court shall be released to the 2nd Defendant on account of the costs of the aborted auction.

DATED AND DELIVERED AT NAIROBI THIS 15TH DAY OF MARCH 2021.

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango.

Mr Mwinzi instructed by Mwendwa Mwinzi and Associates Advocates for the Plaintiff.

Mr Mberere instructed by Ahamed Mberere and Company Advocates for the 1st Defendant.

Mr Wandati instructed by Kisilu Wandati and Company Advocates for the 2nd Defendant.