



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL AND TAX DIVISION**

**HCCC NO. 136 OF 2019**

JOAN PACKING LTD.....1<sup>ST</sup> PLAINTIFF/APPLICANT

ANNIE WANGECHI NGUMBA

Alias ANNE WANGECHI NGUMBA.....2<sup>ND</sup> PLAINTIFF/ APPLICANT

VERSUS

DIAMOND TRUST BANK LIMITED .....1<sup>ST</sup> DEFENDANT/RESPONDENT

JOSEPH M. GIKONYO

T/A GARAM AUCTIONEERS.....2<sup>ND</sup> DEFENDANT/RESPONDENT

**RULING**

1. The plaintiff/Applicant filed this suit before the Environment and Land Court at Milimani seeking the following orders: -

- a) *A permanent injunction stopping defendants, their servants or agents from selling Ngong/Ngong/49904 and/or order compelling the defendants or their agents/servants not to interfere with the plaintiff's quiet enjoyment and possession of the suit property until determination of this suit.*
- b) *A declaration that the Statutory Notice of Sale dated 12<sup>th</sup> August 2015 and Notification of Sale dated 26<sup>th</sup> February 2016 are void ab initio.*
- c) *General damages and aggravated damages.*
- d) *A declaration that the purported intended sale by the defendant is unlawful, illegal and void ab initio.*
- e) *Cost and interest at court rates.*

2. Concurrently with the plaint, the plaintiff filed an application dated 16<sup>th</sup> April 2016 seeking orders that: -

1. *Spent*
2. *Spent*
3. *That an urgent temporary injunction be issued restraining the defendants their agents, servants, employees and whomsoever from selling, auctioning or advertising Ngong/Ngong/49904 pending the hearing and determination of this suit.*
4. *The defendants do bear the cost of this application.*

3. The application is supported by the 2<sup>nd</sup> applicant's affidavit and is premised on the grounds that: -

- a) *There is no proper Statutory Notice issued to the plaintiffs by the 1<sup>st</sup> defendant.*

- b) The Statutory Notice dated 12<sup>th</sup> August 2015 is fatal, defective in law and against the Land Act 2012.*
- c) The charge document dated 23<sup>rd</sup> February 2014 was never executed by the plaintiff.*
- d) No proper charge documents were executed by the plaintiffs.*
- e) Charge documents are void ab initio.*
- f) The defendants never took regard of the moratorium period.*
- g) The notification of sale is against the Land Act 2012.*
- h) Undervaluing Ngong/Ngong/49904 which value is currently Kshs 225,000,000/-.*
- i) That Joan Packaging Ltd & Joan Packaging and Accessories Ltd are two different entities.*
- j) The defendants are acting in cohorts in misrepresenting material facts.*
- k) The charge documents are oppressive and fraudulent.*
- l) The applicants dispute the amount of interest levied.*

4. The 1<sup>st</sup> respondent opposed the application through the Replying Affidavit of its Debt Recovery Officer **Mr. Robert Oloo** who avers that the 2<sup>nd</sup> applicant is the registered owner of LR NO. Ngong/Ngong/49904 (hereinafter “**the Suit Property**”) which she charged to secure loan facilities to the tune of Kshs 90 million from the 1<sup>st</sup> Respondent.

5. He states that the applicants breached the express terms of the Overdraft facility and the Term Loan Facilities aforesaid by failing to make punctual payments when the same fell due thereby falling in arrears in the sum of Kshs 9,013,973/29 and US\$ 3,283/37 as at 27<sup>th</sup> March 2015 made up as follows: -

- a) Arrears of Kshs 6, 075,901/31 under Term Loan 1;
- b) Arrears of Kshs 1,645,475/77 under Term Loan 2;
- c) Arrears of Kshs 1, 292,596/21 being the excess amount overdrawn on the 1<sup>st</sup> plaintiff’s current account beyond the approved overdraft limit of Kshs 10,000,000/-; and
- d) Arrears of US\$ 3,283/37 being the sum overdrawn on the 1<sup>st</sup> plaintiffs US\$ account but not paid on demand.

6. He adds that despite the Bank’s repeated demands to the plaintiffs to settle the above arrears, they failed, refused and/or neglected to do so thus prompting the bank to instruct its advocates on record to issue two demand letters to the plaintiffs as shown in annexures marked “**RO6.**”

7. He avers that the plaintiffs failed, refused and/or neglected to attend to the aforesaid demand letters and that the arrears position on the loan facilities deteriorated remarkably and increased to Kshs 24,871,849/31 as at 28<sup>th</sup> July 2015 comprising of: -

- a) Arrears of Kshs 11,443,478/67 on Term Loan 1;
- b) Arrears of Kshs 4,544,850/56 on Term Loan 2; and
- c) Arrears of Kshs 8,883,520/88 on the Overdraft facility.

8. He further states that in accordance with the provisions of Section 90(3) of the Land Act, the Bank’s Advocates on record issued a Statutory Notice to the 2<sup>nd</sup> plaintiff informing her the plaintiff it would exercise its statutory power of sale over the suit property if the default was not remedied within three (3) months from the date of service of Statutory Notice.

9. He further avers that owing to the failure to settle the debt, the bank instructed its advocates on record to issue a 40-day Notification Sale advising the plaintiff that the bank would exercise its Statutory Power of Sale if the arrears were not redeemed during the stipulated period.

10. He maintains that the plaintiffs were served with all the requisite Statutory Notices the receipt of which they acknowledged and adds that the plaintiffs have on numerous instances sought and been granted more time to enable them meet their obligations towards the bank which opportunities they did not utilize.

11. Parties canvassed the application by way of written submissions which they highlighted before Honourable Lady Justice M. Gitumbi on

18<sup>th</sup> October 2017 after which the matter was listed for mention on 14<sup>th</sup> May 2018 to fix a Ruling date.

12. For reasons that are not clear to this court, a ruling date was not issued in the matter and after several mentions, it was on 3<sup>rd</sup> June 2019 transferred to this court on the basis that the cause of action was a commercial transaction. It then became necessary for this court to be furnished with the certified copies of the proceedings taken before the Environment and Land Court so as to enable it court proceed with the matter from where it had reached before the said court.

13. When the matter came up for mention before me on 12<sup>th</sup> November 2020, **Mr. Kahuthu**, learned counsel for the plaintiff informed the court that the certified copies of the proceedings were ready. He urged the court to issue a ruling date for the application dated 12<sup>th</sup> April 2016 as it was apparent that the Environment and Land Court did not make any ruling on the matter despite having heard the oral parties' submissions.

### **Analysis and Determination**

14. I have considered the application dated 12<sup>th</sup> April 2016, the 1<sup>st</sup> respondent's response and the parties' respective written submissions. I have also considered the oral submissions made by counsel during the highlighting of the submissions. I find that the main issue for determination is whether the plaintiffs have made out a case for the granting of the orders of injunction.

15. The law governing the granting of interlocutory injunction is set out under order 40(1) (a) and (b) of the Civil Procedure Rules 2010 which provides that: -

*"Where in any suit it is proved by affidavit or otherwise—*

*(a) That any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree;*

*(b) That the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders."*

16. The conditions for consideration in granting an injunction were settled in the case of **Giella v Cassman Brown & Company Limited** (1973) E A 358, where the court expressed itself on the condition's that a party must satisfy for the court to grant an interlocutory injunction as follows: -

*"First, 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 by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience."*

17. The principles in **Giella v Cassman Brown** (supra) were captured in **Paul Girona Wanjau v Gathuthi Tea Factory Company Ltd & 2 others** [2016] eKLR as follows:

*"i) Is there a serious issue to be tried?*

*ii) Will the applicant suffer irreparable harm if the injunction is not granted?*

*iii) Which party will suffer the greater harm from granting or refusing the remedy pending a decision on the merits? (often called "balance of convenience")*

18. The test for granting of an interlocutory injunction was considered in the American **Cyanamid Co. v Ethicom Limited** (1975) A AER 504 where the following elements were noted to be of great importance namely:

**i. There must be a serious/fair issue to be tried,**

**ii. Damages are not an adequate remedy,**

**iii. The balance of convenience lies in favour of granting or refusing the application.**

19. I will now turn to consider the evidence presented by the parties' herein, through their respective affidavits, with a view to determining if the instant application meets the threshold set hereinabove for the granting of orders of interlocutory injunction.

20. It was not disputed that the plaintiffs obtained loan facilities from the 1<sup>st</sup> defendant and that the said facility was secured by a charge over the suit property. The plaintiffs have however not demonstrated that they repaid the loan as agreed and neither have they denied that they are indebted to the 1<sup>st</sup> defendant for the debt that gave rise to the 1<sup>st</sup> defendant's exercise of the statutory power of sale.

21. The plaintiffs have instead faulted the defendants for failure to issue proper statutory notices, under valuation of the suit property and

reliance on defective charge documents.

22. My finding is that in view of the undisputed fact that the plaintiffs are truly indebted to the 1<sup>st</sup> defendant, it follows that they have come to this court to seek the equitable relief of injunction with unclean hands. I therefore find that they have not established that they have not made a prima facie case against the defendants so as to warrant the granting of orders of injunction. In **Kenleb Cons Ltd v New Gatitu Service Station Ltd & another**, (1990) eKLR the court held as follows on what a party seeking an injunction must demonstrate:

***"To succeed in an application for injunction, an applicant must not only make a full and frank disclosure of all relevant facts to the just determination of the application but must also show he has a right legal or equitable, which requires protection by injunction."***

23. I also find that the plaintiffs did not establish that they will suffer substantial loss if the orders sought are not granted. I note that the loss in this matter will be suffered by the 1<sup>st</sup> defendant who was as at April 2016 owed money to the tune of over Kshs 111 million which amount continues to accrue interest to date statutory notices.

24. On the plaintiffs' claim that the statutory notices were defective, I note that courts have taken the position that lack of or improper issuance of statutory notices cannot stand in the way of a chargee seeking to exercise its statutory power of sale. Moreover, annexure "RO8" "RO9" and "RO10" to the replying affidavit indicate that the plaintiffs were served with the requisite notice. Courts have also taken the position that lack of or improper service with statutory notices cannot stop a chargee from exercising its statutory power of sale. I am guided by the decision of the Court of Appeal in the case of **National Bank of Kenya Limited v Shimmers Plaza Ltd** [2009] eKLR wherein the learned judges held as follows:

***"We venture to say that where the court is inclined to grant an interlocutory order restraining mortgagee from exercising its statutory power of sale solely on the ground that the mortgagee has not issued a valid notice, then in our view, the order of injunction should be limited in duration until such time as the mortgagee shall give a fresh statutory notice in compliance with the law. We respectfully think that the learned judge did not exercise his discretion judicially in the circumstances of this case when he granted an order of injunction until the determination of the suit."***

#### **Interest levied**

25. The plaintiffs also disputed the interest charged by the 1<sup>st</sup> defendant. My take is that interest levied on the sum advanced is governed by the terms of the agreement between the parties. Courts have taken the position that the question of interest levied cannot be a ground for stopping the chargee's exercise of statutory of sale. I am guided by the decision in **Pelican Investments Ltd v National Bank of Kenya Ltd** [2000] 2 EA 488 (CCK) wherein it was held that: -

***"Unless it is plain that fraud or oppression existed, the courts will not interfere with the terms of a contract or the provisions as to interest...in any case, even if the interest charged was unconscionable, the same would only be a dispute as to amount which is not a proper ground for granting an injunction. "***

#### **Defective charges**

26. The plaintiffs further argued that the charge documents were null and void *ab initio* as the same were not executed by them. I have perused the letters of offer attached to the 1<sup>st</sup> defendant's replying affidavit as annexures "RO 1" and "RO2".

27. I have also perused annexures "RO3", "RO4" and "RO5" being the various charge documents executed by the parties herein. Considering that the plaintiffs do not deny the fact that the 1<sup>st</sup> defendant advanced the loan facilities to them as stated in the said letters of offer and charge documents, I am unable to find that there is any defect in the said charge documents.

28. Having regard to the findings and observations that I have made in this ruling, I find that the application dated 12<sup>th</sup> April 2016 is not merited and I therefore dismiss it with costs to the 1<sup>st</sup> defendant.

**Dated, signed and delivered via Microsoft Teams at Nairobi this 15<sup>th</sup> day of April 2021 in view of the declaration of measures restricting court operations due to Covid -19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17<sup>th</sup> April 2020.**

**W. A. OKWANY**

**JUDGE**

#### **In the presence of:**

Mr. Kahuthu for plaintiffs/applicants

Mr. Janjo for Shah for respondent

Court Assistant: Sylvia.