REPUBLIC OF KENYA

IN THE HIG H COURT OF KENYA

AT NAIROBI

MILIMANI COMMERCIAL COURT

COMMERCIAL & ADMIRALTY DIVISION

HCCOMM NO. E485 OF 2020

SEAHAWK GENERAL LOGISTICS LIMITED.....1ST PLAINTIFF/APPLICANT

MATRIX LOGISTICS LIMITED.....2ND PLAINTIFF/APPLICANT

WANZALA DAN SAMUEL.....3RD PLAINTIFF/APPLICANT

-VERSUS-

STANBIC BANK KENYA LIMITED.....DEFENDANT/RESPONDENT

R U L I N G

1. By a Notice of Motion dated 19/11/2020, brought under ***Order 40, Rules 1(a), 2, 4 and 10, Order 51 Rule 1 of the Civil Procedure Rules 2010; Section 89, 90, 96, 97, 103 and 104(2) of the Land Act No. 6 of 2012,*** the applicants sought injunctive orders against the respondent.

2. The orders were in respect of the properties comprised in title **L.R. No. 7583/237 Mwitu Road, Karen Nairobi, Kajiado/Kaputei Northe/42870, 42871, 42872, 42873, 42874, 42875, 42876, 42877, 42878, 42879, 42880, 42881, 42882, 42883, 42884, 42885, 42886, 42887, 42888, 42923, 42924, 42925, 42926, 42927, 42928, 42929 and 42930 and L.R. No. Ngong/Ngong/55819** ("the suit properties").

3. The application was grounded upon the supporting and further affidavit of the 3rd applicant sworn on 19/11/2020 and 20/12/2020, respectively. It was the applicants' case that the respondent had advanced the 1st plaintiff several facilities totaling Kshs. 56,000,000/- on the security of the suit properties. The said amount was repayable on monthly basis and over time, the applicants had repaid in excess of Kshs. 80,000,000/-.

4. However, the repayments were affected by the disruption of the 1st applicant's business due to the Covid-19 pandemic. The applicants requested the respondent for a moratorium and restructuring of the facilities but the latter declined.

5. Then on 26/6/2020, the respondent issued the applicants with a statutory notice under ***Section 96(2) of the Land Act***. The applicants sought to sell one of the suit properties by way of private treaty but the respondent declined. The respondent failed to comply with the requirements of the Land Act because the valuations undertaken did not reflect the current value of the suit properties. That the applicants were willing to service the facilities from the projects the 1st applicant had with government institutions.

6. The application was opposed by the respondent through a replying affidavit of **Elisha Nyikuli** sworn on 9/12/2020. It was contended that the applicants were not truthful. The respondent had severally restructured the facilities but the applicants had failed to comply with the restructure terms. The outstanding as at 14/02/2019 was Kshs. 83,774,212/- upon restructure.

7. The plaintiffs accounts continued to accrue arrears and as at the time of instructing the auctioneers, the arrears were at Kshs. 13,656,091/76. The applicants had failed to comply with the statutory notices which had forced the respondent to instruct the auctioneers to proceed with the sale. The applicants' allegation that they had identified a buyer for some properties was unverified. In the premises, the application should be dismissed.

8. In the further affidavit, the applicants denied the allegation that they had not been candid with the Court. They contended that the respondent had not followed the laid down procedure of exercising a chargees statutory power of sale. That no notice under **section 90(2) of**

the Land Act had been issued as the applicants had complied with the original notice dated 19/06/2019 and had paid a total of Kshs. 9,190,000/- within 3 months as demanded.

9. That in breach of its duty of care towards the applicants, the respondent had hastily and unlawfully rushed to exercise its power of sale on the basis of the manifest undervaluation of the suit properties.

10. The Court has considered the record, the depositions of the parties and the submissions. This is an injunction application. The principles applicable are well known. They were set out in the case of **Giella v. Cassman Brown [1973] EA.** These are that, the applicant must prove a prima facie case with a probability of success, that if the injunction is not granted he will suffer irreparable loss and damage and that if the court is in doubt, it will determine the matter on a balance of convenience.

11. In this case, there is no dispute as to the outstanding amount. The only allegations are that; the respondent is attempting to exercise its statutory power of sale un-procedurally for lack of statutory notice under ***section 90(2) of the Land Act*** and for under-valuation of the suit properties. There was also a contention that, due to the challenges brought about by Covid – 19 pandemic, the Court should invoke ***section 104 (2) of the Land Act*** and suspend the respondent's exercise of its remedy under the law appropriately.

12. On prima facie case, the applicant contended that the respondent had neither given them an opportunity to review the terms of their engagement nor opportunity to seek a purchaser(s) for the suit properties in order to clear the loan.

13. The respondent averred that it had accommodated the applicants through various restructure of the facilities but they had at all times defaulted. It is for that reason that the respondent had decided to exercise its statutory power of sale. On the allegation that the it had refused to allow them to get a purchaser for the suit properties, the respondent contended that none had been introduced to it and that in any event, it had the right under the law to sell the suit properties either by private treaty or by public auction.

14. The court has considered those contestations. Whether or not to agree to accommodate the plaintiffs was in the discretion of the respondent. The respondent was entitled to insist on its pound of flesh. In so far as the accommodation being sought was not mandatory under the contract between the parties, but only gratuitons, the respondent could not be faulted for insisting on a strict application of the terms of the contract between it and the plaintiffs.

15. As to the alleged sale to a willing purchaser, there was no evidence to show that such a purchaser existed. This would have been evidence by either by a sale agreement or offer to purchase. In any event, nothing prevented the plaintiffs from presenting such purchasers to the respondent for consideration by the latter.

16. In **Premier Flour Mills Ltd & 2 others v Standard Chartered Bank Kenya Ltd [2019] Eklr,** the court held: -

> **"Indeed the arrangement for a sale by private treaty might sound attractive but then the discretion lies with the chargee to decide whether to allow the chargor to dispose the properties by private treaty."**

17. From the foregoing, the respondent's insistence in realizing its security cannot be faulted.

18. The applicants contended that the respondent had not complied with the provisions of ***section 90(2) of the Land Act.*** That the notice dated 2/06/2019 was spent since the sum demanded therein had been fully paid in the sum of Kshs. 9,500,000/-. The respondent contended otherwise and submitted that the statement of account did not show any reduction on the amount due. That there was no requirement to issue another notice.

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.

20. In **Nyando Enterprises Limited v Barclays Bank Kenya Limited [2018] Eklr,** the court held: -

> **"In the premises, any averment that no Statutory Notice was served under section 90 of the Land Act is clearly untenable. It is also immaterial that the Section 90 Notice was issued on 7 June 2016, for, once a valid notice has been given, there is no obligation in law for a Chargee to re-issue a notice, even where the sale is not conducted as initially scheduled. In this respect, I would agree with and endorse the expressions of Warsame, J in Executive Curtains & Furnishings Ltd vs. Family Finance Building Society [2007] eKLR in which he had the following to say:**
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> **"The plaintiff was given an opportunity to redeem the charge property through the statutory notice dated 24th February, 2006. I am not aware of any law requiring the defendant to repeat or reissue the statutory notice once it is issued and served upon the borrower. The purpose of the notice is to warn the borrower that due to his default and due to the outstanding debt, the charged property is susceptible to a sale if he fails to redeem it within the 90 days after service of the notice. The period of 90 days is meant to give the borrower sufficient time within which to make arrangement to redeem his charged property. Any time after the expiry of the 90 days, the charge property is out of the hands of the borrower."**

21. In the present case, it cannot be said that the respondent stifled the plaintiffs' equity of redemption. The notices were properly issued and cannot be faulted as contended by the applicants.

22. The applicants complained that the respondent had under-valued the suit properties. That the valuations were of less value than the

original valuation when the properties were being charged.

23. Section 97(2) of the Land Act provides that **'A chargee shall before exercising the right of sale ensure that a forced sale valuation is undertaken by a valuer'.** It is clear that under this provision, all that is required is a valuation of less than 12 months from the date of exercise of the statutory power of sale. The allegations of under valuation could have held sway if the applicants would have provided an alternative valuation. Since the Court has the respondent's set of valuations only, the allegations of under-valuation remained unproven.

24. In **Palmy Company Limited v Consolidated Bank of Kenya Limited [2014] Eklr,** it was observed as follows: -

> **"The court needs cogent evidence and material in order to say that prima facie, there has been an undervaluation of the suit property which is an infringement of section 97(2) of the Land Act by the Defendant as to entitle the court to call for an explanation or rebuttal from the Defendant. That approach is necessary to prevent defaulters from filing valuation reports with value way beyond the open market value just to obtain an injunction. Needless to state that having an arguable point, as is the case here, is not sufficient to establish a prima facie case for the grant of an injunction especially in cases of exercise of the power of sale by a chargee who has shown that the Applicant has defaulted and continue to be in default. It should be known that, as long as it is lawfully exercised, the Statutory Power of Sale is not a favour that the chargor extends to the chargee or an infringement on the right of or a foreclosure of the chargor's equity of redemption; it is a statutory remedy which is inextricably tied to the right of the chargee to recover its money-which is property guaranteed under Article 40 of the Constitution."**

25. The court is persuaded by the foregoing and adopts the same here.

26. The applicants invited the Court to suspend the respondent's remedy under ***section 104(2) of the Act.*** The case of **First Choice Mega Store Ltd vs. Ecobank Kenya Ltd [2017] Eklr,** was relied on by the applicants.

27. I agree with the holding in that case that the exercise of the power under that section should be exercised only where it is demonstrated that the Chargor is capable of settling the amount due within a reasonable period. That for some difficulties which can be overcome within a reasonable time, the settlement cannot be achieved immediately. This is so because any postponement of the Chargees remedy for an unreasonable period will be interfering with a party's statutory right as well as contractual relationship with the Chargor. In any event, it may lead to the stripping of the value of the properties due to the piling of the arrears.

28. In **Muhani & Another vs. National Bank of Kenya Ltd [1990] KLR 73,** the court stated: -

> **"The mortgagor who has given an express power of sale cannot by starting a suit perhaps a perfectly hopeless suit derogate from that which it has in express terms conferred upon the mortgagee by the instrument namely a statutory power of sale and to hold otherwise would be simply to tear up the instrument which contains the contract agreed upon by the parties...The very object of the legislation granting a chargee a statutory power of sale would be negated if the courts interfere with his statutory or contractual powers unless, of course there is an allegation of fraud or improper exercise of the power of sale."**

29. I reiterate the foregoing here. There was no indication that the applicants were capable of servicing the facility even if they were given time. There was evidence that on three occasions the facilities had been restructured yet the applicants were unable to meet the terms of the restructure. I reject that invitation.

30. From the foregoing, it is clear that the applicants have not proved any prima facie case with any probability of success.

31. That being the case, the Court need not consider the other limbs of **Giella v. Cassman Brown Case.** However, if the Court's view on them is required, there was nothing to show that the applicants would suffer any loss that is irreparable if no injunction is granted. And further, the balance of convenience tilts in favour of declining any injunctive orders.

32. Accordingly, the application dated 19/11/2020 is without merit and is dismissed with costs.

DATED AND DELIVERED AT NAIROBI THIS 15TH DAY OF APRIL, 2021

A. MABEYA, FCI Arb

JUDGE