



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

HCC NO. 37 OF 2020

FORMERLY ELDORET ELC CASE NO. 94 OF 2020

RICHARD TERER ..... 1<sup>ST</sup> PLAINTIFF/APPLICANT

ALICE CHEBOR TERER.....2<sup>ND</sup> PLAINTIFF/APPLICANT

VERSUS

I & M BANK LIMITED .....1<sup>ST</sup> DEFENDANT/RESPONDENT

SILAS KIPTOO KIBII .....2<sup>ND</sup> DEFENDANT/RESPONDENT

KAPRU LIMITED..... 3<sup>RD</sup> DEFENDANT/RESPONDENT

RULING

Before me are two applications, the first being the Applicants' Notice of Motion Application dated 26<sup>th</sup> October, 2020. It seeks orders;

a. Spent

b. That a temporary injunction to issue restraining the Defendant/ Respondent whether itself, its agents, servants and/or employee from dispossessing the Plaintiffs/Applicants, transferring, leasing, taking possession or taking any further step in occupation, possession, ownership, the running, in any adverse or otherwise way alienating, operating or managing of the business structures/buildings structures on the suit properties being ELDORET/MUNICIPALITY/BLOCK 13/514 & 515 pending the hearing of the Application inter-parties

c. That an injunction do issue restraining the Defendant/ Respondent whether itself, its agents, servants and/or employee from dispossessing the Plaintiffs/Applicants, transferring, leasing, taking possession or taking any further step in occupation, possession, ownership, the running, in any adverse or otherwise way alienating, operating or managing of the business structures/buildings structures on the suit properties being ELDORET/MUNICIPALITY/BLOCK 13/514 & 515 pending the hearing of the main suit.

d. That the sale of the suit properties conducted on or about 14<sup>th</sup> October, 2020 be declared null and void.

e. That this Honourable court be pleased to appoint or nominate an independent valuer to ascertain the current open market value and forced sale value of the suit properties and the premises thereon, that is ELDORET/MUNICIPALITY/BLOCK 13/514 & 515 for further determination of the issues herein.

f. That costs of this application be provided for.

The application is premised on the grounds that;

a. That the Plaintiffs/Applicants are the registered owner and or *Chargors* of that parcel land namely ELDORET/MUNICIPALITY/BLOCK 13/514 & 515.

b. That the suit properties comprise of three units residential building with tenants.

- c. That the Plaintiffs/Applicants applied for a loan facility and the Defendant/Respondent advanced the Plaintiffs the same.
- d. That the Defendant/Respondent in purporting to exercise its statutory power of sale colluded with the valuer to undervalue the suit properties and developments thereon contrary to its obligations under Section 97(2) of the Land Act, 2012.
- e. That on the 14<sup>th</sup> October, 2020 the Defendant sold the suit properties by way of public auction at a price below the current market price and the forced sale valuation and further without notification and or due notices to the Plaintiffs.
- f. That the Defendant/Respondent has breached the duty of care owing to the Chargors in failing to undertake the current market value before exercising the power of sale.
- g. That the Plaintiffs/Applicants have failed to obtain the best price reasonably obtainable at the time of sale on 14<sup>th</sup> October, 2020.
- h. That the Defendant/Respondent grossly undervalued the property from Kshs.30,000,000/= with a forced sale value at Kshs. 22, 500,000/= as per the valuation report conducted.
- i. That the price at which the charged land has been sold is way below the market value at which comparable interest in land in Eldoret township are being sold in open market.
- j. That the defendant/Respondent through its employee participated in the public auction and in which as the highest bidder was declared purchaser hence conflict of interest.
- k. That the defendant/respondent failed to issue the notification of sale contrary to Section 96 (2) of the Land Act.
- l. That the Plaintiffs have established the threshold in the case of Giella Vs. Cassman Brown.
- m. That the Defendant/Respondent have threatened to take possession and management of the Hotel situated on the suit property.
- n. That the Plaintiffs/applicants have heavily invested in the suit property and if the same is sold at an undervalued price, they stand to suffer irreparable loss and damages which cannot be compensated in monetary terms.
- o. That the plaintiffs/Applicants should therefore be granted the orders sought as the Defendant/Respondent has not complied with the required laws in the sale of the charged property hence a direct infringement of the Plaintiffs/Applicants rights.
- p. That the defendant/Respondent will not be prejudiced in any way if the orders sought are granted.
- q. That this application has been brought promptly and in utmost good faith.

The application is further supported by an affidavit of Alice Chebor Terer dated 26<sup>th</sup> October, 2020.

The second application is the Applicants' Notice of Motion dated 7<sup>th</sup> December, 2020 and filed on 8<sup>th</sup> December, 2020. The Applicants are mainly seeking the following orders;

**a) Spent**

**b) That a temporary injunction jointly and severally by way of status quo do issue restraining the 1<sup>st</sup>, 2<sup>nd</sup>, & 3<sup>rd</sup> Defendants/Respondents whether by themselves or their agents, servants, and/or employees from further dispossessing off, adverse transferring, leasing, taking any further step in occupation, possession, ownership, the running in any adverse or otherwise way alienating, operating or managing of the premises structures/buildings on the suit land ELDORET/MUNICIPALITY 13/514 &515 pending the hearing of Application inter-parties.**

**d) That a temporary injunction jointly and severally by way of status quo do issue restraining the 1<sup>st</sup>, 2<sup>nd</sup>, & 3<sup>rd</sup> Defendants/Respondents whether by themselves or their agents, servants, and/or employees from further dispossessing off, adverse transferring, leasing, taking any further step in occupation, possession, ownership, the running in any adverse or otherwise way alienating, operating or managing of the premises structures/buildings on the suit land ELDORET/MUNICIPALITY 13/514 &515 pending the hearing of application inter-parties.**

**f) That the costs of this application be provided for.**

The application is premised on the grounds that;

- a. That the Plaintiffs/Applicants are still in possession of the parcels of land Nos. ELDORET/MUNICIPALITY/BLOCK**

13/514 & 515 comprising of three residential units.

**b. That the Defendants/Respondents herein in collusion with the valuers undervalued the suit properties contrary to the obligation in Section 97 (2) and the Land Act (forced sale valuation)**

**c. That on 14/10/2020 and or 13/10/2020 or thereabouts the 1<sup>st</sup> Defendant/Respondent sold or purports to have sold the suit properties to the 2<sup>nd</sup> Defendant/Respondent at price below the current market value and lower than the earlier forced sale valuation report on record.**

**d. That the 2<sup>nd</sup> & 3<sup>rd</sup> Defendants/Respondents have issued a twofold notice ultimatum to the Plaintiffs/Applicant's firstly, to vacate with the intention of taking possession and management of the business premises within 14 days; secondly, have transferred the parcels of land/ premises to the 3<sup>rd</sup> Defendant/Respondent's names.**

The application is further supported by an affidavit of Alice Chebor Terer dated 7<sup>th</sup> December, 2020 and a further affidavit dated 29<sup>th</sup> March, 2021.

The Defendants are opposed to the said applications and in doing so the 1<sup>st</sup> Defendant relies on a Replying affidavit sworn on 25<sup>th</sup> November, 2020 by Andrew Muchina, while the 2<sup>nd</sup> defendant relies on a Replying Affidavit sworn on 14<sup>th</sup> December, 2020 by Silas Kiptoo Kibii and the 3<sup>rd</sup> Defendant on a Replying affidavit sworn on 10<sup>th</sup> February, 2021 by Lyn Ashley Toroitich.

The undisputed facts herein, are that the 1<sup>st</sup> Respondent offered to advance a loan of Kenya Shillings Fifteen Million, Five Hundred and Ninety-Six Thousand (Kshs. 15, 596,000.00) to the Applicants vide a letter of offer dated 23<sup>rd</sup> April, 2018. The said loan was secured by the registration of a first legal charge over land parcel Nos. **ELDORET MUNICIPALITY/BLOCK 13/514 and ELDORET MUNICIPALITY/BLOCK 13/515**. The applicants failed and or neglected to service the loan facility and as at 30<sup>th</sup> April, 2019, they had an outstanding balance Kshs. 15,734, 187.86.

That vide a letter dated 14<sup>th</sup> June 2019, the 1<sup>st</sup> Respondent called up the entire loan demanding the immediate repayment of the arrears and the outstanding amount in full. The 1<sup>st</sup> Respondent issued the 90 days statutory notice inviting the Applicants to rectify the default by settling the arrears of Kshs. 1, 371,437.52 and the total outstanding balance of Ksh.16,371,444.35.

Subsequently the 1<sup>st</sup> Respondent issued the Applicants with a forty (40) days statutory demand notice vide a letter dated 8<sup>th</sup> October, 2019. That in line with 1<sup>st</sup> Respondent's instruction, M/s View Line Auctioneers issued the Applicants with a notification of sale and a forty-five (45) days redemption notice both dated 6<sup>th</sup> December, 2019.

That the said notices were then followed by numerous attempts to dispose of the suit properties but in vain. Consequently, the 1<sup>st</sup> Respondent instructed Advert Valuers to undertake a valuation of the property for purposes of yet another attempt to realize the security. The said valuers undertook the valuation and prepared a report dated 9<sup>th</sup> October, 2020. That the report indicated that the property had an open market value of Kshs. 30,000,000.00 and forced sale value of Kshs. 22,500,000.00.

In an effort to realize the security due to the 1<sup>st</sup> Respondent, another auction was advertised and it took place on 13<sup>th</sup> October, 2020. The 2<sup>nd</sup> Respondent participated in the auction and presented a bid of Kshs. 17,000,000.00. His bid was accepted and the purchaser bought the suit properties at a total consideration of Kshs. 17,000,000.00 at the fall of the hammer. He deposited Kshs. 4,250,000.00 with the auctioneers.

The 2<sup>nd</sup> Applicant depones in the Affidavit in support of the Application that, the 1<sup>st</sup> Respondent colluded with the valuers to undervalue the suit properties and purportedly sold by way of public auction the suit properties to the 2<sup>nd</sup> & 3<sup>rd</sup> Respondents at a price below the current market price and lower than the assessed forced sale value. She also avers that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents have since issued a two-fold ultimatum notice for them to vacate with the intention of taking possession and management of residential business and have actually and arbitrarily transferred the suit properties to the 3<sup>rd</sup> Respondent's name.

The Applicants have also faulted the 3<sup>rd</sup> Respondent for not complying with provisions of *Section 90(2)* and *Section 96(2)* on Statutory Notices to be issued before undertaking a sale by public auction. They relied on the case of **David Gitome Kuhiguka Vs. Equity Bank Ltd [2013] eKLR** to buttress their submission.

In response to the Applicants' averments and submissions on the issue of whether the suit properties were undervalued, the 1<sup>st</sup> Respondent submitted that they had made not less than 5 attempts to realize the securities at a point when the Respondents were not paying their loans. They further submitted that the 1<sup>st</sup> Respondent's decision to sell the suit properties herein for a sum of Kshs. 17,000,000.00 was not actuated by ill will which would contravene the obligations placed on them by Section 97 of the Land Act, 2012. The 1<sup>st</sup> Respondent submitted that it had acted in good faith, and in the circumstances, the 1<sup>st</sup> Respondent obtained the best price reasonably possible, noting that numerous attempts had been made towards realization of the suit properties by public auction to no avail. The 1<sup>st</sup> Respondent cited the case of **Omari Nyambati Vs Small Enterprises Finance Co. Ltd & 3 Others [2015] eKLR** to buttress its submission.

The 1<sup>st</sup> Respondent also argued that the valuers and the auctioneers have not been enjoined in the suit to defend themselves against the allegations of collusions and the alleged undervaluation of the suit properties.

On the issue of whether statutory notices were issued before the sale, the 1<sup>st</sup> Respondent submitted that it had observed the right to issue

Notice as contemplated by *Section 90 (1) and (2) of the Land Act* after the applicant's default. The 1<sup>st</sup> Respondent sent out the 1<sup>st</sup> statutory notice dated 14<sup>th</sup> June, 2019 and the 2<sup>nd</sup> statutory notice dated 8<sup>th</sup> October, 2019 was subsequently sent in compliance with *Section 96 (2) of the Land Act, 2012* and finally, the Redemption Notice by the Auctioneer was sent to the Applicants via letter dated 5<sup>th</sup> December, 2019 from View Line Auctioneers.

The 2<sup>nd</sup> & 3<sup>rd</sup> Respondents in opposition to the application submitted that their acquisition of the suit properties is lawful and that they did not infringe on the Applicants' rights. That the 2<sup>nd</sup> Respondent participated in a lawful public auction and thereafter sold his interest in the suit properties to the 3<sup>rd</sup> Respondent for a valuable consideration. The 2<sup>nd</sup> Respondent further submitted that after the said public auction, a memorandum of sale and a certificate were issued in favour of him and consequently the 2<sup>nd</sup> Respondent paid the 25% deposit and had a balance of 75% transferred to the Applicants' loan account thus concluding the statutory power and granting 2<sup>nd</sup> Respondent a legal interest in the suit properties capable of being transferred to other third parties at the 2<sup>nd</sup> Respondent's will.

The 2<sup>nd</sup> & 3<sup>rd</sup> Respondents further submitted that prior to the transfer, the suit properties were valued at Kshs. 8,500,000.00 by the government valuer and stamp duty was paid accordingly and thereafter the suit properties were transferred to the 3<sup>rd</sup> Respondent who is currently the sole registered owner.

The 2<sup>nd</sup> & 3<sup>rd</sup> Respondent's contended that the Applicants' equity of redemption over the suit properties were extinguished upon conclusion of the auction and that the Applicant's remedy if any exists lies in a claim for damages against the 1<sup>st</sup> Respondent as the 3<sup>rd</sup> Respondent is now the lawful owner of the suit properties and is entitled to enjoy them at the exclusion of the Applicants.

### **ISSUES FOR DETERMINATION AND ANALYSIS**

Having carefully considered both applications, the affidavits tendered by both parties in support and in rebuttal of issues herein as well as the submissions on record, the only issue for determination is whether or not the Applicants' have met the threshold for granting interlocutory injunction.

In the celebrated case of *Giella Vs. Cassman Brown and Co. Ltd (1973) EA 358*, the Court set out the Principles for Interlocutory Injunctions. These principles are;

- a. The Plaintiff must establish that he has a prima facie case with high chances of success.**
  - b. That the Plaintiff would suffer irreparable loss that cannot be compensated by an award of damages.**
  - c. If the Court is in doubt, it will decide on a balance of convenience.**
- i. Have the Applicants demonstrated a prima facie case, with probability of success?**

From the record, it is clear that 1<sup>st</sup> Respondent advanced a loan facility in the sum of Kenya Shillings Fifteen Million, Five Hundred and Ninety-Six Thousand (Kshs.15,596,000.00) to the Applicants herein. There is no doubt that the Applicants failed and or neglected to service the loan facility by making monthly instalments of (Kshs. 214, 503.00) as was provided for in the Letter of Offer and as such as of 30<sup>th</sup> April, 2019 the Applicants had an outstanding balance of (15,734,187.86). It was the 1<sup>st</sup> Respondent's case that the Applicants were in arrears of (1,090,588.77) and the outstanding balance stood at (Kshs. 16,090,595). That due to the said default the 1<sup>st</sup> Respondent issued the Applicants with the 1<sup>st</sup> statutory notice on 14<sup>th</sup> June, 2019 and the 2<sup>nd</sup> statutory notice was subsequently issued on 8<sup>th</sup> October, 2019 in accordance with the provisions of the law. It is the 1<sup>st</sup> Respondent's case that the suit properties were sold in an effort to realize its security.

The Applicants herein were aware that they were obliged to make monthly payments towards the repayment of the loan but did not pay as expected. Failure by the Applicants to honour the terms of the agreement prompted the 1<sup>st</sup> Respondent to exercise its statutory power of sale in order to realize its security. I also note that the 1<sup>st</sup> Respondent was careful to issue all the relevant notices upon the Applicants before selling the suit properties.

In the case of *Kyangaro v Kenya Commercial Bank Ltd & Another (2004) 1 KLR 126. At page 145* the learned Judge had this to say:

**“Secondly, the injunction sought is an equitable remedy. He that comes to equity must come with clean hands and must also do equity. The conduct of the plaintiff in this case betrays him. It does not endear him to equitable remedies. He admitted in this Court, quite frankly, that since leaving the employment of the bank over four years ago, he has never paid a cent towards redemption of the loan. He admits that he is in default, and yet he is also in possession. He can't have it both ways. Either he pays the loan, or allows the bank to realize its security. He who comes to equity must fulfill all or substantially all his outstanding obligations before insisting on his rights. The plaintiff has not done that. Consequently, he has not done equity. In the hands of the plaintiff, a permanent injunction would wreak havoc to the first defendant, and that would be inequitable. While chargees are enjoined by law to follow the laid down procedures for the realization of their security, the Courts must not at the same time be converted into a haven of refuge by defaulters. Even lenders and chargees have their own rights.”**

It is trite law that **“he who comes to equity must come with clean hands”**. The law cannot be invoked to aid an indolent and defaulting party. The Applicants herein should have been upright in the performance of their contractual obligations under the charge instrument. In view of the foregoing reasons, this court finds that the Applicants have not established that they have a prima facie case with probability of success at

trial.

**ii. Whether the plaintiff will suffer irreparable injury/loss that cannot be compensated by an award of damages if the application for temporary injunction is not allowed?**

It was the Applicants' contention that if temporary injunctive orders are not granted, they stand to suffer irreparable loss. The Applicants further contends that the consequences which have befallen them as a result of the unprocedural, unfair, unjust and or illegal or unlawful sale of the suit properties by the 1<sup>st</sup> Respondent; and the subsequent transfer to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, are severe and cannot be compensated by monetary terms.

The 1<sup>st</sup> Respondent contends that even if an injunction is not granted, the Applicants will not suffer any substantial loss, that cannot be adequately compensated by an award of damages, the reason being that the 1<sup>st</sup> Respondent is a big and reputable banking institution that would not find it difficult to recompensate the Applicants in the event that need arises. Secondly, that the suit properties were offered as security to be sold in the event of default. It is for that reason the 1<sup>st</sup> Respondent is of the view that the Applicants cannot claim that they will suffer irreparable loss in capable of compensation by an award for damages as the property was a security meant to be sold in case of default to service the loan. The Respondent in support of the above preposition referred this court to the case of **Kitur Vs. Standard Chartered Bank & 2others (2002) 1KLR**.

The 1<sup>st</sup> Respondent has demonstrated through evidence on record that it duly exercised its statutory power of sale in accordance with the provisions of Section 90 (1), (2) and (3) (e) of the Land Act, 2012. The Applicants were well aware that in case of default, statutory power of sale was one of the remedies available to the 1<sup>st</sup> Respondent when they gave out the suit properties as security for the loan advanced to them.

In case of **Andrew Muriuki Wanjohi –vs- Equity Building Society Ltd (2006) eKLR** the Judge stated as follows;

**“Whenever the Applicant offered the suit property as security, he was conscious of the fact that if the borrower did not meet his obligations, the suit property could be sold off. Therefore, in the event that it later became necessary for the suit property to be sold off, by the chargee, the chargor could not be heard to complain that his loss was incapable of being compensated in damages. He had the property evaluated in monetary terms. He had then told the chargee that he knew the property to be capable of providing the chargee with the peace of mind, of knowing that the money given as a loan would become recoverable even if the borrower did not pay it.”**

In the case of **Jopa Villas LLC Vs. Private Investment Corp & 2 Others, Machakos HCCC No.215 of 2008**, the Court held that;

**“I am clear in my mind that the applicant is running away from the obligations lawfully imposed and with its knowledge and participation court should not aid in that quest but will instead uphold the rights of the 1<sup>st</sup> Defendant to recover the monies lawfully advanced.... Our courts must uphold the sanctity of lawful commercial transactions”.**

In view of the foregoing, this court finds that the Applicants have not established that failure to grant the orders sought herein, will make them suffer irreparable loss which cannot be compensated by an award for damages.

**iii) In whose favour does the balance of convenience lie?**

There is no doubt that the balance of convenience in this case tilts in favour of the Respondents. The Applicants have defaulted in repayment of the loan that was advanced to them by the 1<sup>st</sup> Respondent. They have also not demonstrated any effort to repay the loan or any proposals offered to the bank. Having established that, the interests of the chargee are in imminent need of protection at this point and this Court is unable to agree with the Plaintiffs' contention that they are likely to suffer more inconvenience if the injunction is disallowed.

From the foregoing and in line with the principles enunciated in the

*locus classicus* of **Giella -vs- Cassman Brown**; the Applicants have demonstrated existence of a *prima facie* case with a probability of success. Further, the evidence placed before this court shows that the Applicants herein are in default of repaying the loan advanced to them by the 1<sup>st</sup> Respondent and cannot claim that they will suffer irreparable harm if they are evicted from the suit properties.

The upshot is that the two applications herein are in want of merit. They are dismissed with costs to the Respondents.

**S.M GITHINJI**

**JUDGE**

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 14<sup>TH</sup> DAY OF JUNE, 2021**

In the presence of:-

Mr. Omusundi for the Plaintiffs (absent)

Mr. Momanyi for the first defendant

Mr. Lagat for the 2<sup>nd</sup> and 3<sup>rd</sup> defendant

Ms Gladys - Court assistant