REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCC NO. 244 OF 2019

SAMO SECURITY LIMITED.....1ST PLAINTIFF

OMUREMBE IYADI.....2ND PLAINTIFF

VERSUS

SBM BANK KENYA LIMITED.....DEFENDANT

(FORMERLY CHASE BANK KENYA LIMITED)

RULING

1. Through the application dated 31st December 2019, the Plaintiffs/Applicants seek orders that: -

    1. Spent.

    2. Spent.

    3. That the defendant/Respondent whether by himself or his servants or agents or otherwise, however, be restrained from selling or advertising for sale or in any way disposing of property known LR No. 1008/59 Town House, Number 8 Miotoni Terraces, Karen Estate, Nairobi until the suit herein is heard and determined.

    4. That the defendants does furnish all the relevant documents to enable the plaintiffs to carry out forensic audit of the accounts because of the conflicting figures issued by the defendant after which the plaintiffs will file further documents.

    5. That cost of this application be provided for.

2. The application is supported by the affidavit of the 2nd applicant and is premised on the grounds that: -

    1. That no valid statutory notice has been served regarding the amount owed to the defendant.

    2. That the defendant is in the process of selling the property as per the notice they have issued for the 22nd of January, 2020.

    3. That there is conflicting figures as to what is owed, no valid statutory notice has been served regarding the amount owed to the defendant.

    4. The defendant received Kshs 3 million as part payment from proceeds of sale by private treaty but failed to issue fresh notice after they decided to cancel the agreement.

    5. That the defendant has charged illegal interest and penalties.

    6. That the auctioneer has not valued the property as required by law. They have instead plagiarized a valuation report by other parties.

7. That only a schedule of the property has been attached – with no Valuation Report as required by law.

8. That the figures relied on are also not accurate. The bank has given different figures.

9. The defendant had refused to release title documents to facilitate a sale by private Treaty as had been mutually agreed- which lends credence to plaintiffs' view that they have an ulterior motive.

10. That to allow auction to proceed will encourage injustice which cannot be remedied by way of damages.

11. There is case, NRB Petition 801 of 2014 pending in the High Court concerning the validity of title and judgment is scheduled for 20th of March 2010.

3. The Respondent/Defendant opposed the application through the affidavit of its Legal Officer **Mr. Kevin Kimani** who states as follows: -

1. That the plaintiff was granted a credit facility in the sum of Kenya Shillings = Thirty-Three Million (Kshs 33,000,000/=) as noted in the offer letter dated 19th May, 2015.

2. That the aforementioned credit facility was secured by a charge over property LR No. 1008/59 Town House No. 8, Miotoni Terraces, Karen and personal guarantee and indemnity from the Directors.

3. That the plaintiff defaulted on his loan obligations in express contravention of the agreed terms and conditions signed between the parties.

4. That the plaintiff subsequently defaulted on his payments for the credit facility leading to a recall of the total outstanding balance in the sum of Kenya Shillings Thirty- Four Million Five Hundred and Eighty- Seven Hundred and Nineteen and Twenty-four cents (kshs 34,587,719.24/-) as at 6th March 2017.

5. That despite the said demand, the plaintiff failed to liquidate the amount it owed the bank leading to the defendant issuing the statutory Ninety (90) day notice in accordance with Section 90(2) of the land act over the secured property in order to realize its security. This was communicated in writing through letter dated 20th July, 2017.

6. That I hasten to add that the above notice complied with all ingredients required including stating the nature and extent of default, the amount required to be paid within the stated three months for purposes of making good the default, and that in the event the same is not complied with, the chargor would thereafter sue for money due and owing under the credit facility.

7. That subsequent to the above ninety-day notice and in accordance with Section 96(2) of the Land Act, the defendant communicated to the plaintiff that after the expiry of Forty (40) days, the charged property shall be sold by way of public auction and/or private treaty to recover its security noting that the default amount now stood in the sum of Kenya Shillings Thirty-Eight Million Five Hundred and Seventy-Six Seven Hundred and Three and Fifty-Four Cents (Kshs 38,576,703.54/-).

8. That the defendant instructed Regent Valuers International (K) Limited via a letter of instructions dated Monday 16th September 2019 for a valuation report on the charged property which valuation was conducted on Friday 20th September 2019 and report on the same dated 15th October 2019 submitted to the defendant.

9. That Leakey Auctioneers, under the instructions of the defendant issued the plaintiff with a 45-day Redemption Notice dated 28th October 2019 indicated that the sum owed stood in the sum of Kenya Shillings Forty-Two Million Five Hundred Ninety-Four Eighty Hundred Twenty-Four and Twenty-Four Cents (42,594,824.24/- as at 24th October, 2019.

10. That whereas the plaintiff has requested the defendant to allow them to sell the property by way of private treaty, the purchaser repudiated the agreement after undertakings between the purchaser's Advocate and the defendant and after only paying the sum of Kenya Shillings Three Million which amount was accounted for in the Statement of Account.

11. That having failed to redeem the property and the credit facility still in arears, Leakey's Auctioneers under the instructions of the defendant issued a Notification of Sale of Immovable Property which sale is scheduled for 22nd January, 2020.

12. That the current outstanding amount as at 8th January, 2020 stood in the sum of Kenya Shillings Thirty- Eight Million Seven Hundred Eighty – Six Thousand Six Hundred Seventy – Nine Thousand and Sixty-Nine Cents (Kshs 38,786,679.69/-).

13. That drawing from the above and in response to the grounds alluded to in the subject Notice of Motion, it is a gross misrepresentation to this court that neither valuation was done, nor statutory notices issued.

14. That further, NRB Petition 801 of 2014 (sic) cited by the plaintiffs in the application on the alleged dispute concerning the validity of the title has no bearing on the instant matter. The defendant is not a party to the said proceedings, if any, the certificate of Lease of the charged property is in the name of the 2nd plaintiff.

4. Parties canvased the application by way of written submissions which I have considered. The question raised is whether the applicant has satisfied the criteria for grant of interlocutory injunction.

5. It is a trite law that there are conditions to be met before an interlocutory injunction can be granted. In ***Giella v Cassman Brown Co. Ltd*** **[1973] E.A. 358 the court held 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 harm which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on a balance of convenience."**

6. The test for granting of an interlocutory injunction was considered in the ***American Cyanamid Co. v Ethicom Limited*** **(1975) A AER 504** *where three 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.**

7. The important consideration before granting a temporary injunction under **order 40 Rule 1 of the Civil Procedure Rules** is the proof that any property in dispute in a suit is in a danger of being wasted, damaged or alienated by any party to the suit or wrongfully sold in execution of a decree or that the defendant threatens or intends to remove or dispose the property, the court is in such a situation enjoined to grant a temporary injunction to restrain such acts. In the instant case, there is no doubt that the suit property is in danger of being alienated as the defendant does not deny that it has set in motion the process of realizing the security offered by the plaintiff for the debt. The defendant however contends that it has a legal right to exercise a statutory power of sale, while the Applicants challenge the right on the basis that they were not served with the statutory notices among other grounds.

Prima Facie Case

8. In **Mrao** *Ltd v* ***First American Bank of Kenya and 2 others***, **(2003) KLR 125** *which was cited with approval in* ***Moses C. Muhia Njoroge & 2 others v*** **Jane W Lesaloi and 5 others, (2014) eKLR**, *the Court of Appeal defined a prima facie case as: -*

> **"A Prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later".**

9. In the present case, it was not disputed that the defendant advanced a loan facility in the sum of Kshs 33 million to the plaintiffs which loan was secured by a charge over the suit property in addition to Personal Guarantee and Indemnity from each of the Directors of Samo Security Limited. It was also not disputed that the plaintiffs defaulted in the loan repayments thus precipitating the defendant's decision to exercise its statutory power of sale.

10. The applicants argued that the respondent was not entitled to exercise its statutory power of sale as it had not issued them with the requisite statutory notices as provided for under Section 90(2) of the Land Act (hereinafter "the Act"). The respondent, on the other hand, submitted that it served the applicants with all the requisite notices. I have perused the respondent's annexures marked **KK4, KK5** and **KK7** which are copies of letters sent to the applicant by the respondents in respect to 90-day notice as per Section 90(2) of the Land Act, 40 days' notice in line with Section 96(2) of the Act and 45 days Redemption Notice by the Auctioneers respectively.

11. In view of the above position, I am satisfied that the applicants were duly served with the requisite statutory notices. In any event, courts have taken the position that lack of or improper service with the with statutory notices cannot stand in the way of a chargee in exercising its right to sell the charged property as in such a scenario, all that the court can do is order for fresh service of the statutory notices. I am guided by the decision in ***National Bank of Kenya Limited v Shimmers Plaza Ltd*** **[2009] eKLR** wherein the court 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 mortgage 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."**

12. In sum, I am not satisfied that the applicant has established a prima facie case so as to warrant the granting of the orders of injunction. Needless to say, it is trite law that he who comes to equity must come with clean hands and in this case, the applicants cannot be said to have clean hands owing to the existing outstanding debt. I am guided by the decision in ***Showind Industries v Guardian Bank Limited & Another*** (2002) 1 EA 284 where the court held as follows: -

> **"…….an injunction is granted very sparingly and only in exceptional circumstances such as where the Applicant's case is very strong and straight forward. Moreover, as the remedy is an equitable one, it may be denied where the Applicant's conduct does not meet the approval of Court of equity or his equity has been defeated by laches"**

13. Having found that the applicants have not established a prima facie case, I find that it will not be necessary to consider if the two remaining conditions for the granting of orders of injunction have been met as it is a requirement that all the three conditions be fulfilled before an order of injunction is granted. I am guided by the decision in ***Nguruman Limited V. Jan Bonde Nielsen & 2 Others,*** CA NO. 77 OF 2012, where the Court expressed itself on the importance of satisfying all the three requirements for an order of injunction as follows: -

> **"In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;**
>
> **(a) establish his case only at a prima facie level,**
>
> **(b) demonstrate irreparable injury if a temporary injunction is not granted, and**
>
> **(c) ally any doubts as to (b) by showing that the balance of convenience is in his favour.**
>
> **These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between." (Emphasis added).**

14. My above findings would have been sufficient to determine this application but I am still minded to consider applicants' argument that they will be greatly prejudiced by the auction of the suit property and stands to suffer irreparably as the said property is their matrimonial home. The position taken by the courts regarding mortgage over family/matrimonial property is that such property is not precluded from sale in the event of a default in loan repayments. I am happy to refer to HCCC Number 82 of 2006 ***Maltex Commercial Supplies Limited & Another v Euro Bank Limited (In Liquidation)*** where the court observed that: -

> **"… Any property whether it is a matrimonial or spiritual house, which is offered as security for loan/overdraft is made on the understanding that the same stands the risk of being sold by the lender if default is made on the payment of the debt secured".**

15. Similarly, in ***Maithya v Housing Finance Co. of Kenya & Another*** [2003] 1 EA 133 at 139 the court stated as follows: -

> **"Charged properties are intended to acquire or are supposed to have a commercial value otherwise lenders would not accept them as securities. The sentiment of ownership which has been greatly treasured in this country over the years has in many situations given way to commercial considerations. Before lending, many lenders banks and mortgage houses are increasingly insisting on valuations being done so as to establish forced sale values and market values of the properties to constitute the securities for the borrowings or credit facilities…loss of the properties by sale is clearly contemplated by the parties even before the security is formalized."**

Valuation

16. The applicants faulted the respondent for an alleged failure to carry out a fresh valuation of the suit property. This means that the applicants were of the view that the earlier valuation of the suit property had been overtaken by events. Courts have however held that undervaluation *per se* cannot form a ground for the granting of orders of injunction since breach by the chargee in selling the property at an undervalue can be remedied through a claim for damages. (See ***Jashvantsing L. Solanki v Diamond Trust Bank Ltd.*** [2014] eKLR).

17. My finding is that even assuming that the defendant had not done a valuation of the suit property, this failure alone is cannot form a ground for issuance of orders to stop the sale as the defendant can be afforded an opportunity to comply with the provisions of the law on the valuation of the subject property. Moreover, the applicants have not demonstrated that the respondent stopped them from conducting a valuation on the suit the suit property.

Forensic audit.

18. The applicants also argued that the respondent was not very clear about the amount of debt owed to it which amount kept on changing thus necessitating a forensic audit to establish the actual debt due. This court notes that the prayer for a forensic audit was allowed in the application dated 23rd June 2020. I find that the applicants have not indicated what steps they have taken to conclude or carry out the said audit or if they have appointed an auditor in the first place.

19. Be that as it may, disagreements over the loan balance due is also an issue that cannot stop the exercise of statutory power of sale. This is the position that was adopted in ***Mrao Limited v First American Bank of Kenya Ltd & others*** **(supra)** where the court addressed itself thus: -

> **"The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has begun a redemption action, or because the mortgagor objects to the manner in which the sale is being**

arranged. He will be restrained, however, if the mortgagor pays the amount claimed into court, that is, the amount which the mortgagee claims to be due to him, unless, on the terms of the mortgage, the claim is excessive."

20. Having regard to the findings that I have made in this ruling, I am not satisfied that the application dated 31st December 2019 is merited and I therefore dismiss it with costs to the respondent.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT NAIROBI THIS 3RD DAY OF JUNE 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 17TH APRIL 2020

W. A. OKWANY

JUDGE

In the presence of:

Mr. Awino for Plaintiffs/Applicants.

Mr. Nyachio for Muchemi for Defendant/Respondent.

Court Assistant: Sylvia.