



REPUBLIC OF KENYA

IN THE HIGH COURT

AT BUNGOMA

CIVIL SUIT NO. 4 OF 2020

TWO CALVES INVESTMENTS LIMITED.....1ST PLAINTIFF/APPLICANT

DANIEL SHISIA ABUAO.....2ND PLAINTIFF/APPLICANT

VERSUS

KENYA COMMERCIAL BANK LIMITED.....DEFENDANT/RESPONDENT

RULING

1. Contemporaneous with the plaint, the plaintiffs/applicants preferred the instant application dated 15th July, 2020, seeking the following orders;

a) (spent).

b) Pending the hearing and determination of this application inter-parties, the honourable court be pleased to issue temporary injunction restraining the defendant, its agents and or servants from instructing auctioneers to commence the process of realizing or to put up for auction all those parcels of land comprised in title numbers East Bukusu/N. Kanduyi/6384, 6385, 6867, 6930 and 6931 or any of them.

c) Pending the hearing and determination of this suit, the honourable court be pleased to issue temporary injunction restraining the defendant, its agents and or servants from instructing auctioneers to commence the process of realizing or to put up for auction all those parcels of land comprised in title numbers East Bukusu/N. Kanduyi/6384, 6385, 6867, 6930 and 6931 or any of them

d) Costs of the application be provided for.

2. The application is supported by the affidavit of Daniel Shisia Abua who is the 1st plaintiff's director. He depones inter alia; that at the applicants' request, the respondent extended to the applicants a facility of Kshs 35,000,000/= secured by a legal charge over the 2nd applicants parcels of land comprised in title numbers East Bukusu/N. Kanduyi/6384, 6385, 6867, 6930 and 6931 to finance Local Purchasing Orders (LPO) issued by the County Government of Kakamega; that it was an implied term of the facility that that repayment of the facility was to be from the LPO proceeds since they anticipated that the County Government would pay before 30th April, 2019; that upon delay of payment by the aforesaid county government, the applicants informed the respondent and sought its indulgence and the respondent represented the indulgence to the applicants; that in the second week of March, 2020, the 2nd applicant was called to the respondent's regional office where he was handed a 40-days Statutory Notice despite having paid a sum of Kshs 15 Million from alternative sources; that the notice was neither served on all the parties nor preceded by a 90-days' notice as by law prescribed; that the County Government has certified the sum of Kshs 55, 702, 946.73/= which they anticipate to be paid within five months from 10/6/2020; that the respondent is duly informed of this and in any case, the sum is way above the respondent's debt which is 25, 682, 925.17/=; that the respondent has instructed auctioneers who called him and inform him that the auctioneer will be advertising the properties for sale; that the respondent's actions are inequitable, ill- timed and ill-informed and will put them into unnecessary expenses in form of auctioneers' fees.

3. The respondent opposed the application through a replying affidavit sworn on 8/9/2020 by Edward Siya who is the respondent's recovery manager and who deponed inter alia; that the 1st applicant was advanced the aforesaid facility to be paid in full by 30/4/2019 by way of bullet payment or on receipt of the LPO proceeds and that other sources would be explored to clear the facility in case of delayed payments; that the applicants defaulted in payment of the installments due whereupon the respondent issued a 90-days' notice on 23/8/2019; that on 21/11/2019, the respondent wrote to the Chief Officer, Ministry Of Roads, Infrastructure and Public Works Kakamega County on behalf of the applicants to ensure the loan is offset and informing, *inter alia*, that the facility was in arrears and failure to settle the amount within seven days from then, the respondent would proceed to auction the properties, which letter went unanswered; that by letter dated 22nd

November, 2019, the 2nd applicant undertook to clear the arrears by 20/12/2019 but which has not been done; that the 24th February, 2020, the respondent issued a notice of intention to sell the properties; that the default persists and the respondent therefore acquires a title over the charged properties and that the applicants have not disclosed material facts pertinent to the application. The respondent thus contends that the applicants have not met the threshold for the grant of the orders sought.

4. The application was disposed of by way of written submissions. However, it is only submissions by the respondent that are on record. The respondent submitted on the following issues;

- i) Whether the applicants have complied with the repayment obligations for the facility in accordance with the letter of offer.
- ii) Whether the respondents issued the requisite notices to the applicants to enable it exercise the statutory power of sale over the charged properties.
- iii) Whether the applicants are aware of the extent of their indebtedness to the respondent.
- iv) Whether the applicants have attained the requisite threshold for the grant of the orders sought.
- v) Whether the applicants have approached the court with clean hands.

5. On the first issue, it is submitted that the terms of the letter of offer were very unambiguous that the entire amount was to paid by 30/4/2019. That the letter further stipulated that other sources of income would be used to clear the debts in case of delayed payments and that the parties are bound by the terms of the contract. Reliance has been placed in the cases of *National Bank Of Kenya Ltd Vs Pipe plastics Samkolit (K) Ltd & another (2001)eKLR*, *Twiga Chemicals Industries Limited Vs Allan Stephen Reynolds (2014)eKLR*, *Aineah Liluyani Njirah Vs Agha Khan Health Services Ltd (2013) eKLR* and *Jopa Villas LLC Vs Private Investment Corp. & 2 others (2009)eKLR*. That since the County Government was not a party to the agreement, no representations could be made for the repayment of the facility from the county.

6. On the second issue, counsel submits that the 90 days' statutory notice and the statutory notice to sell were served by way of registered post through the postal address provided by the applicants but the applicants persisted in the default. Counsel relies in the authorities in *Lameck Mbaka Motegi V Bank of Baroda(Kenya) Ltd & another (2017) eKLR*, *Mesgo Limited & another vs National Bank of Kenya Limited (2020) eKLR*.

7. On the third issue, it is submitted that the respondent regularly furnished the applicant with the loan statement relating to the facility. That the demand and statutory notices indicated the level of indebtedness and in any case, a dispute on the accounts is not a ground for grant of an injunction. Counsel cites the case of *Air Travel & Related Studies Ltd Vs Equity Bank(Kenya) Ltd (2017) eKLR* in support of this proposition. That as such, the applicants were well aware of their indebtedness to the respondent.

8. On the fourth issue, citing the case of *Giella Vs Cassman Brown (1973) E.A 358* and *Mesgo Limited & another Vs National Bank of Kenya Ltd (supra)*, it is submitted that the applicants have not met the threshold for the grant of the injunction.

On the requirement to establish prima facie case, counsel cites the case of *Mrao Vs First Community Bank of Kenya & 2 others (2003) eKLR* in support of the proposition that no evidence has been adduced to demonstrate that the applicants will be prejudiced if the respondent exercises its statutory power of sale.

On the requirement that one has to establish irreparable damage, counsel submits that the applicants have failed to demonstrate the loss to be suffered if the orders are not granted. The case of *James Kipruto Lagat and another vs Family Bank Limited and another (2016) eKLR* and *Lameck Mbaka Motegi Vs Bank of Baroda (Kenya) Ltd & another (supra)*

On the balance of convenience, the respondent submits that the balance of convenience lies towards rejecting the application since the debt owed is likely to outstrip the value of the charged properties.

9. On the fifth issue counsel contends that the applicants are guilty of material non-disclosure and deliberately and mischievously misled the court and on that ground the application should be dismissed with costs.

Analysis and Determination

10. After carefully perusing the application, the reply thereto, the annexures and the respondent's submissions, I am of the view that the sole issue commending itself for determination is whether the applicants have made out a case entitling them the grant of the orders sought.

The grant of a temporary injunction is anchored on the provisions of Order 40 Rule 1 of the Civil Procedure rules which provides;

1. 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; or

(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.

The principles guiding the courts when dealing with such an application were aptly stated in the celebrated case of **Giella Vs Cassman Brown & Co. Ltd (1973) E.A 358** where the court gave the three broad principles that an applicant must establish before the orders can issue. The three conditions are;

- 1. an applicant must show a prima facie case with a probability of success;*
- 2. an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, and;*
- 3. when the court is in doubt, it will decide the application on the balance of convenience;*

The fourth principle emerging from our jurisprudence is as was espoused by Nyakundi J. in **Royal Mabati Factory Limited V Imarisha Mabati Limited [2018] eKLR** where the learned judge held;

It is also a principle of law that in exercising discretion for grant of interlocutory injunction the court should take the approach that appears to carry what I can call a lower risk of injustice to either of the parties in the suit. I am therefore guided by the above principles in determining whether or not the applicant's Notice of Motion on interlocutory injunction should be granted pending the hearing and determination of the main suit.

Similarly, in **Marple Brooks Projects Company Limited & another Vs I & M Bank Limited (2019) eKLR**, it was held;

"The next issue to address is whether the injury visited upon the Applicant should the conservatory orders not be granted could be compensated by way of damages. The principle generally is that where damages would suffice and the Respondent would be in a position to pay them, the court ought not to grant conservatory orders at an interlocutory stage. However, the position taken by Ringera J.A in the case of Kanorero River Farm Ltd and 3 Others v National Bank of Kenya Ltd (2002) 2 KLR 207 was that "No party should be allowed to ride roughshod on the statutory rights of another simply because it could pay damages."

11. With these principles in mind, I proceed to examine each of these elements in determining whether the applicants are indeed entitled to the orders sought. It is not in dispute that the applicants were advanced a facility of Kshs 35,000,000/= by the respondent to finance an LPO and that the money was to be received through the respondents once the LPO is settled. That if the payment delayed, the applicants were duty bound to explore alternative sources to settle the amount. In any case, the facility was to be cleared by 30/4/2019. This never happened and as at the date of filing the suit, the applicants had not settled the debt.

The applicants freely concede that they are indebted to the respondent only that the respondent has not complied with the law governing the chargee's statutory power of sale. The applicants maintain that the respondent was aware from the onset that the debt would be settled once the LPO is paid and therefore since the same has not been settled, the respondent ought to await payment from the County Government of Kakamega.

Prima facie case with a probability of success

12. One of the applicants' contention is that the respondent has not issued the requisite notices to entitle it to exercise its statutory power of sale. The respondent vehemently denies this fact. In fact, the respondent has annexed the 90-day notice together with the certificate of postage. This fact has not been rebutted by the applicant.

The other contention raised is that the respondent had represented to the applicant that it would wait for the LPO's to be paid. Having carefully considered the application to ascertain this, I do not find any express or implied representation by the respondent.

What then do the applicants need to establish at this stage as a prima facie case? In **Mrao Vs First community bank of Kenya & 2 others (2003) eKLR**, it was held;

"A prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right and the probability of success of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case."

In **Royal Mabati Factory Limited V Imarisha Mabati Limited [2018] eKLR** it was held:

"My role at this stage is to ensure that I do not embark on a journey resulting that of in depth analysis meant to be of a trial of the suit. This is indeed so given the fact that at this stage I have been presented with a rival affidavit evidence. I consider resolution of any disputes in the affidavit evidence and any difficult queries of the law to be a preserve of the main action."

Having considered the application together with the responses thereto and the respondent's submissions, I find that the applicants have not put forth sufficient evidence to establish that they have a prima facie case with chances of success at the trial.

Irreparable injury

13. On this limb, the applicants depone that they stand to lose the properties where they are currently putting up a hotel worth a sum much higher than the debt and in any case, the LPO can offset the entire debt once the County Government of Kakamega pays it.

On the other hand, the respondent contends that the applicants have not demonstrated any harm they stand to suffer.

The court at this stage is required to balance the two conflicting rights with a view of doing justice to both as a court of equity and fairness. The court is alive to the obligations by the applicants to settle their debts lest the respondent is driven to liquidation. The respondent is equally entitled to exercise its statutory power of sale pursuant to the agreement entered into upon default by the borrower. However, in appropriate cases, the court will issue an injunction to prevent arbitrariness of either party to the transaction.

The court is in agreement with the authority in *James Kipruto Lagat & another Vs Family Bank Limited & another (2016)eKLR* for the position that the burden of proof to show the irreparable loss is on the applicant and not the defendant. The valuation report annexed to the respondent's replying affidavit puts the market value of the charged properties at Kshs 310,000, 000/= which is way above the amount demanded by the respondent.

As such, i find that the applicants have established that they stand to suffer irreparable loss if an order is not issued in form of a temporary injunction.

Having found as such, I need not delve into the other limbs, that is, the balance of probability and the principle established in *Royal Mabati Factory Limited V Imarisha Mabati Limited [2018] eKLR*.

14. In the result, it is my finding that the plaintiffs' application dated 15/7/2020 has merit. The same is allowed in the following terms:

- a) A temporary injunction is hereby issued restraining the defendant/respondent its agents and or servants from instructing auctioneers to commence the process of realizing or to put up for auction all those parcels of land comprised in title numbers East Bukusu/N. Kanduyi/6384, 6385, 6867, 6930 and 6931 or any of them pending the hearing and determination of the main suit.
- b) The applicants are ordered to set down the suit for hearing and final determination within **90 days** from the date of this ruling failing which the orders shall lapse and that the respondent shall be at liberty to proceed with its right to realize the securities.
- c) Costs of the application shall abide the outcome of the main suit.

DATED AT BUNGOMA THIS 14TH DAY OF DECEMBER, 2021

D.Kemei

Judge

In the presence of:

Nanzushi for Ratemo for Plaintiffs/Applicants

J. B. Macharia for Defendant/Respondent

Wilkister Court Assistant