



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL CASE NO. 58 OF 2019**

**FRANCIS KIARIE KINYANJUL.....PLAINTIFF**

**-VERSUS-**

**HFC LIMITED.....DEFENDANT**

**RULING**

1. This is a ruling on the application by the plaintiff dated 19.7.2019 seeking, in the main, orders that the *Court be pleased to restrain the Defendant by itself, their agents or their employees or servants from advertising ,interfering, possessing, selling, alienating, offering for sale ,leasing ,disposing off or transferring the plaintiffs property known as MOMBASA/BLOCK/XXVII/1422(hereinafter “the subject property) pending the hearing and determination of the suit and further that the costs of this Application be provided for.*

2. The Application is premised on the grounds contained in the supporting affidavit of the Plaintiff sworn on the 19.7.2019 and the supplementary Affidavit sworn on the 8.8.2019. Other grounds are on the face of the Application.

3. The deponent avers that he is the registered owner of the subject property and that sometime in 2013, he approached the Defendant for a loan of Kshs. 11,000,000/= intended for a take-over of a loan from Barclays Bank Kenya limited by the defendant. It is then added he two parties then executed a charge over the subject property in the sum of Kshs. 20,000,000/= but the additional sum 9,000,000/= was never advanced to him.

4. The Plaintiff further avers that after exercising due diligence, the defendant established that the interest in the lease to the subject property was due for expiry in a few years and it was agreed and made a condition of the lending contract that the Defendant’s advocates, Ms. Muriu Mungai & Co. Advocates, would concurrently apply for the extension of the lease to the subject property while perfecting the security and the said extension was made a condition precedent to the loan and the charge securing it. The plaintiff the accuses the defendant to have deceitfully purported to have had the lease extended as agreed through its agent, Njihia, Muoka, Rashid & Co. Ltd, in a valuation report dated 13.10.2016 and an official search dated 3.10.2016. The plaintiff contended that no extension had in fact been done and therefore that the facts were misrepresented and the misrepresentation thus led him to proceed with the contract on the basis of such a vitiating factor.

5. The Plaintiff also avers that he delayed in the repayment of the Defendant’s loan and a re-payment plan was worked out between them and there was an understanding that they would shop for a buyer for the subject property in order to offset the accrued arrears. Potential buyers were indeed identified but they pulled out of the transaction as soon as they discovered that the lease to the subject property had not been extended and as a result, the subject property’s price was suppressed on account of the short unexpired tenure.

6. The agreed sale by private treaty having fallen through, the subject property was advertised for sale by public auction on the 22.7.2019. That intended sale was faulted by the plaintiff on the basis that the valuation report being relied on by the Defendants was more than twelve months old contrary to the auctioneer rules; no statutory notices had been issued to the County Government of Mombasa as the law dictates; the Notification of Sale dated 21.6.2019 was not properly served and the said Notification of sale did not set the reserve price as its states that the property shall be sold at the maximum amount it shall fetch.

7. The Plaintiff avers that the failure to notify the county Government of Mombasa, as the lessor of the subject property contravened Rule 11 of the auctioneer Rules 1997 and condition B of the certificate of lease providing that there cannot not be any disposition without the lessor’s consent first sought and obtained.

8. The Plaintiff also avers that the valuation report by Centenary Valuers is highly suspicious as the valuers never visited the subject property and that the plaintiff was never furnished with the report. Rule 15 of the Auctioneer rules of 1997 was relied upon as commanding that upon the auctioneer receiving instructions, he ought to issue a Notification of Sale and Redemption Notice as previous notices cannot be relied for being limited to the previous instructions.

9. The Plaintiff insisted that he did not waive special condition no. 14 of the letter of offer which he accepted on the 1.7.2013 as it was a condition precedent. He thought the same had been implemented by the representation in the official search by the Defendant's agents which he relied on and that he has never received the letter dated 21.8.2013 sent via his e-mail. The omissions by the Defendant and failure to adhere to the law was said to have clogged his equity of redemption.

10. The Defendant/Respondent opposed the Application on the strength of its Replying Affidavit sworn on the 29.7.2019 by **Mr. Amos Wachira Mwangi** its Branch Manager. He avers that the plaintiffs grounds supporting his Application are unfounded allegations used by a heavily defaulting Plaintiff to delay the Defendant's exercise its statutory power of sale.

11. He further averred that there is no way the failure to serve the County Government of Mombasa clogs the Plaintiff's equity right of redemption as he has been given adequate notice to exercise that equity and the County government of Mombasa will not pay the loan he owes.

12. It was also averred that the valuation report dated 13.10.2016 was purely for mortgage purposes and in fact the Defendant instructed Centenary Valuers Limited to carry out a valuation for the purposes of sale and a valuation dated 6.6.2019 was returned.

13. It is further averred that the notification of sale dated 21.6.2019 was personally served upon the Plaintiff and he signed it and he has annexed it herein. As a matter of fact, it was asserted, the said service was as a matter of courtesy extended to the plaintiff as the plaintiff had already been served with a Redemption Notice and a Notification of Sale both dated 27.9.2018 for an auction scheduled for the 3.12.2019. However, the sale did not obtain any bid marching the reserve price.

14. It is averred that the Defendant waived the condition for extension of the lease since the loan term was 10 years yet the remainder of the lease was 27 years and the legal and incidental costs of the extension of the lease were not economically viable to the Defendant and that information was conveyed to the Defendant vide letter dated 21.8.2013 sent to the Plaintiff's e-mail, the same was never contested and the alleged cost for extension of lease where invoiced as costs of creation of a charge only.

15. It is averred that the Plaintiff cannot be allowed believe parts of the valuation report and ignore other parts of the same valuation report and that the Defendant is just a consumer of the valuation report as the Plaintiff is and the fact that Njihia Muoka & Rashid Company Limited gave a search showing the lease had been extended does not mean the Defendant gave such representation.

16. It is also averred that the Plaintiff still has the freedom to pursue the extension as he has had six years but still he has done nothing to extend the lease to the subject property and since he has the intentions of selling the subject property, he will not be prejudiced if the Defendant sales the same on his behalf and the Plaintiff will not suffer any prejudice if the property is sold at a lower price as he himself has failed to extend the lease and he has a statutorily prescribed remedy in damages.

17. It is deponed that the Plaintiff is in arrears of Kshs. 3,594,408.97 and an outstanding loan of Kshs. 9,587,003.53 as at 24.7.2019 and it is unfair to block the Defendant from exercising its statutory power of sale.

### **Determination**

18. I have considered the affidavits filed, the annexures thereto and submissions by both parties' advocates on record, the relevant applicable law and precedents relied upon.

19. The first issue for determination is whether on the evidence and material placed before court, the plaintiff has satisfied the conditions upon which a temporary injunction can be granted.

20. The principles guiding the grant of interlocutory application are now well settled. Those principles were set out in **East African Industries vs. Trufoods [1972] EA 420** and **Giella vs. Cassman Brown & Co. Ltd [1973] EA 358**. In **Nguruman Limited vs. Jan Bonde Nielsen & 2 Others [2014] eKLR** where the Court restated the law 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.**

21. In **Mrao Ltd v. First American Bank of Kenya Ltd & 2 Others [2003] eKLR**, Bosire, JA defined a prima facie case as follows:

**“So what is a *prima facie* case” I would say that in civil cases it is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”**

22. Does the Plaintiff/Applicant have a 'genuine and arguable case' and therefore a prima facie case? Before I can go any further to set out my deductions herein, I must point out to the parties that my findings herein are not conclusive and must await the full trial of this suit. This position is supported by the decision in **Airland Tours & Travels Ltd versus National Industrial Credit Bank Milimani High Court Civil Case No. 1234 of 2002** where the court held as follows:

**“In an interlocutory application, the court is not required to make any conclusive or definitive findings of fact or law, most certainly not on the basis of contradictory affidavit evidence or disputed provisions of the law.”**

23. With that background laid down, I turn to assessing whether or not the Plaintiff/Applicant has met the three conditions for the grant of a temporary injunction. Firstly, I must assess whether the Plaintiff has established a prima facie case with a probability of success at the main trial.

24. In this case from the plaint, the cause of action is hinged on the fact that he was not served with a Notification of Sale; the Valuation Report relied on by the Defendant was more than 12 months old; there was misrepresentation on the part of the Defendant on the extension of the subject property lease and a Statutory Notice was not issued to the head lessor.

25. On the issue of service of the notification of sale, it is uncontroverted that the plaintiff had already been served with a Redemption Notice and a Notification of sale both dated 27.9.2018 for an auction scheduled for the 3.12.2019. However, the sale did not obtain any bid marching the reserve price. In **Kyangavo vs. Kenya Commercial Bank Ltd & Another [2004] 1 KLR 126** it was held that it was not necessary to give another notification for 45 days after the lapse of the previous one since notification need not be given every time as opposed to advertisements which need to be given afresh every time fresh instructions are received by the auctioneer, and the sale should be at least 14 days after the first newspaper advertisement.

26. I am in consonance with the Defendant submission that it was not mandatory for a fresh notification of sale to be issued by the Defendant and it is neither here nor there whether the same was served or not. I do find that that alone cannot be enough to establish a prima facie case

27. On the issue of the Valuation Report, Section 97 (1) (2) and (3) of the Land Act, No. 6 of 2012 mandate that chargee who exercises a power to sell the charged land, including the excise of the power to sell in pursuance of an order of a court, owes a duty of care to the chargor, any guarantor of the whole or any part of the sums advanced to the chargor, any chargee under a subsequent charge or under a lien to obtain the best price reasonably obtainable at the time of sale and must, before exercising the right of sale, ensure that a forced sale valuation is undertaken by a valuer. In my opinion, the obligation upon the chargee is not optional but mandatory and where no valuation is undertaken, a sale thereafter ensuing would be contra statute and would thus be amenable to setting aside as of right. On the same vein if the complaint be raised and proved beforehand, I would not hesitate to find for the chargor.

28. In this matter, I note that there is on record a valuation dated 6.6.2019. It was thus the duty of the Plaintiff to prove that the said valuation would be below 25% of the given market value. This has not been rebutted by the Plaintiff. Consequently, no prima facie case has been raised on the issue of valuation.

29. On the issue misrepresentation by the Defendant agent clogging the Plaintiff's equity of redemption, I note that clause 14 of the special condition of the letter of offer stipulates as follows:

**“This offer is subject to the extension of lease term for a period not less than 45 years.”**

30. No evidence has been furnished to this Court to demonstrate that clause 14 of the special conditions of the letter of offer had been waived. I have had an opportunity to consider the submission by the Defendant that the waiver was communicated to the Plaintiff via e-mail vide letter dated 21.8.2013. I have looked at the said letter, without going deeper, I find that there is no evidence that the same was ever forwarded to the Plaintiff via e-mail as it is not indicated to what e-mail address was the said letter sent, to whom and when. From the foregoing, it is my conclusion that there was no waiver of condition no. 14 of the special conditions of the letter of offer. Further, having read through the letter alleged to be containing the “waiver”, I note that at the 3<sup>rd</sup> last paragraph the Defendant was merely giving its opinion as to why an extension is not mandatory which opinion was not binding. I do therefore find that it was no more than an opinion that did not constitute a meeting of minds as to amount to term of an agreement between the two and capable of varying a covenant signed by both.

31. I have looked at the valuation report dated 13.10.2016 and a copy of an official search attached thereto. At page no. 3 of the valuation report on tenure, it is stated that the leasehold interest is for a term of 99 years with effect from 1<sup>st</sup> December 2011. The same information is reflected on an official search conducted on the 4.10.2016 and attached to the valuation report. It is therefore my finding that the Defendant agent misrepresented the fact that an extension of the subject property's tenure had been done while aware that there had never been success and/or attempt by the Defendant to commence the process of extension. The foregoing finding, in my view, is a vitiating factor to the contract between the Plaintiff and Defendant and as a result it is my finding that the Plaintiff has indeed establish a prima facie case with probabilities of success on the issue of misrepresentation.

32. According to **BROOMS LEGAL MAXIMS** at page 191:

**“It is a maxim of law, recognized and established that no man shall take advantage of his own wrong; and the maxim which is based on elementary principles is fully recognized in courts of law and equity and indeed admits of illustration from every branch of legal procedure. The reasonableness of the rule being manifest .....**”

33. Similarly, Justice Hoffmann in the English case of **Films Rover International**, made this point regarding the grant of injunctive relief ([1986] 3 ALL E.R.772, atpp.780 – 781):

**“A fundamental principle is....that the Court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been ‘wrong’ .....**”

34. The Court must take cognizance of the fact that the plaintiff's debt is undisputed. It has been argued by the Defendant that there is no

irreparable injury to be suffered by the Plaintiff as the Plaintiff has admitted is desire to sell the subject property in order to settle the outstanding arrears and further that Plaintiff has a statutory prescribed remedy in damages.

35. I am fully cognisant of the fact that the law is not that in all cases where the damage is capable of being quantified injunction will not be granted. **Ringera, J** (as he then was) in **Martha Khayanga Simiyu vs. Housing Finance Co. of Kenya & 2 Others Nairobi HCCC No. 937 of 2001 [2001] 2 EA 540:**

**“the law is not that an interlocutory injunction can never issue where damages would be an adequate remedy and the Respondent is in a position to pay them. That is the normal course but not the invariable course. The court has to take into account the conduct of the Respondent and the gravity of the breaches of law or contract alleged otherwise it would confer a carte blanche on those who are rich enough to pay all quantum of damages to ride roughshod over the rights of other persons. The rich do not fear to pay damages and they must be compelled to submit to the authority of the law by being put to other perils”.**

36. This court finds that the conduct of the Defendant and the effect of the alleged breaches to be very grave. It would confer “carte blanche” to the Defendant if it is allowed proceed with impunity and only be asked to pay damages. It will be equivalent to blessing a violation of a right on the consolation that the violated would be assuaged by an award of damages.

37. Consequently, prayer 3 of the plaintiff’s Application dated 19.7.2019 is allowed with costs. However the injunction granted is limited for a period of three (3) months to enable the plaintiff realise his desire to sell the property by private treaty and settle the debt. For avoidance of doubt, if by the 15.4.2020 the plaintiff shall not have paid the debt, the defendant shall be at liberty to reactivate the realisation of its security.

38. On costs, the debt being admitted and the postponement of the sale now ordered being of the effect of growing the debt and therefore additional burden to the plaintiff as it also portends erosion of the value of the security, I direct that each party shall bear own costs.

**DATED AND DELIVERED AT MOMBASA THIS 15TH DAY OF JANUARY 2020.**

**PJ O OTIENO**

**JUDGE**