REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

COMMERCIAL CASE NO. 19 OF 2017

KENYA UNITED STEEL COMPANY (2016) LIMITED.....PLAINTIFF

VERSUS

STANDARD CHARTERED BANK KENYA LTD.....DEFENDANT

R U L I N G

Introduction and outline of facts

1. The plaintiffs suit seeks ultimately that the court decrees that the intended sale of the suit property, subdivision no. 884 Section VI MN in the absence of a valid and lawful notice is unlawful, irregular and void, that the redemption notices as exhibited are fraught with inaccuracies constitute a clog on the plaintiffs right to redeem and an injunction to restrain the sale of the suit property in the absence of a valid redemption notice.

2. To preserve the substratum of that dispute the plaintiff filed a Notice of Motion dated 24/2/2017 on the same day and was granted interim orders where-after the matter was severally adjourned to enable the parties negotiate but no agreement was reached thus the Application had to be argued and was argued by filling of written submissions and having same highlighted.

The Applicant's case

3. By the application, the plaintiff seeks an order of temporary injunction against the respondent to restrain it from the exercise of statutory power of sale on the grounds that the requisite statutory notice had not been issued and served hence it was imperative that an order of injunction issues to stop the respondent from acting in away towards the clogs of right to redeem which would thus amount to an injury incapable of repair by way of damages.

4. In support of the Application, the applicant swore the Affidavit in support and exhibited therein the legal charge dated 14/3/2011, notices issues under the Land Act as well as those issued under the Auctioneers Act. It turns out from the Affidavit and annextures that notices were indeed issued but the applicants contends that the same are invalid in content.

5. It was also contended that the notices and demands relate to sums levied and applied contrary to the Banking Act, Section 44.

6. When served, the Respondent filed a Replying Affidavit in which it was contended that over and above the legal charge, the applicant executed in the Respondents favour a debenture, a fixed debenture over all the assets of the applicants, save for agricultural land subject to Land Control Act, to secure the borrowings of the applicant upto a maximum of Kshs. 700,000,000/=. The debenture also provided that the applicant would provide an additional security by way of charge over the suit property and another being Mombasa/Block XIX/179.

7. The said securities placed an obligation upon the applicant to pay the debts thereby secured which obligation the applicant defaulted in fulfilment despite several payment proposals made and indulgence granted. A record of correspondence between the parties was revealed and in particular a letter dated 5/5/2014 to the Respondent by the applicant detailing what was outstanding on each of the accounts operated which letter elicited a series of correspondence by which the applicant promised payment of atleast USD 500,000 but no money was paid. The deponent then pointed out that as a consequence of default and unfulfilled promises it decided to issue demand for payment of the total debt then outstanding and gave notice of intention to realize the securities in the event of default to comply with the demand for payments.

8. Even that demand was never honoured hence the services of a lawyer were procured to issue the notices under sections 90 and 96 of the Land Act. The Respondent takes the position that there having been persistent default it heard recalled the total debt and the sum due for demand and payment was therefore the total debt outstanding and not just the arrears.

9. It was pointed out that all the time, the applicant had not challenged the accuracy of the sums disclosed as outstanding in favour of the respondent and has to-date not filed a suit to challenge the sum outstanding but had accepted same and infact asked from bank statement to enable it procure another financier to take over the debt which debt still stood at different figures respecting some six accounts disclosed in the Affidavit at paragraph 27 and in various letter exchanged. On the basis of the admitted debt and due notices served, the defendant urged that the application be dismissed.

10. Based on the said Affidavits, parties filed and exchanged written submissions. The Applicants submissions are dated and filed on 20/2/2019 while those by the Respondent were dated and filed on 12/3/2019.

Analysis and determination

11. Having read the papers field and submissions, it is to me apparent that the suit, and therefore the application, is hinged upon the resolution as to whether the notices served and acknowledged were valid in terms of their content and message conveyed. I see that as the only issue because it is that issue that relates to the question whether or not a prima facie case is disclosed. It is only after the existence of a prima facie case is determined that the rest of the two questions would arise.

12. The Applicant acknowledges receipt of the notices but contend that the same are invalid on the basis that Section 90 demands that the debtor be informed adequately as to the nature and extent of default relates to non-payment of any money due the amount that must be paid to rectify the default. To the applicant while relying on the decisions in ***Trust Bank Ltd vs Eros Chemists Ltd [2000] eKLR,*** is that the notices served, as far as they demand the total outstanding debt and not the sums of arrears, were not in consonance with Section 90 of the Act. Other decisions were also cited where the court issued orders of injunction for failure to serve notices before staging a sale. None of the cited cases however considered the Applicants position on Section 90 Land Act on whether demand of the total debt rather than demand for arrears suffices as a valid notice.

13. On whether or not there was a risk of an injury capable of repair by an award of damages, the applicant cited to court the decision in **Lanban Mbololo vs First Community Bank Ltd** and ***Andynac Palace vs Equity Bank*** where the court held that ability to pay damages should not be a ground to purport to sell a security contrary to the law demanding issuance of notices.

14. For the Respondent, the submissions offered were to the effect that the notices served and acknowledged were valid for reasons that the respondent had in fact recalled the entire debt hence payment of the same was the only way to correct the default. Reliance was placed on the terms of the charge at clause 1.1 which created an obligation upon the applicant to pay the debt on or the 14/4/2011 or on written demand. The decision in ***First Choice Mega Stores Ltd vs Ecobank Kenya Ltd [2017] eKLR*** and ***Albert Mario vs Vishram Shamji [2015] eKLR*** were cited for the interpretation of Section 90(2) and proposition of the law that where there exists a term of a charge that sum, payable shall be payable upon demand then an obligation is created upon the charger to honour or pay once the demand is made. The third Resort was also made to the provisions of Section 56(2) Land Registration Act to help with Constitution of when a loan is deemed to be payable where there is no date specified in the charge.

15. Counsel then distinguished the decision in ***Fredrick Makumbi vs Kenya Commercial Bank[2018] eKLR*** to have been decided on its own facts and circumstances in that there was no consideration as to whether the charge provided for the date due for payment and Section 56(2) Land Registration Act was not considered.

16. On whether notices were issued and served pursuant to Section 96 of the Act, the respondent referred the court to pages 54 & 55 of its exhibits which are the notices and the certificates of posting to the applicant's postal address revealed in the contractual documents and service effected pursuant to clause 14.3 of the charge. That assertion of service was never commented upon and thus uncontroverted. Being so uncontroverted the burden having been upon the applicant to prove non-service the respondent contend that the allegation of lack of service has not been proved but disproved instead.

17. On notice by the auctioneer, it was submitted and I agree, that no default was pointed out and that it remain just an allegation. On allegations that the sums demanded are exaggerated and consist of illegal on non-contractual sums, counsel for the respondent posits that no particularity was provided but that in any even a dispute as to the sum outstanding is not a basis to grant an injunction.

18. On irreparable injury, submissions were made that the plaintiff having shown efforts to sell the suit property by private treaty cannot turn around and allege that a sale would visit upon it an injury.

19. Having considered all the materials availed, I do find that indeed the notices served met the requirements of the law. Here the contract between the parties does define when the date of payment would fall and when it shall be deemed to have fallen. That contract has not been alleged to have been invalid for illegality in that no challenge over the contract has been mounted. It remains a contract between the parties a bargain by the two to which the two must be held strictly.

20. That contract says unequivocally that there was a covenant by the applicant for payment of the debt on the 14/4/2011 or on written demand made by the respondent. Demands have been served and acknowledgments made with requests for indulgence. I do find that once the demand for payment matured, when the notice given expired, the entire debt became due and the sum the outstanding became the default which needed to be have been made good by payment. It is thus to me a non-issue that the respondent needed to recalculate how many instalments were outstanding in arrears. My understanding of the demands of Section 90(2) is that the default must be a default to meet the terms of the contract between the parties. That being the case and the parties having agreed on a payment date or a date demanded, I do find that section 90(2) was fully complied with and the applicants contention is not merited but grounded on the misapprehension of the provision.

21. On whether or not the notice under Section 96 was served, it is to be noted that the notices exhibited and the evidence of service have not been controverted. Even when granted leave to file a supplementary affidavit the applicant opted to say nothing. I do find that it was not open nor sufficient for the applicant to merely allege lack of service and leave it to court. The duty was always upon him to prove it. It is the

plaintiff as the person who moved the court whose burden it was to prove every fact alleged to entitled him to the remedy sought.

22. However, having alleged a negative, no event, of service, it must be seen that the operations of Section 112 of the evidence Act were then invited because the facts of service could only be within the knowledge of the respondent. In other words, the burden to prove that service had in fact been effected rested with the respondent. In pursuit of discharging that burden, notices and evidence of service were tendered. This court finds that notices under Section 96 were indeed issued on the 26/9/2016 and posted 28/9/2016. That to me is sufficient evidence that the notice was not only issued but also duly served.

23. Having found that the acknowledged notices under Section 90 was valid and that the notice under section 96 was indeed issued and served, I do equally find that where the chargee has served valid notices, the chargors suit crafted as the one here, cannot be viewed to present a prima facie case with any prospects of success.

24. To this court, it is the existence of a prima facie case that premises an order for injunction so that the substratum of suit is preserved. Where there is no prima facie case disclosed, it serves no purpose to consider whether the applicant stands to suffer any irreparable loss or where the balance of convenience tilts towards.

25. For those reasons, I do find no merit in the Notice of Motion dated 24/2/2017 which I hereby dismiss with costs.

Dated and delivered at **Mombasa** this **16th** day of **January 2020**.

P.J.O. OTIENO

JUDGE