



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL CASE NO. 14 OF 2018

EDDS DESIGNERS LIMITED.....APPLICANT

AND

UNITED CREDIT LIMITED.....1ST RESPONDENT

JOSEPH M. GIKONYO T/A GARAM AUCTIONEERS.....2ND RESPONDENT

RULING

1. The Notice of Motion was filed under a certificate of urgency and is dated the 24th September, 2018; the application is premised under the provisions of Articles 10 and 40 of the Constitution 2010, Order 40 Rules 1(a) 2(1) and Order 51 Rule (1) of the Civil Procedure Rules 2010, Sections 6(1) 6(2) and 6(3) of the Fair Administrative Action Act 2015 Section 6 of the Land Control Act and Sections 1A, 1B and 3A of the Civil Procedure Act, Section 13(2)(f) of the Consumer Protection Act; and all other enabling provisions of the law; the applicants seek the orders as set out hereunder;

(a) Spent.

(b) Spent

(c) An injunction do issue restraining the 1st respondent by itself, its employees, its agents including the 2nd respondent Garam Investments Auctioneers from selling, advertising, alienating or disposing of the applicants suit property Title No Nyeri/Uasonyiro/621, Kabati Village Kiawara area in Nyeri County pending the 'inter partes' hearing and determination of the suit;

(d) The costs of the application be awarded to the applicant.

2. The applicant relied on the grounds on the face of the application and on his Supporting Affidavit; the application was opposed by the respondents in terms set out in the Replying Affidavit made by NainaHaria on behalf of the 1st and 2nd respondents;

3. At the hearing hereof the applicant was represented by learned Counsel MsWangechi whereas the 1st respondent was represented by Learned Counsel Mr.Kimani; the 2nd respondent was unrepresented and did not file any response and was also not in attendance at the hearing hereof; the parties were directed to file and exchange written submissions and the application was canvassed by way of highlighting of the written submissions by the parties respective counsel; hereunder is a summation of the submissions;

THE APPLICANTS' CLAIM

4. The applicant avers that the 1st respondent had not served the applicant with the requisite three (3) month statutory notice as required by the law in respect of the subject land; and that the 2nd respondent had also not served the requisite 45 days Statutory Notice as required by the Auctioneers Rules;

5. The 1st respondent's statutory power of sale does not exist, having failed to issue to the applicant the requisite mandatory statutory notices; the applicant only learnt of the threatened sale of the suit property by way of an advert in the Daily Nation Newspaper on 10th September, 2018; the applicant cited **Trust Bank Ltd v Eros Chemists Ltd & Another [2000]eKLR** where it was held that for the statutory power of sale to accrue the statute provides for a three month's period to lapse after service of the notice; the applicant also relied on **Joseph MwangiKariuki v Equity Bank Ltd & Another [2008]eKLR** where it was held that non-service of the valid statutory notice is a fundamental breach of the provisions of section 74 of the RLA which derogates from the chargor's equity of redemption;

6. The applicant submitted that it beats logic why the 1st respondent preferred postal service to personal service when the applicant's physical address was known to the 1st respondent; a certificate of postage is not proof or confirmation of receipt of the statutory notices by the applicant; the applicant relied on **Peter KuriaMunyuira v Housing Finance Company of Kenya Ltd & Another HCCC No.457 of 2006 (Unreported)** where it was held that a notice sent through registered post takes effect after the collection of the registered mail of the chargor from the Postal Corporation of Kenya; the court observed that it is incumbent upon the chargee to ensure the registered mail sent through any process is received and there must be evidence of receipt and the date it was collected or received by the addressee;

7. The applicant has established a *prima facie* case with a probability of success; the applicant relied on **Mrao v First American Bank of Kenya Ltd & 2 Other [2003]eKLR** where it was held that a *prima facie* case is one where a court or tribunal directing itself on the material presented on conclude that there exists a right which has apparently been infringed by the opposite part as to call for an explanation or rebuttal from the other side; the applicant also condemned the 1st respondent for fraud and illegality for failure to take out a licence contrary to Section 3(1) of the Banking Act; the respondent also breached the Consumer Protection Act for refusing to act on several requests to supply the applicant with the necessary loan documents;

8. Unless the sale of the property is stopped by way of an injunction, the applicant will suffer irreparable injury which cannot be compensated by an award of damages; the applicant relied on **Samuel KiarieMuigai v Housing Finance Company Kenya Ltd HCCC No. 1678 of 2001** and **Waithaka v Industrial and Commercial Development Corporation [2001]eKLR**;

RESPONDENTS RESPONSE

9. The 1st respondent submitted that New Age Developers and Construction Ltd applied for a facility of Kshs.15 million from the 1st respondent; the loan was given through a letter of offer dated 25th February 2015; it was secured partly by the suit property owned by the applicant; the borrower, the applicant and the 1st respondent registered a charge dated 27th February 2015 over the suit property; the borrower later defaulted in payment and as at 30th September 2018 the outstanding amount was kshs.22,831,113/-;

10. Under the Land Act, the lender is not obligated to send 90 days' notice under Section 56(2) of the said Act; the Act only anticipates that a lender would serve two notices, 3 months' notice under Section 90 of the Land Act and 40 days' notice to sell under Section 96 of the Land Act; there is no obligation to send a three months' notice under section 96 of the Land Act as alleged by the applicant;

11. The applicant was duly served with both the 90 days statutory notice and the 40 days' notice to sell; certificate of postage dated 21st February 2017 was produced in evidence in the replying affidavit; the notice was acknowledged by the applicant's advocates in a letter dated 14th May 2018 which was also produced as an exhibit in the said affidavit;

12. The 1st respondent relied on **Moses KibiegoYator v Ecobank Kenya Limited (Eldoret) C & L No.426 of 2013** where it was held that a notice will be considered served if there is material to show that the notice was received or acknowledged, say through an acknowledgment letter; the 1st respondent also cited **NyangiloOchieng& Another v Fanuel B. Ochieng& 2 Others Civil Appeal No.148 of 1995**;

13. On whether the 1st respondent breached the Central Bank Prudential Guidelines it was submitted that the 1st respondent is authorized to carry out the business of Hire Purchase as the case in the matter; the 1st respondent relied on its Memorandum of Association which states that one of the objects of the 1st respondent is to finance the sale of goods, articles and commodities;

14. The borrower voluntarily applied for the financial accommodation and agreed to charge the suit property; the 1st respondent cited **New Age Developers & Construction Co. Ltd v Jamii Bora Bank Ltd [2017]eKLR** where it was held;-

“On the question of illegality of the Charge, one question that comes to mind is why did they receive the money from the Defendant. The Court notes it was also the duty of the Plaintiff to obtain consent to Charge the suit land before they received the money. The Court notes that the plaintiff has not come to court with clean hands where it purports that it was never furnished with the statement of accounts.”

15. The borrower has not been servicing its loan; it has been issuing cheques which have been returned unpaid; it could not have been issuing cheques to an unlicensed body; having offered the suit property as security the property became commercial property the loss of which would entitle the applicant for damages in an appropriate case; the 1st respondent relied on **New Age Developers and Construction Company Ltd v Sidian Bank Ltd [2018]eKLR**; there is no evidence that the 1st respondent cannot compensate the applicant in form of damages;

16. The balance of convenience favours denial of the injunction orders sought; the debt stood at Kshs.22,831,113/- as at 30th September 2018 and the borrower has not taken any steps to reduce it; the 1st respondent relied on **Andrew MuriukiWanjohi v Equity Building Society Ltd & 2 Others [2006]eKLR** where it was held that there is a risk of the debt outstripping the value of the property/security if an injunction is given when the borrower has not made any repayments for more than three years; the court observed that in such circumstances the stoppage of the sale would result in continued growth of the debt and hence exposing the lenders to substantial irrecoverable losses;

17. In any event the property has a forced sale value of Kshs.3,150,000/- which means that even if sold the proceeds cannot cover the whole of the outstanding amount; the 1st respondent urged this Court to dismiss the application dated 24th September 2018 for lack of merits;

ISSUES FOR DETERMINATION

18. After reading the respective rival written submissions this court has framed only one issue for determination;

(i) Whether the conditions for granting the injunctive orders have been met by the applicant;

ANALYSIS

19. The application was brought under a Certificate of Urgency and the applicant obtained temporary injunctive orders pending the *inter-partes* hearing and determination of the application; the temporary order was conditional to the applicant depositing the sum of KShs.2,851,750/- into court; the respondent pointed out to the court that five months had since lapsed and up to the time of the hearing hereof the applicant had failed to comply with the terms of the court order;

20. This court will only address the issue as to whether the applicant is deserving of the orders sought and costs; the other issues arising from the application for determination related to consumer protection and Central Bank guidelines are best left for determination at the full hearing by the trial court;

Whether the conditions for granting the injunctive orders have been met by the applicant;

21. The applicant instituted proceedings against the respondents and sought restraining orders on the grounds that the 1st respondent did not serve it with the Statutory Notices under the provisions of Section 56(2) of the Land Registration Act nor the three (3) months Notices under Sections 90 and Section 96(1) of the Land Act; the applicant also maintained that the 2nd respondent had failed to serve it with the 45 days Statutory Notice as required under Rule 15(d) of the Auctioneers Rules;

22. The applicable law for the granting of injunctions is found under the provisions of Order 40 Rule 1(a) of the Civil Procedure Code; and the three principles for granting injunctions are enshrined in the renowned case of **GiellavsCassman Brown & Co. Ltd [1973] EA 358**; the Applicant has to satisfy the court on the following requirements which are that;

(a) The Applicant must establish a prima facie case with a probability of success;

(b) The Applicant must demonstrate irreparable injury that cannot be adequately compensated by an award of damages;

(c) If in doubt, then the balance of convenience tilts in whose favour;

23. It is not in dispute that the 1st respondent registered a charge over the suit property which Charge is dated the 27/02/2015; and it is not disputed that the applicant was registered as the proprietor of the suit property and was also the borrower; what is also not in dispute is that the borrower has defaulted in payments of the secured amount;

24. The applicant's contention is that it had never received the requisite notices and that due to the failure by both respondents of service it was therefore deserving of the orders sought;

25. From perusal of the court record in particular the affidavit evidence of the 1st respondent this court has sighted both the 90 days statutory notice and the 40 day notice; the first statutory notice is dated 21/12/2017 and the 1st respondent has annexed the Certificate of Postage which is dated the 21/12/2017; the 40 day notice to sell is also supported by a Certificate of Postage which is dated the 8th January 2018;

26. This court is satisfied that the 1st respondent did not merely produce the file copies of the Notices but also produced the certificates as proof of postage; these annexures are a prima facie demonstration that the notices were properly served upon the applicant as contemplated by the Charge Document;

27. The Applicant's only saving grace is that it is seeking an equitable remedy and it is trite law that equity relies less on precedent but more on the need that justice be served; the remedy is discretionary and the Applicant does not have to prove the underlying claim all it has to do is persuade the court that there is good reason why the Respondents' rights should be restricted;

28. This court is not pre-judging the 1st respondent but is persuaded that from the material tendered the applicant has an arguable case as there are serious questions and doubts that are raised as to the nature of the 1st respondent's business and financial dealings; the questionable issue is whether the 1st respondent is a hire purchase entity or licenced to operate as a financial institution; on this ground the applicant is found to have a good and arguable case and the answer will establish the legality of the Charge and the subsequent notices; as stated earlier these are issues best left to the trial court to determine;

29. Both parties contend that they both stand to lose; the 1st respondent contends that there was misrepresentation on the value of the suit property and that even if the suit property were to be sold there would be a substantial shortfall;

30. In this instance this court will exercise its discretion on a balance of convenience; therefore, in the exercise of balancing the convenience and in weighing the relief *vis-a-vis* the injury this court has satisfied itself that the potential injustice that may be caused to the applicant arising from the 1st respondent's questionable operations greatly outweigh the injury that may be done to the 1st Respondent; and as such the sale should not be allowed to proceed;

31. For those reasons this court finds that the balance of convenience tilts in favour of the applicant; nevertheless, all is not lost as the applicant shall hereby be directed to tender the same security in the sum of KShs.2,851,750/- as a condition precedent to the issue of the injunctive orders; the amount to be deposited with the 1st respondent within 30 days from the date of this ruling; and to continue making the monthly payments with effect from the 31/03/2020 and thereafter on the last day of each and every succeeding month; the sums shall be

payable direct to the 1st respondent during the pendency of this suit; in default of any one instalment the 1st respondent and the 2nd respondent shall be at liberty to proceed with the sale of the subject property.

FINDINGS AND DETERMINATION

32. The Application is found to be meritorious and is hereby allowed; as the applicant is found to have met the conditions for the grant of an injunctive order;

(a) An interlocutory injunction hereby issues restraining the 1st respondent by itself, its employees, its agents and the 2nd Respondent Garam Investments Auctioneers from advertising, alienating or disposing of the suit property Title No Nyeri/Uasonyiro/621Kabati Village Kiawara Area within Nyeri County pending the hearing and determination of the suit; on condition that;

(b) The applicant deposits the sum of KShs.2,851,750/- with the 1st respondent within 30 days from the date of this ruling and continue making monthly payments with effect from the 31/03/2020 and thereafter on the last day of each and every succeeding month until the case is heard and determined; the sums shall be payable direct to the 1st Respondent during the pendency of this suit;

(c) In default of any one payment the injunctive orders herein shall automatically be discharged;

(d) The applicant to ensure the matter is disposed of within 12 months from today's date.

33. The Respondents shall have the costs of this Application.

Orders accordingly.

Dated and Signed and Delivered at Nyeri this 13th day of February, 2020.

HON.A.MSHILA

JUDGE