



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

MILIMANI LAW COURTS

CIVIL CASE E043 OF 2019

KIRI-IRA HOLDINGS LIMITED.....1ST APPLICANT

NAMSI LIMITED.....2ND APPLICANT

VESRUS

KENYA COMMERCIAL BANK LTD.....1ST RESPONDENT

LEAKEY'S AUCTIONEERS.....2ND RESPONDENT

RULING

The Plaintiffs/Applicants Advocate filed certificate of urgency Application dated 25th March 2019 and urged the court to hear the matter on a priority basis on grounds;

- a) That the 1st Defendant herein entered into an agreement with the 2nd Plaintiff whereby the former was to advance the latter some facilities amounting to Ksh 44,597,590/- in form of asset finance and working capital;
- b) That the said facilities were securitized by;
 - i) A debenture over a cabinet making machine
 - ii) A charge over the property known as L.R. No. KAJIADO/OLOOLOITIKOSH/KITENGELA/2293 registered in the name of the 1st Plaintiff who acted as the guarantor for the said facilities;
- c) That the 2nd Plaintiff unfortunately defaulted on payment which prompted the bank to foreclose by selling the cabinet making machine.
- d) That it was indeed the Plaintiff's expectation that the proceeds from the sale of the machine would have covered the balance of whatever was due and owing to the bank.

Annexed to the application under certificate of urgency, the Applicant filed Notice of Motion Application of the same date, **pursuant to Article 159 (2)(d) of the Constitution of Kenya 2010; Order 40 Rule 1 of the Civil Procedure Rules 2010; Section 3A of the Civil Procedure Act; chapter 23 Laws of Kenya** and all other enabling provisions of the Law and sought orders;

- a) That the Court issues orders restraining the Respondents, their workers, agents or anyone acting on their behalf from attaching, transferring, alienating, advertising, selling or in any other way interfering with the properties known as L.R. No. Kajiado/Olooloitikosh/Kitengela/ 2293 any other property of the Applicants pending the hearing and determination of this application and/or suit.
- b) That the issues an order restraining the 1st Respondent from listing the Applicants with the Credit reference Bureau pending the hearing and determination of this application and/or suit.
- c) That pending the hearing and determination of this application, the issues an order compelling the 1st Defendant to furnish the

Applicants with :

- i) Statements of the 2nd Applicant's loan account showing the repayment schedule of the facility;
 - ii) Copies of the chattels mortgage and charge documents of the facilities issued to the 2nd Applicant.
- d) That the Court issued an order compelling the Respondents to furnish the Applicants with copies of the forced sale valuation reports for the above mentioned property; L.R. No. Kajiado/Ololoitkosh/Kitengela/2293 earmarked for sale.

The Applicant contested service of mandatory statutory notices prescribed under **Sections 90 & Section 96 of the Land Act** and Notice of Auction of the suit property under **Rule 15 of the Auctioneers Act**. The Applicant also contested the duties of the Chargee prescribed by **Section 97 of Land Act** and sought to be provided with Valuation Report of the suit property.

The Applicant contended that the Respondent had already exercised its right over the debenture over a Cabinet making machine.

As at October 2014, the Applicant admittedly owed the Respondent Ksh 22,000,000/= while the Cabinet machine was purchased 2 years earlier at Ksh 50,000,000/-. There was no justifiable reason or basis in the Applicant's view for the Respondent to exercise statutory power of sale as the debt ought to have been settled through sale proceeds of the Cabinet making machine.

1st DEFENDANT'S REPLYING AFFIDAVIT

The Application is opposed vide a Replying Affidavit dated 8th April 2019, sworn by Tom Ogola; Legal Manager of the 1st Defendant. He deponed that the 2nd Plaintiff sought and was offered a security facility by the 1st Defendant for the sum of EURO 173,430 equivalent to Ksh 20,811,600 (Kenya Shillings Twenty Million, Eight Hundred and Eleven Thousand six hundred) vide a letter of offer dated 23rd March 2011 annexed and marked as **TO-02**.

He stated that the above security was secured by among other securities by a Guarantee and indemnity of the 2nd Plaintiff's Directors; annexed and marked **TO-03**.

That the 2nd Plaintiff requested and was offered banking facilities by the 1st Defendant as clearly indicated on the letter of offer dated 4th June 2012 annexed as **TO-04**; for a total sum of Ksh. 47,207,781 (Kenya Shillings Forty Seven Million Two Hundred and six Thousand Seven Hundred Eight one).

That the letter of offer, its terms and conditions were un-equivocally accepted by the 2nd Plaintiff and its directors appended their signatures in acceptance as indicated at page 12 of the letter of offer dated 4th June 2012.

That the 2nd Plaintiff sometime in November 2012 sought an Enhancement of Banking facility which the 1st Defendant agreed to vide their letter dated 5th November 2012 annexed and marked **TO-05**.

That the 2nd Plaintiff, as part of the banking facility advanced to it, borrowed from the 1st Defendant the sum of Ksh 25,000,000.00 (Kenya Shillings Twenty Five Million) which amount was secured by a legal charge in respect of land and buildings comprised in Title Number Kajiado/Ololoitkosh/Kitengela/2293 which property was and still is in the name of the 1st Plaintiff copies of charge and original title document annexed and marked **TO-06**.

That the enhanced loan facility was also secured by a guarantee and indemnity of the 2nd Plaintiff's Directors and a Deed of Guarantee and Indemnity dated 25th July 2012 was duly executed annexed as **TO-07**.

That the total amount advanced by the 1st Defendant to the 2nd Plaintiff was Ksh 47,206,781 (Kenya Shillings Forty Seven Million Two Hundred and six Thousand Seven Hundred and Eighty One) and which amount was contemporaneously secured by a Debenture Instrument dated 20th July 2012 annexed as **TO-08**.

That the 1st Defendant at the request of the 2nd Plaintiff agreed to enhance the banking facilities it had advanced to the 2nd Plaintiff and sought as a further security a Deed of Guarantee and Indemnity and further terms and conditions of the enhanced facility were clearly indicated in the letter dated 4th February 2013 annexed as **TO-09**.

That the 2nd Plaintiff through its directors and shareholders ratified the requests for facilities advanced to it and executed a Subordination Agreement binding the directors and shareholders to the banking facilities and the obligations of the 2nd Plaintiff marked **TO-10**.

That in response to paragraph 7 of the Supporting Affidavit it is not true that 1st Plaintiff was not served with a statutory notice as a notice was sent vide letter dated 3rd October 2014. The 1st Plaintiff responded vide their letter dated 3rd November 2014 wherein they acknowledged the debt outstanding and gave an intimation of a possible avenue to settle the same. Attached are the said Letters marked **TO-11**.

That in response to paragraph 8 of the Supporting Affidavit the 2nd Plaintiff was served with a statutory notice which had clearly indicated

how much it owed the 1st Defendant and therefore the averments made at paragraph 8 are untrue.

That in response to paragraph 11 and 12 of the Supporting Affidavit the 1st Defendant indeed carried out a valuation of the charge property and a forced sale price was set as indicated in the valuation report dated 10th January 2019 annexed **TO-12**.

That the alleged cabinet making machine at paragraph 15 and 16 of the Supporting Affidavit did not fetch sufficient amounts despite its high purchase price and valuation. There are limited players in that industry making it difficult for the 1st Defendant to realize the secured amounts and therefore in accordance with the terms of the Deed of guarantee and indemnity, the 1st Defendant was entitled to demand settlement of all outstanding amounts from the 2nd Plaintiff.

That in response to paragraphs 17 and 18 of the Supporting Affidavit the 1st Plaintiff was indeed allowed to sub divide the charged suit property vide letter dated 17th January 2018. The Applicants failed to adhere to the set down conditions and failed to make the proposed sub-division process come to fruition so that the outstanding amounts could be offset.

The Respondent/1st Defendant filed and presumably served the Supplementary List of Documents on 9th July 2019. Therein, the 1st Defendant annexed the Plaintiffs statements of Accounts.

APPLICANTS' SUBMISSIONS

a) Whether the bank breached its duty of care in selling the cabinet making machine

The Applicants submitted that **Section 97 of the Land Act** stipulates the duties of a charge in exercising its statutory power of sale. **Section 97 (2)** lays out the obligation of the charge on the question of valuation. It provides;

“(2) A chargee shall, before exercising the right of sale, ensure that a forced sale valuation is undertaken by a valuer.

That the forced sale value should not go below twenty five per centum of the market value. It is imperative to note that under **Section 97(1) of the Land Act**, a chargee is expected to exercise a duty of care towards a charger, failure to which it would be liable for breach of duty of care. The said Section provides;

“A chargee who exercises a power to sell the charged land, including the exercise of the power to sell in pursuance of an order of a court, owes a duty of care to the charger, any guarantor of the whole or any part of the sums advanced to the charger, any charge under a subsequent charge or under a lien to obtain the best price reasonably obtainable at the time of sale. 2. A charge shall, before exercising the right of sale, ensure that a forced sale valuation is undertaken by a valuer.”

The Applicants relied on the case of David Gitome Kuhiguka –vs- Equity Bank Ltd [2013] eKLR, where Havelock J. stated that;

“...the obligation on chargee to ensure that a forced sale valuation is undertaken by a valuer comes under the heading to section 97 of the Land Act, 2012 – “Duty of chargee exercising power of sale “ to my mind, such a duty is obligatory”

The Applicant's submitted that it was mandatory of the chargee under the above noted section to obtain the best price reasonably available at the time of sale. This duty has not been duly discharged as the valuation has not been availed to date of the charged suit property. The valuation report for the Cabinet Making Machine has not been provided nor any documentation to show how much the Cabinet Making Machine disposed at. The claim by the Defendant that the said machine did not fetch sufficient amounts to realize the secured amount is not confirmed.

1st DEFENDANT'S SUBMISSIONS

In a nutshell, the 1st Respondent submitted that the Plaintiffs approached the 1st Defendant and requested banking facilities as outlined above. There is no dispute that the monies were advanced to the Plaintiffs after a letter of offer was written to the Plaintiffs and was duly executed.

The facilities were secured by a debenture of Cabinet making machine, Charged suit property LR Kajiado/Ololoitokoshi/ Kitengela/2293 and guarantees and Indemnities by the Plaintiffs directors.

The 1st Defendant was/is entitled to exercise its right of statutory power of sale over the suit property in default of payment of the facilities. The 1st Defendant contended all requisite notices were served and Valuation conducted over the suit property. The Plaintiffs proposed to be allowed to subdivide the suit property so as to sell and proceeds would settle outstanding debt. The Proposal was made 5 years ago, to date the Subdivision is not completed and the Plaintiffs failed to comply with the conditions agreed upon between the parties over the subdivision of the suit property.

The 1st Defendant relied on the case of Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 Others [2014]eKLR which provides;

“The person who makes such an allegation must lead evidence to prove the fact. She or he bears the initial legal burden of proof which she or he must discharge. The legal burden in this regard is not just a notion behind which any party can hide. It is a vital

requirement of the law. On the other hand, the evidential burden is a shifting one, and is a requisite response to an already-discharged initial burden. “The evidential burden is the obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence or non-existence of a fact in issue” [Cross and Tapper on Evidence, (Oxford University Press, 12th Ed, 2010 page 124)].”

The 1st Respondent relied on the celebrated landmark case of Giella vs Cassmann Brown (1973);

“...the court has to consider the following questions before granting injunctive relief:

- i) *Is there a prima facie case....*
- ii) *Does the applicant stand to suffer irreparable harm...*
- iii) *On which side does the balance of convenience lie...*

& Mrao Ltd vs First American Bank of Kenya Ltd (2003) eKLR,

“...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 the Applicant’s case upon trial...it is a case 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 from the latter...”

DETERMINATION

The Court considered the pleadings and submissions filed by the parties.

ISSUES

Whether the Plaintiffs are entitled to the grant of temporary injunction

- i) *The plaintiff must establish that he has a prima facie case with high chances of success;*

LOAN/ FACILITIES

The 1st Defendant advanced the 2nd Plaintiff;

- a) Ksh 20,811,600 in 2011
- b) Ksh 47,206,781 in 2012
- c) Ksh 25,000,000/- in 2012

The Plaintiffs Statements of Accounts as annexed confirm the following;

- d) Namsi Limited-AC KCB from April 2011- Feb 2019 the amount outstanding is Ksh 18, 2015 889.31/-

The Applicant/Plaintiffs admitted default in servicing the facilities after making diligent and regular payments upto 2016.

DEFAULT/DEMAND/NOTICES

The Plaintiffs contest service of statutory notices. There is evidence of the Statutory Notice under **Section 90 of Land Act** of 3rd October 2014 sent to;

Namsi Limited relating to Property LR Kajiado/Ololoitikoshi/Kitengela/2293 in Kiriira Holdings Limited-Guarantor/Chargor; Ataro East Africa Limited Borrower.

The Applicant contest validity of the said Notice due to reference to Ataro East Africa Limited; an unknown party to these transaction and proceedings.

This Notice is successfully challenged due to reference of non parties.

There is also no evidence of any other statutory Notice(s) except the one for the 2nd Defendant’s Notice of Auction after 45 days.

VALUATION

The 1st Defendant wrote to **Prestige Valuers Limited** on 7th January 2019 to value the subject suit property LR Kajiado/Ololoitkoshi /Kitengela/2293.

The Valuation Report was/is availed on 17th January 2019; the Market Value was/is Ksh 60,000,000/-; Mortgage Value was/is 48,000,000/= and Forced Sale Value was/is Ksh 45,000,000/=

PAYMENTS/SERVICING FACILITIES

The Plaintiff/Applicants admit obtaining loan facilities from the Respondent, there is security of the charged property in lieu of the facilities. In the absence of the Plaintiff/Applicants exercise of right of redemption, this Court finds that the *prima facie* case is not established.

ii) That the Plaintiff would suffer irreparable loss that cannot be compensated by an award of damages;

That the Plaintiffs submitted that they stand to suffer irreparable loss and damage not compensatable in damages should the Defendants who are eager to illegally, unlawful and unprocedurally sell the suit property are allowed to sell the suit property.

In David Mburu Githere vs Jamii Bora Bank Limited [2017] eKLR it was held;

“The Plaintiffs herein, as submitted by the Defendant wilfully gave the suit property as security and as such it became a commodity for sale and it is therefore subject of sale in case of default. Further, even if the Court was to find in favour of the Plaintiffs at the final determination of the suit, damages would be an adequate remedy. The Plaintiffs thus can find recourse in Section 99(4) of the Land Act which provides that;

A person prejudiced by an unauthorised improper exercise of the power of sale shall have a remedy in damages against the person exercising the power.

iii) If the court is in doubt, it will decide on a balance of convenience.”

The Plaintiffs/Applicants stated that the balance of convenience tilts in preservation of *status quo* until both parties are heard on the merits of the instant application as the 2nd Defendant will still be in a position to recover their money.

This Court finds from the pleadings filed and submissions ably made by parties; through respective Counsel, there is no dispute as to the contract between the Applicants and Respondent. There is no challenge to the Charge document properly executed and registered. Valuation of the suit property was conducted and was valid for 12 months before sale.

However, this Court finds that statutory notices were not properly served by Respondent to the Applicants. There is the Notice under **Section 90 of Land Act** that included a non party Ataro Limited; the 45 Day Notice by Leakey Auctioneers 2nd Defendant was duly served. This Court found that Notice under **Section 96 of Land Act** was not served or annexed to the Applications.

Secondly, the Amount claimed from Applicants by Respondent is over Ksh 18,205,889.31 arising from default in the Loan and/or overdraft facilities.

Thirdly, the documents the Plaintiffs demanded to be availed are on the Court record and presumably served to Plaintiffs/Applicant; as of/at now namely;

- a) Statements of Account 2011-2019- 1st Defendant’s Supplementary Affidavit filed on 9th July 2019.
- b) Valuation Report of 17th January 2019- marked TO-12
- c) Copies of Chattels Mortgage and Charge Documents-marked TO-8 & TO-6 of 1st Defendant’s Replying Affidavit.

Fourthly, the letter of 6th January 2016 from the 1st Defendant to the plaintiffs confirms that the sale of the Cabinet making machine held on 16th November 2015 and 16th December 2015 failed to realise serious offer of the sale. The best offer was Ksh 8 milion, the buyers sought to buy parts of the machine rather than the whole. In the circumstances, the Cabinet machine was not sold.

From the totality of the evidence on record, the Plaintiffs owe 1st Defendant outstanding amount of the facilities advanced, the plaintiffs have a right to exercise the right of redemption. In the meantime, the plaintiffs have not demonstrated a *prima facie* case the grant of Interlocutory injunction.

DISPOSITION

- 1. The application of 25th March 2019 seeking grant of Interlocutory injunction pending hearing and determination of the suit is dismissed with costs.**
- 2. The Plaintiffs/Applicants have not established prima facie case to warrant grant of Interlocutory Injunction.**

3. The 1st Defendant in the absence of the plaintiffs exercising right of redemption, is at liberty to exercise the right of statutory power of sale subject to compliance with Sections 90, 96& 97 of Land Act & Rule 15 of Auctioneers Rules.

DELIVERED SIGNED & DATED IN OPEN COURT ON 4th MARCH 2020.

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF:

Mr Omondi H/b Karanja For Respondent/defendant Ms Kavaji Holding Brief Mr. Okatch For Plaintiff

COURT ASSISTANT – MR.TUPET

MS KAVAJI: We apply for proceedings and certified copy of ruling and we seek stay of execution pending appeal

COURT: Stay of execution granted 30 days from today pending appeal.

Certified copies of proceedings and ruling to be provided upon payment of requisite fees.

M. W. MUIGAI

JUDGE

4TH MARCH 2020