



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND TAX DIVISION**

**HCCC NO. E003 OF 2020**

**ZACHARIA W. BARAZA t/a**

**SIUMA AUCTIONEERS.....1<sup>ST</sup> PLAINTIFF/APPLICANT**

**ZACHARIA W. BARAZA.....2<sup>ND</sup> PLAINTIFF/APPLICANT**

**ESTHER NANJALA WEKESA.....3<sup>RD</sup> PLAINTIFF/APPLICANT**

**VERSUS**

**NCBA BANK KENYA PLC.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**GEORGE MUIRURI t/a**

**LEAKEY'S AUCTIONEERS.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

**Background**

1. The 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs are the registered owners of residential premises developed on LR No. Kitale Municipality Block 17/Bidii/105 (hereinafter “**the suit property**”). In the year 2016, the 1<sup>st</sup> plaintiff sought and obtained a loan facility that was secured by a First Banking Legal Charge of Kshs 40,000,000 over the suit property. It was agreed that the loan repayment was to be by way of 120 equal monthly installments.

2. The plaintiff's did not keep up with the agreed loan repayment and sometime in April 2018, the 1<sup>st</sup> defendant sought to exercise its statutory power of sale. The intended sale was however cancelled after the plaintiffs engaged the 1<sup>st</sup> defendant in talks and made certain payments.

3. In January 2020, the 1<sup>st</sup> defendant once again set in motion the process of sale of the suit property following the plaintiff's default thereby precipitating the filing of the instant suit wherein the plaintiffs seek the following orders:-

***A. Permanent injunction restraining the defendant itself, agents, servants and or employees by whatever name called from advertising, offering for sell, selling, disposing of, auctioning, or transferring the property known and described at TITLE NUMBER KITALE MUNICIPALITY BLOCK 17/BIDII/105.***

***B. That the proposed sale be stayed, nullified or reversed.***

***C. Costs of this suit be provided for.***

4. Concurrently with the plaint, the plaintiff also filed the application dated 8<sup>th</sup> January 2020 that is the subject of this ruling.

**Applicant's case.**

5. The applicants seek the following orders in their said application:-

1. Spent

2. Spent

3. *That a temporary injunction do issue restraining the defendant/respondent itself, its agents, servants and or employees by whatever name called from advertising, offering for sell, selling, disposing of, auctioning, or transferring the property described as title number Kitale Municipality Block 17/Bidii/105 pending the hearing and determination of this suit.*

4. *That costs of this application be provided for.*

6. The plaintiffs challenge the defendants' exercise of the statutory power of sale on the main grounds that:

*i. The defendants failed to follow the due process as prescribed under the Land Act, 2012 and the Auctioneer's Rules in exercising its power of sale.*

*ii. No statutory notice was issued to the plaintiffs/applicants before the proceeding with and or setting in motion process to sale the charged property;*

*iii. The defendants/respondents did not conduct the statutory obligatory a forced sale valuation before exercising its power of sale in fragrant breach of the express provisions of Section 97(2) of the Land Act, 2012.*

7. In written submissions in support of the application, **M/S Ogwoka Ndege & Company Advocates** for the applicants submitted that before exercising statutory power of sale, the plaintiff were entitled to a notice alleging default, a further two months for compliance with the default notice, at least a 40 days statutory notice and a current forced sale valuation before the actual sale and realization of the security as provided for under Sections 90(3), 96(2) and 97(2),(3) of the Land Act, 2012 (hereinafter "**the Act**").

#### **The respondent's case.**

8. The respondents opposed the application through the replying affidavit of the 1<sup>st</sup> respondent's Senior Legal Counsel **Mr. Stephen Atenya** who avers that the application is classical example of abuse of the court process as the plaintiffs failed to make the loan repayments as agreed in both the letter of offer and the charge.

9. He further states that to enable the exercise of the 1<sup>st</sup> defendants statutory power of sale, the defendants complied with the Act by issuing all the requisite notices before advertising the property for sale by public auction.

10. He further states that 1<sup>st</sup> defendant instructed M/S Dominion Valuers Ltd to carry out a pre-sale valuation in order to obtain the best possible price for the suit property.

11. In their written submission to the application, counsel for the defendants argued that the application does not meet the conditions set for the granting of temporary orders of injunction.

#### **Analysis and determination.**

12. I have considered the pleadings filed herein and the submissions by both counsels together with the authorities that they cited. I find that it was not disputed that the plaintiffs obtained financial facility from the 1<sup>st</sup> defendant which facility was secured by a charge over the suit property herein. A perusal of the affidavits filed by both parties shows that the plaintiffs' default is not disputed. From the 2<sup>nd</sup> plaintiff's affidavit in support of the application, it is clear that as early as April, 2018, the defendant made the first attempt to sell the suit property as the plaintiffs were already in default. Indeed, at paragraph of the said purporting affidavit, the 2<sup>nd</sup> defendant avers as follows;

*"That sometime in the month of April 2018, the 1<sup>st</sup> defendant/respondent sought to exercise Statutory Power of Sale and indeed set in motion plans to sale the charged property. However, the sale did not proceed as we personally engaged the 1<sup>st</sup> defendant and also made substantial payments leading to the cancellation of the process to sale the charged property. Annexed hereto and marked "ZWB-1" are copies attesting as much"*

13. I note that even though the plaintiffs claim that they made substantial loan repayments after the cancellation of the first attempt to auction the suit property, no material was placed before this court to show that the alleged substantial payments were made.

14. I note that the plaintiff mainly contests the intended sale on account of lack of service of the requisite statutory notices, absence of forced sale valuation and alleged refusal, by the 1<sup>st</sup> defendant, to reschedule the loan in compliance with the applicable interest rates regulations.

15. The question which then arises is whether the reasons advance by the plaintiff would warrant the issuance of orders of temporary injunction to restrain the 1<sup>st</sup> defendant from exercising its statutory power of sale.

16. The principles governing the granting of interim orders of injunction are well settled. The said principles were set out in the case of **Giella v Cassman Brown & Company Ltd** [1973] EA 353 and restated, together with their mode of application in **Nguruman Limited v Jan Bonde Nielsen & 2 Others**, CA No. 77 of 2012, as follows:

**“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;**

- 1. establish his case only at a prima facie level,**
- 2. demonstrate irreparable injury if a temporary injunction is not granted, and**
- 3. allay any doubts as to (b) by showing that the balance of convenience is in his favour.**

***These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. (See Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86). If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant’s claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit “leap-frogging” by the applicant to injunction directly without crossing the other hurdles in between.” (Emphasis added).***

17. I will now turn to consider if the plaintiffs’ application meets the threshold set for the granting of temporary orders of injunction.

#### **Prima facie case**

18. It is well established that, in order to secure an injunctive relief the applicant must first establish a prima facie case with a high chance of success. The Court of Appeal pronounced itself on what constitutes a prima facie case in *Mrao Ltd v First American Bank of Kenya and 2 others* [2003] KLR 125 as follows:-

***“A Prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later”.***

19. I am alive to the fact that at this stage, I am not determining the main suit and my role is to determine whether the applicant has established a *prima facie* case against the Respondents so as to qualify for the orders sought in the application under consideration. In determining whether the plaintiffs have established a prima facie case, it is necessary to examine the law, the pleadings filed herein and the arguments advanced by both parties.

20. It is not disputed that the plaintiffs obtained a loan facility from the defendant and that the plaintiffs have been experiencing challenges in keeping up with the loan repayments, a scenario that led to an earlier attempt by the 1<sup>st</sup> defendant to exercise its statutory power of sale in 2018 before the parties reached a compromise. The plaintiffs’ case, as I understand it, is that they made substantial payments towards the settlement of the loan arrears due. I however note that plaintiffs did not place any material before this court to show that they had indeed settled all the loan arrears that are due to the 1<sup>st</sup> defendant. The plaintiffs claim that the 1<sup>st</sup> defendant should be restrained from exercising its statutory power of sale on the basis that they were not served with the requisite statutory notices and that the suit property had not been valued so as to determine its current forced sale value.

21. My finding is that the issue of whether or not the 1<sup>st</sup> defendant issued the plaintiffs with the notices or carried out the valuation of the suit property does not take away the fact that the plaintiffs are indebted to the 1<sup>st</sup> defendant. I further find that owing to the fact that the plaintiffs are indebted to the 1<sup>st</sup> defendant, it logically follows that they cannot be said to have established a prima facie case against the defendants.

22. Having found that the plaintiffs have not established a prima facie case against the defendants, the plaintiffs’ application automatically fails and I do not have to consider the applicability of the remaining conditions for granting orders of interim injunction. My findings on the issue of prima facie case notwithstanding, I am still minded to address the issues raised by the plaintiffs regarding service of notices and the valuation of the suit property.

#### **Service of requisite statutory notices.**

23. I find that even though the plaintiffs claim that they were not served with the requisite statutory notices, the defendants attached annexure “D-1” to the replying to demonstrate that the statutory notices were duly served on the plaintiffs. The said annexure “D-1” comprises the following:-

- ◆ ***Demand notice pursuant to Section 90 of the Land Act, 2012 issued by Messrs Kimondo Gachoka & Co Advocates and dated 6<sup>th</sup> July, 2017.***
- ◆ ***90- day Statutory Notice under Section 90(2) of the Land Act, 2012 by Messrs Kimondo Gachoka & Co Advocates and dated 6<sup>th</sup> July, 2017.***
- ◆ ***40- day Notice of Intention to Sell/Redemption Notice by Messrs Kimondo Gachoka & Co Advocates and dated 18<sup>th</sup> December,***

2017.

24. I am therefore satisfied that the plaintiff was duly served with the statutory notices pursuant to Section 90 of the Act. Be that as it may and even assuming that the said statutory notices were not served on the plaintiffs, courts have severally held that lack of or improper service of statutory notices cannot be a basis for barring a charge from exercising its statutory power of sale where a default has been established. This was the position taken by the Court of Appeal in *National Bank of Kenya Limited v Shimmers Plaza Ltd* [2009] eKLR wherein the learned judges held as follows:

***“We venture to say that where the court is inclined to grant an interlocutory order restraining mortgagee from exercising its statutory power of sale solely on the ground that the mortgagee has not issued a valid notice, then in our view, the order of injunction should be limited in duration until such time as the mortgagee shall give a fresh statutory notice in compliance with the law. We respectfully think that the learned judge did not exercise his discretion judicially in the circumstances of this case when he granted an order of injunction until the determination of the suit.”***

#### **Valuation.**

24. The plaintiffs faulted the defendants for advertising the suit property for sale in the absence of a forced sale valuation thereby undermining the best interests of the chargor by not offering to sell the property at the prevailing market value.

25. On its part, the 1<sup>st</sup> defendant stated that it engaged the services of Dominion Valuers Limited who carried out a pre-sale valuation indicating the current open market value of the suit property at Kshs 44 million and the Forced Market sale value at Kshs 33 million.

26. The defendants attached the valuation report to the replying affidavit as annexure “F”. I note that the plaintiff did not challenge the valuation report presented by the defendants through a separate valuation report showing that the suit property had a higher value than the value presented by the defendant’s valuers. Moreover, courts have taken the stand that lack of valuation or alleged under valuation of charged property cannot stop a charge from the exercise of its statutory power of sale. (See *Jashvantsing L. Solanki v Diamond Trust Bank Ltd.* [2014] eKLR).

#### **Interest rates.**

27. The plaintiffs claim was that the 1<sup>st</sup> defendant overcharged interest on the loan facility and did not adjust the interest rates in compliance with the interest rates capping regulation. I have carefully perused the plaintiffs’ pleadings and I note that at no point did the plaintiffs write to the 1<sup>st</sup> defendant to lodge a complaint over the applicable interest rates.

1. Clearly therefore, one can say that the challenge on the applicable interest rates at this point may be an afterthought. In any event, the issue of illegal charges and interest rates are issues that can be canvassed at the hearing of the main suit and cannot stand in the way of a charge in exercising its statutory power of sale where there is default. Courts have taken the position that they will not grant injunction on the basis of disagreements over interest rates. A case in point is the decision in *Fina Bank Ltd v Ronak Ltd* (2001) 1 EA 54 (CAK) where the Court of Appeal held:

***“As the charge documents which were in evidence before the High Court expressly reserved, in favour of the Appellant, the right to charge interest at variable rates its absolute and sole discretion, the contractual relationship between the parties could not be impeached because the exact rate or rates had not been specified. Accordingly the Respondents had not made out a case for injunctive relief in their favour and the order of the High Court had no sound basis.”***

2. Similarly, in *Pelican Investments Ltd v National Bank Of Kenya Ltd*, [2000] 2 EA 488 (CCK), it was held:-

***“Unless it is plain that fraud or oppression existed, the courts will not interfere with the terms of a contract or the provisions as to interest.....In any case, even if the interest charged was unconscionable, the same would only be a dispute as to amount which is not a proper ground for granting an injunction.”***

3. In *Shah v Shah* ( 1965) EA 91it was held that:-

***“An injunction restraining a mortgagee from exercising his power of sale can be granted very rarely if the dispute is only as to the amount of interest”.***

4. Again in *Sports Cars Ltd v Trust Bank Ltd*, Case No 754 of 1999, the court held that:-

***“The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute or because the mortgagor has begun redemption action, or because the mortgagor objects to the manner in which the sale is being arranged. He will be restrained, however, if the Mortgagor pays the amount claimed into court, that is the amount which the mortgagee claims to be due, unless on terms of the mortgage, the claim is excessive”.***

28. Applying the above principles to the present case, I find that the issue of the amount due to the defendant and the interest chargeable are issues that are governed by the terms of the contract between the parties and which the court cannot interfere with at this interlocutory stage.

29. Needless to say, as I have already stated in this ruling, in order to succeed in an application for injunction, an applicant must demonstrate

that his application meets the three conditions that were set in the famous case of *Giella v Cassman Brown* (supra).

30. In the present case, having found that the plaintiffs are in default of the loan repayments, I am unable to find that the plaintiffs have established that they have a prima facie case against the defendants. I find that from the material presented before me, it will not serve the interest of justice to stop the bank from proceeding with the exercise of its statutory power of sale.

**Conclusion**

31. The upshot of the above foregoing is the finding that the application dated 8<sup>th</sup> January 2020 is not merited. The same is hereby dismissed with costs. Consequently, the interim orders issued herein are hereby vacated.

**Dated, signed and delivered via Microsoft Teams at Nairobi this 14th day of May 2020 in view of the declaration of measures restricting court operations due to Covid -19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17<sup>th</sup> April 2020**

**W. A. OKWANY**

**JUDGE**

**In the presence of:**

M B Ochieng for Makori for the Defendants

Nyanyuki Ndege for Plaintiffs/Applicant

C/A & DR Hon Wanyama

**W. A. OKWANY**

**JUDGE**