



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCC NO. E228 OF 2019

BEYRUHA ACADEMY LIMITED.....1ST PLAINTIFF

SAGAL INVESTMENT LIMITED.....2ND PLAINTIFF

-VERSUS-

GULF AFRICAN BANK LIMITED.....1ST DEFENDANT

LEAKEY'S AUCTIONEERS LIMITED.....2ND DEFENDANT

RULING

1. This ruling is in respect to the application dated 25th July 2019 wherein the applicant seeks the following orders:

1. Spent

2. Spent

3. That pending the determination of this suit this honourable court be pleased to grant an order of temporary injunction restraining the defendants whether by themselves, their employees, servants, agents or auctioneers from doing any of the following acts, that is to say, from further advertising for sale, selling whether by public auction or private treaty, disposing of or otherwise howsoever completing by conveyance or appointing Receivers exercising any power conferred by Section 90(3) of the Land Act by leasing, letting, charging or otherwise howsoever interfering with the plaintiff's ownership of and title to all that parcels of land known as L.R. No. 209/18158 Diamond Park Estate, South B and L.R No. 209/12221/333(I.R No. 81080) Five Star Estate, South C.

4. That interlocutory mandatory injunctions do issue compelling the 1st defendant to render a true, proper and accurate account to the plaintiffs and the court on the actual status of the charge account(s).

5. That a declaration be issued, that the Statutory Notice issued to the plaintiff/applicant by the defendant/respondent was a nullity for being defective, for failure to detail the amount that the plaintiff/applicant must pay to rectify the default as required by Section 90(2) (b) of the Land Act No. 6 of 2012.

6. That a declaration be issued, that the issued 45 days Auctioneers Notice to sell upon the plaintiff/applicant was a nullity, as the defendant/respondent had not served upon the plaintiff/applicant a 40 days' notice to sell as required by Section 96(2) of the Land Act No. 6 of 2012.

7. That Land Title L.R NO. 209/18158(I.R No. 127286) Diamond Park Estate, South B and L.R No. 209/12221/333 (I.R No.81080) Five Star Estate, South C be valued by an independent valuer to ascertain its current market value to ascertain the extent of the security attached in exercise of statutory power of sale carried out by the 2nd defendant/respondent on the instructions of the 1st defendant/respondent.

8. That an injunction be and is hereby granted restraining the 1st and 2nd defendants from further advertising for sale, selling whether by public auction or private treaty, disposing of or otherwise howsoever completing by conveyance or appointing Receivers or exercising any power conferred by Section 90(3) of the Land Act by leasing, letting, charging or otherwise

however interfering with the plaintiff's ownership of and title to all that parcels of land known as L.R. No. 209/18158 Diamond Park Estate, South B and L.R No. 209/12221/333(L.R No. 81080) Five Star Estate, South C.

9. That costs of this application and suit be provided for.

2. The application is brought under Sections 96 and 104 of the Land Act (hereinafter "**the Act**"), Order 40 Rules 1, 2 and 4 of the Civil Procedure Rules (CPR) and is supported by the affidavits of the 1st defendant's Director **Mr. Abdi Hassan Abdi**. The application is further premised on the grounds that: -

a. That the 1st defendants have not served the plaintiffs with a Statutory Notice, as required in law and instead served the plaintiffs with a notice of Forty (40) days and thereafter served a Redemption Notice requiring it to redeem the charged property within forty five (45) days notification of sale informing the plaintiff that the property would be sold unless the alleged sum of Kshs 68,838,263.32, with interest, is paid contrary to both terms of the facility agreement dated 9th November, 2015 and the requirements of due notice to the chargor in law.

b. That the sale and auction of the property have been illegally and irregularly advertised for 1st of August, 2019 and 30th July, 2019.

c. That the defendants have sought to attach the property which belongs to the 2nd plaintiff who is the Guarantor under the Facility Agreement not the Principal Debtor under the Agreement entered into as well as the personal property of the Director of the 1st plaintiff company contrary to the terms of the Facility Agreement and the provisions of law requiring that the Guarantor be held liable only after all possible means of settling with the debtor have been exhausted. Further, the defendants have not complied with the Musharakah Agreement which provides for "profit" sharing and have not factored in the total sum of Kshs 30,000,000 paid by the 1st plaintiff to the 1st defendant.

d. That the 1st defendant have not exhausted their remedies against the Principal Debtor to warrant exercise of the statutory power of sale by attaching L.R. No. 209/12221/333(L.R No. 81080) Five Star Estate, South C belonging to the Principal Debtor which would more than have satisfied the alleged defaulted sums, therefore the actions of the 1st defendant in attaching L.R No. 209/18158 Diamond Park Estate, South B is both malicious and illegal.

e. That the plaintiffs were not given updated accounts of the sums due and owing and therefore had not been given the information to fully comprehend the extent of any alleged default by the debtor.

f. The plaintiffs will suffer irreparable harm if the properties are sold as advertised.

3. The 1st defendant opposed the application through the replying affidavit of its Legal Officer, **Mr. Lawi T. Sato** who avers that the plaintiffs were duly served with the statutory notices before the defendant sought to enforce the legal charge that it holds over L.R No. 209/18158 and L.R. No. 209/12221/333 (hereinafter "**the suit properties**"). He attached copies of notices issued together with correspondence from the plaintiffs acknowledging receipt of the notices and the debt owed as annexure marked "**LS1**".

4. He states that the statement of the loan and current accounts shows that not only is the current account overdrawn but that the quarterly payments due on 21st October 2018, 20th February 2019 and 20th June 2019 have not been paid. He faults the plaintiffs for material non-disclosure of the fact that the 1st defendant has previously indulged them over the default and that their promises to regularize the payments have not been honoured.

5. He further avers that the 1st defendant procured valuations of the suit properties prior to instructing the auctioneers to proceed with the intended auction. A copy of the valuation report was produced as annexure "**LS1**" to the replying affidavit.

6. The 1st plaintiff's deponent also swore a further supporting affidavit on 31st July 2019 wherein he avers that the statements of account exhibited by the 1st defendant are incomplete and inconclusive. He faults the 1st defendant for blacklisting the 1st plaintiff with the Credit Reference Bureau (CRB) without taking into account the contractual position that their agreement was premised on Masharakah Profit Sharing Model and not on an interest bearing account.

7. He annexed the audited accounts for the years 2016, 2017 and 2018 to the further affidavit as annexures "**AHA 12, 13 and 14**" and contended that they show the 1st defendant had so far paid the 1st defendant a total sum of Kshs 34,001,246. He further faults the 1st defendant for failing to address the issue of whether the 1st plaintiff made any losses or profits that were to be shared in terms of the Musharakah Profit Sharing Agreement.

8. He states that the 1st plaintiff's projections show that the amount due to the 1st defendant is Kshs 44,798,754 only yet the 1st defendant came up with the sum of Kshs 168,036,881.82 as the sum due which sum is not contained in the agreement of 9th November 2015.

9. The 1st defendant's deponent also swore a further replying affidavit on 30th September 2019 wherein he attached copies of the statutory notices (annexure "**LS1**") which he states were inadvertently omitted from the replying affidavit. He confirms that their agreement was based on Master Musharakah Agreement of 9th November 2015 in which it was agreed that the 1st defendant would finance the 1st applicant's purchase of various properties and would in return acquire a share in the said assets that would then be leased to the 1st applicant on agreed terms.

10. He further states that under Schedule 3 of the Master Musharakah Agreement, the 1st respondent's share would be split into several units which the 1st applicant was to purchase from time to time, gradually diminishing the 1st respondent's share with the ultimate aim of respondent this becoming the sole owner of the assets. He denies the claim that the Agreement was a profit sharing one or that it imposed any obligation on the 1st respondent to establish if the 1st applicant had made profits or losses. He disputes the method adopted by the 1st plaintiff in calculating the repayment profit rates and adds that as at the time the 1st plaintiff offered its properties as security for the Facility, it was well aware that the same would be sold in the event of a default.

11. When the matter came up for mention on 29th July 2019, this court allowed the prayer for temporary order of injunction to restrain the 1st defendant from selling the suit properties pending the hearing and determination of this application.

12. Parties thereafter canvassed the application by way of written submissions which I have carefully considered. The main issue for determination is whether the plaintiffs have made out a case for the granting of the orders of injunction. Accompanying the main prayer for orders of injunction are prayers for mandatory injunction to compel the 1st defendant to render a true and proper account to the plaintiff, valuation of the suit properties and a declaration that the statutory notices issued to the plaintiff by the 1st defendant are null and void.

Valuation

13. The plaintiffs contended that the 1st defendant did not obtain a valuation report of an independent valuer so as to ascertain the current market value in order to determine the extent of the security. I however note that contrary to the plaintiff's assertions, the 1st defendant attached a copy of a valuation report prepared by M/S Metrocosmo Limited to the replying affidavit dated 11th November 2015 which shows that the open market value of the suit properties is Kshs 80 million and Forced Sale value of Kshs 60 million. I note that this valuation report was not challenged by any other valuation report from the plaintiff's valuers, if any.

14. My finding is that the 1st defendant complied with the provisions of Section 97 of the Land Act. The said section stipulates as follow:

(1) A chargee who exercises a power to sell the charged land, including the exercise of the power to sell in pursuance 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 charge under a subsequent charge or under a lieu to obtain the best price reasonably obtainable at the time of sale.

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

1. Be that as it may and even assuming that the 1st defendant did not obtain a valuation report prior to listing the suit property for sale by public auction, courts have taken the position that the lack of a valuation report cannot preclude a charge from exercising his statutory power of sale. (See *Jashvantsing L. Solanki v Diamond Trust Bank Ltd.* [2014] eKLR).

Proper accounts

15. The plaintiffs also faulted the 1st defendant for failing to give proper and/or accurate accounts of the total amount due under the loan facility. In this regard, I note that while the 1st defendant's case was that the total sum due to them was Kshs 66,500,000 as at 7th December, 2016 while the plaintiff claimed that the outstanding amount was Kshs 44,798,754. It is therefore clear to me that the parties are not in agreement as to the exact sum due to the 1st defendant under the facility. The question which then arises is whether a dispute over the amount due under the facility is a ground for stopping the chargee from exercising his statutory power of sale. The answer to the above question is to the negative.

16. I find that the position adopted by the courts and indeed the law is that the court should not stop a charge from exercising its statutory power of sale solely on the ground that there is a dispute as to the amount due. Halsbury's Laws of England VOL.32 4th Edition states:

"A Mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute. 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 to him...."

Statutory notices

17. Section 90(1) of the Act stipulates that:

"(1) If a chargor is in default of any obligation, fails to pay interest or any other periodic payment or any part thereof due under any charge or in the performance or observation of any covenant, express or implied, in any charge, and continues to be default for one month, the chargee may serve on the chargor a notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be."

18. Under Section 90(2) of the Act, it is stated that the notice must adequately indicate the nature and extent of default, the amount to be paid to rectify the default and the time within which the money claimed is payable.

19. Section 90(3) of the Act on the other hand provides for the remedies that accrue to a chargee once the chargor fails to comply and remedy its default within the 90 days period.

Section 96(2) of the Act stipulates as follows: -

“(2) Before exercising the power to sell the charged land, the chargee shall serve on the chargor a notice to sell in the prescribed form and shall not proceed to complete any contract for the sale of the charged land until at least forty days have elapsed from the date of the service of that notice to sell.”

20. Rule 15 of the Auctioneers Rules imposes an obligation on the auctioneer to send a chargee a written redemption notice of a minimum 45 days.

21. In the present case, I note that in both replying affidavits, the 1st defendant demonstrated through the attached annexures that it sent the requisite statutory notices to the plaintiffs. I also note that the plaintiffs acknowledged the receipt of the notices through their letter dated 24th January 2017 wherein the 1st plaintiff’s director states, in part, as follows:

“I refer letter dated 13th DEC, 2016 reference no.GAB/AB/LIT/134 by WALKER KONTOS Advocates.

We acknowledge receipt and note it’s content.

We would like to first & foremost regret that we were unable to meet the Terms & Conditions of the facility advanced to us. No amount of explanation can warrant our default & on this we seek your indulgence & we offer our unreserved apology.

We have since cleared the outstanding arrears and default penalties on the facility by 31st December 2016 & are willing to settle the accompanying cost of the lawyer’s fees. We expect this to be reasonable & not punitive.

Despite the delays we had in fees payment, which we putting permanent solutions to, we are writing this letter as a commitment to fulfill our obligation as per our contract going forward.”

1. Having regard to the 1st plaintiff’s acknowledgement of the statutory notices and the admission of debt, I find that it is not in dispute that proper statutory notices were sent to the plaintiffs. However, even assuming that there was lack of or improper service of the statutory notices, such a lapse in procedure cannot be a basis for stopping the charge from exercising its statutory power of sale. In *National Bank of Kenya Limited v Shimmers Plaza Ltd* [2009] eKLR 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.”

Injunction.

2. The principles governing the granting of orders of injunction were stated in the oft cited case of *Giella v Cassman Brown* [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).

22. 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

23. 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 to 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”.

24. The question which arises is 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.

25. It was not disputed that the 1st applicant is indebted to the 1st defendant for monies advanced to it under the loan Facility Agreement. My finding is that owing to the 1st plaintiff's own admission of indebtedness to the 1st defendant, the plaintiff's cannot be said to have established a prima facie case against the defendants so as to warrant the granting of the orders of injunction. I also note that the plaintiffs did not indicate that they had made efforts to pay the amounts due which debt continues to attract interest.

26. Having regard to the observations and findings that I have made in this ruling, I find that the instant application is not merited and I therefore dismiss it with orders that costs shall abide the outcome of the main suit.

Dated, signed and delivered via Microsoft Teams at Nairobi this 5th day of June 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 17th April 2020.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Ogunde for the defendant

No appearance for plaintiff

Court Assistant: Silvia