



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL CASE NO.139 OF 2018

YURUB INVESTMENT LIMITED.....1ST PLAINTIFF/APPLICANT

NEW NYANZA WHOLESALERS LIMITED.....2ND PLAINTIFF APPLICANT

VERSUS

DIAMOND TRUST (K) LTD.....1ST DEFENDANT/RESPONDENT

DALALI TRADERS AUCTIONEERS.....2ND DEFENDANT/RESPONDENT

Consolidated with

CIVIL CASE NO.451 OF 2017

LABURMAN COURTS LIMITED.....PLAINTIFF/APPLICANT

VERSUS

DIAMOND TRUST BANK (K) LTD.....DEFENDANT/RESPONDENT

RULING

(1) Before this Court are two applications for determination. The first is the Notice of Motion dated **8th November 2017** by which **LABURMAN COURTS LIMITED**, the Plaintiff/Applicant sought the following Orders:-

“1. SPENT

2. SPENT

3. THAT pending the hearing and final determination of the suit herein, the Honourable court do issue a permanent order to refrain the Defendant/Respondent whether by itself, its agents, servants or any other person acting on its authority from recovering, purporting to recover, advertising for sale, selling or in any other manner whatsoever interfering with the Plaintiffs/ Applicant’s property L.R. No.209/ 1063 Nairobi on account of the charge dated 29th 2009 created over the property.

(2) The second application is the Notice of Motion dated **6th April 2018** by which **YURUB INVESTMENTS LTD** (the 1st Plaintiff/Applicant) and **NEW NYANZA WHOLESALERS LTD** (the 2nd Plaintiff/Respondent) seeks the following Orders:-

“1. SPENT

2. SPENT

3. SPENT

4. SPENT

5. SPENT

6. THAT pending the hearing and determination of the suit filed herein, the Respondents by themselves, their officers, servants, agents or any person acting by or through their authority be restrained from advertising the suit property for sale.

7. THAT pending the hearing and determination of the suit filed herein, the Respondents by themselves, their officers, servants, agents or any person acting by or through their authority be restrained from attaching, selling, disposing of alienating, trans-ferring or in any way interfering with the Applicants interest in the suit property by way of a public auction or private treaty and/or otherwise howsoever from interfering with the Applicants' interest in the property.

8. THAT pending the hearing and determination of the suit filed herein, an order do issue directing the 1st Respondent to furnish the Applicants with a detailed and updated statement of Accounts in respect of the amounts being claimed.

9. THAT pending the hearing and determination of the suit filed herein, an order do issue directing the 1st Respondent to furnish the Applicants with the following:-

(i) Copies of Letters of offer in respect to the said amounts;

(ii) copies of executed charge documents;

(iii) Correspondence relating to revision of interest rates.

10. THAT this application be heard inter-partes on such date and at such time as this Honourable Court may direct.

11. THAT the costs of the Application be in the cause.”

(3) The application which was premised upon **Order 40 Rule 1** of the **Civil Procedure Rules 2010** and **Section 3A of the Civil Procedure Act** and all other enabling Provisions of the law was supported by the Affidavit of even date sworn by **ASHA HERSI MOGHE**, the Managing Director of the Applicant Companies.

(4) The 1st Defendant/Respondent **DIAMOND TRUST BANK KENYA LIMITED** opposed the two Applications in doing so relied on the three (3) Replying Affidavits as follows:-

(i) The Replying Affidavit dated **29th January 2018** by **Lwanga Mwangi** a Debt Recovery Officer with the Bank in **HCCC No.451 of 2017**.

(ii) The Replying Affidavit dated **28th June 2018** sworn by **Lwanga Mwangi** in **HCCC No.139 of 2018** consolidated with **HCCC No.451 of 2017**.

(iii) Further Replying Affidavit dated **1st November 2018** sworn by **Tarminder Umesh** in **HCC NO.139 of 2018** consolidated with **NRB HCCC NO.451 of 2017**.

(5) On **3rd December 2018** this file was consolidated with **HCCOM Case No.451 of 2017 LABURNAM COURTS LIMITED –VS- DIAMOND TRUST BANK KENYA LIMITED**. Since the prayers sought by the Notice of Motion dated **8th November 2017** have been subsumed into the prayers being sought in the Notice of Motion dated **6th April 2018** and given the consolidation of the two files I will render my determination in respect of the Notice of Motion dated **6th April 2018**.

(6) The application was canvassed by way of written submissions. The Plaintiff/Applicants filed their written submissions on **26th November 2018** whilst the Defendant/Respondent filed its submissions on **6th November 2018**. On **3rd December 2018** parties appeared in Court to highlight those written submissions.

BACKGROUND

(7) The 1st Defendant/Respondent (“**the Bank**”) advanced financial facilities to the 1st and 2nd Plaintiff/Applicants as follows:

(i) Facilities aggregating to the sum of **Kshs.196,000,000/=** to the 1st Applicant which were secured by a legal charge dated the **18th day of December 2009**, a further charge dated **24th August 2012** and a second further charge dated **28th August 2013** over the property known as **LR.NO.209/1063** (hereinafter referred to as the “**suit property**”).

(ii) The Bank also advanced facilities aggregating to **Kshs.336,000,000/=** to the 2nd Applicant which were secured a legal charge dated **18th December 2009**, a second charge dated **28th June 2011**, a further charge dated **24th August 2012** and a third further charge dated **30th January 2013** over the suit property.

(8) The 1st Applicant is the registered proprietor of the suit property and it also acted as a guarantor of the said loan facilities. The companies had been diligently servicing the facilities until some point its business started experiencing some turbulence and financial difficulties, subsequently falling behind on some scheduled payments. The Bank consequently caused to be advertised the suit property for sale by the 2nd Respondent. This prompted the Applicants to approach this Honourable Court seeking urgent interlocutory orders inter alia that:-

- Pending hearing and determination of the Application, the Respondents by themselves, their officers, servants, agents or any person acting through their authority be restrained from attaching, selling, disposing of, alienating, transferring or any other way interfering with the Applicant's interest in the property.

ANALYSIS AND DETERMINATION

(9) I have carefully considered the written submissions filed by both parties. The only issue for determination is whether the Plaintiff/Applicants have met the threshold for the grant of an interlocutory injunction in line with **Order 40 Rule 1(a)** of the **Civil Procedure Rules 2010**.

(10) The celebrated case of **GIELLA –VS- CASMAN BROWN & COMPANY [1973] E.A 385** set out the conditions precedent to the grant of an interim injunction. In that case it was held that:-

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

PRIMA FACIE CASE

(11) The definition of a “prima facie” case was given in the case of **MRAO –VS- FIRST AMERICAN BANK OF KENYA and 2 OTHERS** as follows:-

“A prima facie case in a Civil Case includes but is not confined to a “genuine or 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 latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case.”

(12) There is no dispute and the Plaintiff/Applicant readily accept that they received and benefitted from the loan facilities granted to them by the bank. Likewise, there is no contest that the said loan facilities fell into arrears. The Plaintiff's equally concede that the said facilities were secured by various charges over the suit property.

(13) The key question then in this matter is whether the Defendant Bank was legally justified to move to exercise its statutory duty of sale.

Section 90(1) of the **Land Act, 2012** provides that:-

“If a charger 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.

Section 96(1) of the same Act provides that:-

“Where a chargor is in default of the obligations under a charge and remains in default at the expiry of the time provided for the rectification of that default in the notice served on the charger under Section 90(1), a chargee may exercise the power to sell the charged land.

(14) The Applicants contend that the Defendant Bank failed to issue them with the requisite statutory notices under the law. The Defendant Bank on its part insists that statutory notices were properly served in full compliance with the Land Act.

(15) Annexed to the Supporting Affidavit dated **8th November 2017** sworn by **Amina Hersi Moghe** a Director of **Laburnam Ltd**, is a Statutory Notice of sale dated **23rd May 2017** [Annexure “A HM2”]. Further in that same affidavit at paragraph 8, 9 and 10 is a confirmation by the deponent (on behalf of the Applicant) that said Statutory Notice was in fact received. The said **Amina Hersi Moghe** depones as follows:-

“8. THAT on 23rd May 2017 the Defendant/Respondent issued statutory notices to remedy the default under Section 90 of the Land Act 2012.

9. THAT upon receipt of the statutory notice in Paragraph II above our advocates responded pointing out that the

Plaintiff/Applicant had paid fully the loan and therefore the Statutory Notice was misplaced and ought to have been withdrawn.”

(16) In light of this clear admission it is mischievous and disingenuous not to mention borderline perjury for the Applicants to claim that they were not served with statutory notices.

(17) Furthermore, the said Notices were sent to the Postal Address of the 1st Plaintiff/Applicant and were copied to the other parties. The Applicants responded to the Section 90 Notice through their Advocates and are therefore estopped from denying receipt of the same.

(18) The Notices under **Section 96** of the **Land Act** were sent to the Applicant by way of registered mail. The existence of prepaid stamp is sufficient proof of this fact. In the case of **ESTHER KEMUMA MOGAKA & OURU POWER LTD –VS- DIAMOND TRUST BANK, Misc ELC No.284 of 2016** it was held:-

“The notices show on the face of it that they were sent under certificate of posting and are embossed with prepaid stamps denoting the same were paid for. Under clause 24(0) of the instrument of charge dated 13th April 2010 any notice or demand for payment was deemed to have been received or served 5 days following the date of posting provided the notice or demand was properly addressed.

I therefore find the Plaintiffs’ allegations that no statutory notices were issued to be a mere **“red herring”** thrown in as an attempt to confuse issues.

(19) The Plaintiff/Applicant takes issue with the amounts being claimed by the Defendant Bank.

(20) The Banks position is that at **31st January 2018** the amounts due under the three facilities was **Kshs.175,964,762.77, Kshs.371,263,613.00** and **Kshs.16,231,260.51** respectively. In any event it is trite law that a dispute over accounts cannot bar the Banks right to exercise its statutory power of sale. In the **MRAO** case [supra] **Hon Justice Richard Kwach** (as he then was) held as follows:-

“The circumstances in which a mortgagee may be restrained from exercising his statutory power of sale are set out in Halbury’s Laws of England, vol.32 (4th edition) paragraph 725 as follows:-

“725 when mortgagee may be restrained from exercising power of sale.

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 a 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 to him, unless, on the terms of the mortgage, the claim is excessive.” (emphasis added)

VALUATION

(21) The Plaintiff/Applicants claim that the Defendant Bank breached **Section 97(2)** of the **Land Act** in that at the time when the suit property was being advertised for sale no recent valuation had been conducted on the suit property. The Applicants aver that the last valuation on the suit property was conducted way back on **7th April 2004**. Again I note with consternation that this is an outright lie being peddled by the Applicants.

(22) The Defendant Bank avers that a valuation was conducted on the suit property on **24th July 2018**. A copy of said Valuation Report s annexed to the Further Replying Affidavit of **Tarminder Umesh** dated **1st November 2018** as (Annexure **“TU2”**)

(23) Based upon the foregoing, I find that the Plaintiff/Applicants have failed dismally to show a prima facie case in order to warrant the orders being sought in their application.

IRREPARABLE HARM

(24) The Applicants plead that should the sale of the suit property by auction be allowed to proceed, they stand to suffer irreparable harm that cannot be adequately compensated by an award of damages.

In the case of **NGURUMAN LIMITED –VS- JAN BONDE NIELSEN (2014) eKLR**, the Court of Appeal held thus:-

“On the second factor, that the applicant must establish that he *“might otherwise”* suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima facie, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot *“adequately”* be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or the harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy.”

(25) Further in **PAUL GITONGA WANJAU –VS- GATHUTHI TEA FACTORY COMPANY LTD & 2 OTHERS [2016] eKLR**, the Court relied on **Halsbury’s laws of England** to define irreparable loss and stated that:

“First, that the injury is irreparable and second, that it is continuous. By the term irreparable injury is meant injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact that the Plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by injunction, if his rights cannot be adequately protected or vindicated by damages.”

(26) The Applicants having voluntarily charged the suit property to the Bank and having received and benefitted from the facilities granted to them cannot now claim that they stand to suffer **“irreparable harm”** if the property is sold due to default. In the case of **ANDREW M. WANJOHI –VS- EQUITY BUILDING SOCIETY & 7 OTHERS [2006] eKLR**, the Court held thus:-

“...by offering the suit property as security the chargor was equating it to a commodity which the chargee may dispose of so as to recover his loan together with interest thereon.”

(27) The value of the suit property is quantifiable and may be compensated by an award of damages. Indeed **Section 99(4) of the Land Act 2012** provides that:-

“A person prejudiced by an unauthorized, improper or irregular exercise of the power of sale shall have remedy in damages against the person exercising that power.”

All in all, I find the Applicants have failed to demonstrate that they stand to suffer irreparable harm if the sale is allowed to proceed.

BALANCE OF CONVENIENCE

(28) This is a facility which was granted to the Applicants way back in the year **2012**. To date the facility remains in arrears. The Applicants have not demonstrated that they are servicing said facility. The bank is entitled to recover its monies.

In **AMIR SULEIMAN –VS- AMBOSELI RESORT LIMITED [2004] eKLR**, **Hon Justice J.B Ojwang** (now retired) stated:-

“The Court in responding to prayers for interlocutory injunctive reliefs, should always opt for the lower rather than the higher risk of injustice.”

My view is that in this case the balance of convenience tilts in favour of the Defendant/Bank.

(29) Finally it is pertinent to note that **Hon Justice Francis Tuiyott** a Judge of the High court in **Nairobi HCCC NO.175 of 2018** considered an application for injunctive relief over the same property. In that case the Hon Judge ruled thus:-

“THAT the Bank is at liberty to exercise its statutory power of sale upon issuing a proper notice under the Auctioneers Rules.”

The Applicants did not bring this decision to the attention of this court which amounts to material non-disclosure. This application is an attempt to review or cause this court to sit on appeal over the decision of a Judge of concurrent jurisdiction, which is an abuse of court process.

CONCLUSION

(30) Based on the foregoing, I find no merit in the current application and I decline to grant the injunctive orders sought. The application dated **6th April 2018** is hereby dismissed in its entirety. Costs are awarded to the **1st Defendant/Respondent**.

Dated in **Nairobi** this...**5th** ..day of **June 2020**.

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Justice Maureen A. Odero