



IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL CASE NO. E087 OF 2020

BETWEEN

AHMED SHEIKH.....PLAINTIFF

AND

FIRST COMMUNITY BANK LIMITED.....1ST DEFENDANT

ALLIED EAST AFRICA LIMITED.....2ND DEFENDANT

RULING

Introduction

1. The Plaintiff is the owner of the property known as House No. 78 situated on LR No. 209/18945 (IR No. 115422) in Monali Park, South C within Nairobi County (“the suit property”). He charged the property in favour of the 1st defendant (“the Bank”) to secure facilities amounting to USD 180,000.00 advanced to the 2nd defendant (“the Company”) by a letter of offer dated 11th March 2015.

2. The Plaintiff complains that the Bank advertised the suit property for sale by public auction on 23rd March 2020. It therefore invoked **Order 51** of the *Civil Procedure Rules*, sections **1A, 1B,3A, 18(b)(i)** of the *Civil Procedure Act (Chapter 21 of the Laws of Kenya)*, sections **90** and **96** of the *Land Act, 2012* (“the *Land Act*”) and **rule 15** of the *Auctioneers Rules* and filed the Notice of Motion dated 25th March 2020 seeking the following order for determination:

[3] THAT this Honourable Court be pleased to issue an Order restraining GARAM AUCTIONEERS or any other Auctioneers acting under the authority of the 1st Respondent/Defendant herein from selling, transferring or alienating or in any other way interfering with the property known as HOUSE NO. 78 ON LR NO. 209/18945 (IR NO. 115422) in MONALI PARK, SOUTH C pending the hearing and determination of this Application and the suit herein.

3. The application was supported by the Plaintiff’s affidavit and supplementary affidavit sworn on 25th March 2020 and 20th April 2020 respectively. The application was opposed by the Bank through the replying affidavit of Clarice Ajwang Ogombo, its Legal Officer, sworn on 14th April 2020. The 2nd defendant did not file any documents in support of or opposition to the motion. The parties agreed to canvass the application through written submissions.

Plaintiff’s Case

4. The Plaintiff’s case is that he guaranteed advances by the Bank to the Company only to the extent of the value of suit property which was assessed at Kshs. 18,000,000.00 in 2015. The Plaintiff stated that after he executed all the documents, he did not hear from the Bank until 22nd November 2018 when the Bank advised him that the Company had defaulted on loan repayments. The Plaintiff deponed that the Bank informed him that it would follow up with the Company.

5. The Plaintiff complained that he was not served with the required statutory notices under **section 90** and **96** of the *Land Act*. He also stated that he was not served with the 45-day notice under **rule 15(d)** of the *Auctioneers Rules*. He was therefore surprised when the suit property was advertised for sale by public auction. He also contended that he was a mere guarantor and that the Bank ought to exhaust all remedies against the Company. He stated that the Company was in the process of liquidation hence its assets would be sufficient to satisfy the Bank’s debt.

1st Defendant's Case

6. In her replying affidavit, Ms Ogombo explained that by a letter of offer dated 11th March 2015, the Bank extended to the Company financial facilities amounting to USD 180,000.00 and in order to secure the facilities, the plaintiff offered to charge the suit property as such he was not a guarantor. She further stated that the Company was under statutory administration. She further deponed that the Plaintiff was not only served with the statutory notices under **section 90** and **96** of the **Land Act** but was also served with the 45 days' notice under the **Auctioneers Rules** as evidenced by certificates of postage annexed to the deposition.

Determination

7. The parties agreed to canvass the application by written submissions in support of their respective positions. The central question I must resolve at this stage is whether, the court should issue an injunction restraining the Bank from exercising its statutory power of sale. In **Nguruman Limited v Jane Bonde Nielsen and 2 Others NRB CA Civil Appeal No. 77 of 2012 [2014] eKLR** the Court of Appeal reiterated the three conditions to be fulfilled before an interim injunction set out in **Giella v Cassman Brown [1973] EA 360** as follows:

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

(a) establish his case only at a prima facie level,

(b) demonstrate irreparable injury if a temporary injunction is not granted, and

(c) ally 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.*

8. Whether there is a prima facie case with a probability of success must flow from what is pleaded in the plaint. I must state that in his submissions, counsel for the Plaintiff raised other issues that were not pleaded in the plaint. Among the issues that were non-compliance with **section 97** of the **Land Act** concerning the valuation of the suit property and the failure to serve and notify the spouse with a notice of the intended sale. It is trite law that a party is bound by its pleadings and the court can only determine those issues that arise from and are within the confines of the pleadings (see **Dakiana Distributors (K) Limited v Kenya Seed Company Limited KSM CA Civil Appeal No. 168 of 2011 [2015] eKLR**). I shall therefore limit my consideration to what is pleaded.

9. The Plaintiff's key complaints in the plaint and application are that he was not served with the statutory notices under **sections 90** and **96** of the **Land Act** and the auctioneers notice under the **Auctioneers Rules**. He also complains that the Bank ought to have exhausted all other remedies before proceeding to realize his property as security for the debt.

10. It is also noteworthy to point out that when the plaintiff approached the court, he only attached two documents to the supporting affidavit and list of documents; a copy of the certificate of title for the suit property and the advertisement of the suit property in the Daily Nation newspaper of 23rd March 2020. He did not attach any other documents evidencing their relationship. Moreover, and what is material to this case is that at paras. 3, 4 and 5 of the supporting affidavit, the Plaintiff states that he was a guarantor and that he signed documents of guarantee yet in the submissions filed by his counsel, he denies that he ever signed a guarantee. The Bank produced a copy of the Supplemental Charge dated 13th April 2015 executed by the Plaintiff in respect of the suit property. In my view failure to produce contract documents, constitutes non-disclosure of material facts which would ordinarily disentitle a party to equitable relief.

11. Counsel for the plaintiff submitted that the Bank failed to follow the prescribed procedure in seeking to realize property offered as security. Counsel contended that the Plaintiff was not served with statutory notices under **section 90** and **96** of the **Land Act** as required by law. He also pointed out that although the Plaintiff admitted in good faith, that he was contacted by the Bank around November 2018 informing him of the Company's default, the communication was not in the form of a statutory notice as required by the law.

12. In response to the deposition by Ms Ogombo that the Plaintiff was served by registered post and through personal hand delivery, Counsel for the Plaintiff submitted that the Bank has not tendered conclusive proof of the said service as the certificate of postage annexed to Ms Ogombo's deposition are not dated hence it is not possible to establish with certainty when the alleged postage was done. He added that the allegation of service of the notices by hand delivery is not supported by any proof.

13. Counsel for the Plaintiff also submitted that the suit property was one of the properties offered as a security to the Bank for the loan advanced to the Company and that he did not execute any personal guarantee for the said facility. He further submitted that the Plaintiff had never been a director or shareholder of the Company to warrant attachment of personal liability if the corporate veil of the Company was to be pierced to reveal the people behind the Company. The Plaintiff maintained that his liability is limited to the extent of the value of the suit property and not for the full value of the facility as demanded by the Bank through its notices.

14. Counsel for the Bank took the position that the Plaintiff executed the Charge over his property on his own volition and he was bound by

it. He pointed out that, based on the replying affidavit, the Bank had demonstrated that it served all the statutory notices required by the law and that the statutory power of sale had crystallized. The Bank accused the Plaintiff of misrepresenting the position in order to secure an ex-parte injunction.

15. The principal ground on which the Plaintiff's application is based, is that the Bank did not serve the statutory notices on him. In ***Nyagilo Ochieng & Another v Fanuel Ochieng & 2 Others*** [1995-1998] 2 EA 260, the Court of Appeal held that the burden of showing that the statutory notice has been served is on the chargee. Once the chargor alleges non receipt of the statutory notice, it is for the chargee to prove that such a notice was in fact served.

16. In order to discharge its burden, the Bank produced two notices addressed to the Plaintiff. The first one under **section 90** of the **Land Act** that was addressed to the Plaintiff is dated 11th January 2018, sent to him at **P. O. Box 30165-00100**. It gives the plaintiff 90 days from the date of receipt of the notice to pay Kshs. 115,937,006.67 or USD 169,557.8 in default of which the Bank would sell the suit property. The substance of the notice complied with the provisions of **section 90** of the **Land Act** in so far as it informed the Plaintiff of his rights.

17. The 40-day notice under **section 96** of the **Land Act** is contained in the letter dated 10th May 2018 informing the Plaintiff of its intention to sell the suit property by public auction on the expiry of 40 days of receipt of the letter and upon failure to pay Kshs. 108,157,513.37 and USD 173,733.01. It also informs the Plaintiff of the rights available to him under the law.

18. Although the notices comply with the substance of the law under **sections 90** and **96** of the **Land Act**, the question is whether the notices were sent to the plaintiff. The two certificates of postage show that the first notice was sent to the Plaintiff through **P O Box 51555-100**. The second notice sent in May 2018 was sent to the Plaintiff through **P O Box 30165-00100**. The auctioneers notice issued under the **Auctioneers Rules** was addressed to the Plaintiff through **P O Box 30165-00100**, Nairobi.

19. The address of the Plaintiff and his spouse disclosed in the charge document is **P O Box 68766-00200**. The notices issued under **sections 90** and **96** of the **Land Act** were sent to the plaintiff through 2 different addresses. The Bank did not clarify or explain why it sent the statutory notices to the Plaintiff to other addresses other than the Plaintiff's address stated in the charge. In light of this evidence placed before the court, the Plaintiff's assertion that he was not served with the statutory notices is not hollow. I would adopt what the court stated in ***Moses Kibiego Yator v Eco Bank Kenya Limited*** NKU E& L No. 426 of 2013 [2014] eKLR that:

In instances where a chargor alleges that he did not receive the statutory notice, the burden shifts to the chargee, to demonstrate prima facie, that the statutory notice was served. If there is material to show that the notice was received or acknowledged, say, through an acknowledgement letter, that will clearly demonstrate that the notice was duly served and received. If the notice was served by way of registered post, the chargee ought to place before the court sufficient material to demonstrate prima facie, that the document was duly dispatched to the proper address of the chargee, and that in the ordinary course of events, the notice must have reached the chargee.

20. Since I have found that the statutory notices were not served in the manner contemplated by the law, I hold that the Plaintiff has established a prima facie case with a probability of success in respect of the issue.

21. I am not convinced that the Plaintiff is not indebted to the Bank. The charge signed by the Plaintiff defines his liability to the Bank. The Plaintiff has not pointed to any provision of the charge or of any law that shows that the Bank must exhaust all other remedies or that limits his liability to the Bank. The charge is valid and the obligation to make payment on demand still stands. I therefore propose to take the route suggested by the Court of Appeal in ***National Bank of Kenya v Shimmers Plaza Limited*** NRB CA Civil Appeal No. 26 of 2009 [2009] eKLR where it observed as follows:

An injunction is an equitable and discretionary remedy. The duration of an order of injunction is at the sole discretion of the trial Judge and depends on the circumstances of each case. In this case, the duration of the injunction until the determination of the suit frustrated the statutory right of the bank to realize the security upon giving a notice which complies with the law. We venture to say that where the court is inclined to grant an interlocutory order restraining a 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.

22. I shall therefore grant an injunction but only limited to the period necessary to comply with the law by issuing and sending to the Plaintiff a statutory notice.

Disposition

23. I allow the Notice of Motion dated 25th March 2020 on the following terms:

(a) The 1st defendant be and is hereby restrained from exercising its statutory power of sale in respect of the property known as **House No. 78 situated LR No. 209/18945 (Original No. 209/18870/78) (IR No. 115422)** unless it issues a fresh statutory notice under **section 90** of the **Land Act, 2012**.

(b) The 1st defendant shall bear the costs of the application.

DATED AND DELIVERED AT NAIROBI THIS 6TH DAY OF JULY 2020.

D. S. MAJANJA

JUDGE

Mr Thiong'o instructed by Murimi Thiongo and Kungu Advocates for the plaintiff.

Mr Kenyariri instructed by Kenyariri and Associates Advocates for the 1st defendant.