



IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL CASE NO. E002 OF 2020

BETWEEN

ISABELLA NYAMBURA GITAU PLAINTIFF

AND

HFC (K) LIMITED.....1ST DEFENDANT

JOSRICK MERCHANT AUCTIONEERS.....2ND DEFENDANT

GARAM INVESTMENTS AUCTIONEERS3RD DEFENDANT

RULING

Introduction

1. The Plaintiff is the owner of the property known as NAIROBI/BLOCK 93/343 being House No. 343 in Golden Gate Estate within Nairobi County (“the suit property”) which she charged to the 1ST defendant (“the Bank”) to secure advances amounting to Kshs. 3,600,000.00 by the Bank to herself, Victor Ndirangu Gitau and Jayne Albert Lema (“the Borrowers”). She has moved the court by a Notice of Motion dated 14th April 2020 made under **Order 40 rule 1** of the *Civil Procedure Rules* for an interlocutory injunction restraining the 1ST defendant (“the Bank”) from selling the suit property in exercise of its statutory power of sale. The application is supported by the Plaintiff’s affidavit sworn on 14th April 2020. It is opposed by the Bank through the affidavit of its Legal Officer, Joseph Lule, sworn on 12th May 2020.
2. The facts emerging from the deposition and the court record are largely common ground. The Plaintiff filed a Notice of Motion dated 8th January 2020 seeking an injunction restraining the Bank from selling the suit property. On 9th January 2020, Okwany J., granted ex-parte interim orders. When the application came up for interparties hearing on 22nd January 2020, the parties recorded a consent on terms that the Plaintiff would pay the Bank Kshs. 600,000.00 within 40 days from the date of the consent being part settlement of the outstanding arrears in default of which the interim orders granted would be vacated. The interim orders were vacated by Okwany J., on 9th March 2020 as the Plaintiff had failed to comply with the terms of the consent by failing to pay the amount agreed.
3. The Bank proceeded to advertise the suit property for sale precipitating the application for consideration in this ruling. I had certified the application as urgent and issued an ex-parte injunction 16th April 2020 pending hearing of the application dated 14th April 2020. I was not aware at the time that Okwany J., had dealt with the matter until the parties filed their submissions and brought the matter to my attention. I mentioned the matter before the parties on 15th April 2020 direct that the matter be dealt with by Okwany J., but both counsel agreed that I should determine the application before me.
4. In her deposition in support of the application, the Plaintiff stated that she was in the process of selling one of her properties in order to offset the arrears as agreed and other liabilities but before the transaction could be completed, the operations at the Central Land Registry in Nairobi were disrupted by re-organisation and the COVID-19 pandemic. The Plaintiff deponed that despite her best efforts to settle the amount agreed upon and offering to make payment, the Bank refused to accept part of the amount. The Plaintiff further deponed that she was will to pay Kshs. 700,000.00 as agreed in the consent towards reduction of outstanding arrears. She further stated that she will suffer prejudice as the value of the suit property is Kshs. 18,000,000.00 while the entire amount including arrears amounts to Kshs. 5,000,000.00. The Plaintiff also complained that the Bank failed to serve notices under the *Land Act, 2012* (“the *Land Act*”) and the *Auctioneers Act, 1996*.

5. The Plaintiff admitted that she was indebted to the Bank and wished to be given an opportunity to comply with the consent recorded in court on 22nd January 2020. She however complained that the Bank's statutory power of sale has not crystallized as she was not served with the statutory notice under **section 90** of the **Land Act** and that the procedure for sale was not followed as the subsequent notices were also not served on her. In the circumstances, the Plaintiff submitted that she has established a case for the grant of an injunction.

6. The principles for the grant of an injunction are not disputed. In **Giella v Cassman Brown [1973] EA 358** it was held that in order to succeed in obtaining an interlocutory injunction, an applicant must establish a prima facie case without a probability of success, that the damages are an adequate remedy and in the case of any doubt, the court should decide the matter on the balance of convenience.

7. Has the Plaintiff established a prima facie case with a probability of success? In **Mrao v First American Bank of Kenya Limited & 2 Others [2003] KLR 125**, the Court of Appeal had this to say about a prima facie case:

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

8. In answer to this question, the parties' respective advocates filed written submissions. I shall refer to the depositions and submission in my consideration of this issue.

9. The Plaintiff complained that she was not served with the 90-day statutory notice required under **section 90** of the **Land Act** which lays down the requirements for a valid statutory notice. **Section 90(1)** provides as follows:

90(1) If the 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 performance or observation of any covenant, express or implied, in any charge, and continues to be in default for one month, the chargee may serve the chargor a notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be.

10. Under **section 90(2)**, the notice shall adequately advise the chargor of the nature and extent of the default by the chargor and where the default, like in this case, consists of the non-payment of any money due under the charge, the amount that must be paid to rectify the default and the time, being not less than three (3) months, by the end of which the payment in default must have been completed. The notice must also specify the consequence that if the default is not rectified within the time specified in the notice, the chargee will proceed to exercise any of the remedies referred to in this section, including sale of the charged property, in accordance with the procedures provided and the right of the chargor in respect of certain remedies to apply to the court for relief against those remedies.

11. The notice issue under **section 90** of the **Land Act** sets in motion the process of the chargee exercising its statutory remedies including the right to sell. The law requires that the notice be served on the chargor to give him or her to the opportunity to rectify the breach or redeem the property if he or she wishes. Service of this notice is a mandatory pre-requisite to the right of the Bank to sell the suit property. In **Nyagilo Ochieng & Another v Fanuel Ochieng & 2 Others [1995-1998] 2 EA 260**, the Court of Appeal held that the chargee bears the burden of showing that the statutory notice has been served on the chargor once the chargor alleges that it has not received the statutory notice.

12. In order to discharge its burden and in answer to the Plaintiff's case, the Bank relied on the depositions of the Mr Lule set out in his earlier affidavit sworn on 15th January 2020. The Bank prepared a statutory notice dated 15th February 2016 addressed to the Plaintiff through her address stated in the charge document. The statutory notice was dispatched by registered post to the Plaintiff as evidenced by a certificate of posting stamped by the Postal Corporation on 1st March 2018. This evidence has not been challenged by the Plaintiff. Based on this evidence, I am satisfied that the Plaintiff was duly served with the statutory notice dated 15th February 2016 by registered post to her address stated in the charge. Upon issuance of the notice the Bank's statutory power of sale crystallized and it was entitled to follow the necessary procedures in order to realize the security.

13. The Bank also produced the Notification of Sale issued under **section 96(2)** of the **Land Act** dated 25th March 2019 giving the Plaintiff 40-day notice from the date of receipt thereof to pay Kshs, 3,957,336,50 due and owing as at 31st March 2019 in default of which it would proceed to sell the property. The notice was sent to the Plaintiff by registered post as shown in the certificate of postage stamped by the Postal Corporation on 26th March 2019. The 45-day Notification of Sale dated 8th November 2019 was issued by the 2nd defendant. There is evidence that the Plaintiff was also served by registered post.

14. In the plaint, the Plaintiff complained that a forced sale valuation of the property had not been carried out by the Bank. Mr Lule attached a copy of the valuation of the suit property conducted by Citiscape Valuers & Estate Agents Limited dated 26th October 2019 showing the market value of the property as Kshs. 18,000,000.00 and the forced sale value as Kshs. 13,500,000.00.

15. Under **section 97** of the **Land Act, 2012** the chargee has a duty of care to the chargor to obtain the best price reasonably obtainable at the time of sale and in that regard, it is required to ensure a forced sale valuation is obtained. Under **Rule 11(b)(x)** of the **Auctioneers Rules**, a professional valuation of the reserve price must be carried out not more than 12 months prior to the proposed sale. The collective effect of these provisions is that the Bank is required to obtain a forced sale value of the property within the year of the intended sale. The valuation report relied on by the Bank is within time prescribe. The Plaintiff has not shown the valuation is doubtful or wrong by producing cogent evidence to rebut the valuation.

16. Having reviewed the evidence on record, I am convinced that the Plaintiff has not established a prima facie case with a probability of success. The evidence shows that the statutory notice under **section 90** of the **Land Act** was served on the Plaintiff and the Bank followed all other procedures to exercise its statutory power of sale.

17. I now turn to the second plank of the Plaintiff's case. It is a plea for an indulgence to enable her settle the part of the arrears which were the subject of the consent order and the opportunity to dispose of her property in order to settle debt. It is clear from the record that the parties recorded a consent on 22nd January 2020. As this was an order by consent, it could only be set aside or varied on the grounds upon which the court would set aside a contract. The jurisprudence on this issue is well settled in several decisions including **Brooke Bond Liebig Ltd vs Mallya [1975] EA 266** and **Flora Wasike vs Destimo Wamboka [1988] 1 KAR 625** where it was held that an order entered into by consent is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud, or collusion, or by an agreement contrary to the policy of the Court, or where the consent was given without sufficient material facts, or in representation or ignorance of such facts in general for a reason which would enable the court to set aside an agreement.

18. The Plaintiff has not set out that any grounds relevant to the setting aside of a consent orders as settled in our jurisprudence. The consent order was clear that the Plaintiff would pay Kshs. 600,000/- within 40 days and in default thereof the interim orders granted on 9th January 2020 would be vacated. The Bank's action of proceeding to sell the property therefore was within what was agreed by the parties. Since no grounds have been established to vary the consent, I decline to intervene further.

19. For the reasons I have set out I dismiss the Notice of Motion dated 14th April 2020 with costs to the Defendants. The interim orders in force are accordingly discharged.

DATED and DELIVERED at NAIROBI this 17th day of JULY 2020.

D. S. MAJANJA

JUDGE

Mr Ikua instructed by Okatch and Partners Advocates for the plaintiff.

Mr Kamwami instructed by J. Louis Onguto Advocates for the defendants.