IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL CASE NO. E005 OF 2020

BETWEEN

JAMES MURIGU NGUYO.....1ST PLAINTIFF

CLEMENT WARUTERE NDEGWA.....2ND PLAINTIFF

AND

AFRICAN BANKING CORPORATION LIMITED.....1ST DEFENDANT

ONESMUS MACHARIA T/A

WATTS AUCTIONEERS.....2ND DEFENDANT

AND

TWENTY TWENTY VENTURE LIMITED.....INTERESTED PARTY

RULING

Introduction

1. The 1st plaintiff is the registered owner of the property LR No. 209/8524/102 located in Nairobi ("the Nairobi property") while the 2nd plaintiff is the registered owner of LR No. KAJIADO/KISAJU/12765 located in Kajiado ("the Kajiado property"). They executed guarantees and offered their properties ("the suit properties") as security for credit facilities including invoice discounting facilities and overdrafts amounting to Kshs. 35,000,000.00 granted to the interested party ("the Company") by the 1st defendant ("the Bank").

2. The gravamen of the Plaintiffs' case is fairly straightforward and is set out in the plaint dated 13th January 2020 as follows:

> *[9] By a letter dated 10/04/2019 the 1st Defendant demanded payment of Kshs. 30,785,953.98 from the Plaintiffs which sum is inconsistent with the guarantees and a clog to the Plaintiffs equity of redemption as it includes Kshs. 8,897,334.67 on account No. .* […] *which is not secured by the guarantees and the charges.*
>
> *[10] The 1st Defendant thereafter has never issued any statutory notices as required by Section 90 and 96 of the Land Act to the Plaintiffs.*
>
> *[11] The 1st Defendant despite being in breach of Section 90 and 96 of the Land Act, has instructed the 2nd Defendant to realise the Plaintiffs' properties through an auction scheduled for 23/01/2019.*
>
> *[12] The said auction is in breach of the law as the values of the properties indicated in the Auctioneers notices is based on a valuation that is more than 1 year old.*
>
> *[13] Despite the principal borrower making a lumpsum payment of Kshs. 4,000,000/= the 1st Defendant is still keen on realizing*

both properties which is valued at more that one half the amount being demanded.

[14] The Plaintiffs properties are valued at an aggregate amount of 62,000,000/- as of July 2018 and it is unconscious and a clog to the Plaintiffs equity of redemption to dispose off both properties yet the property KAJIADO/KISAJU/12765 yet the debt claimed to be outstanding is Kshs. 23,988,453.49/-.

[15] The 1st Defendant being a secured creditor is entitled to other remedies available under the Land Act which are not unconscionable and will not clog the Plaintiffs equity of redemption.

The Application

3. In order to forestall the scheduled auction, the Plaintiffs filed the Notice of Motion dated 13th January 2020 made under **Order 40 rule 1** of the ***Civil Procedure Act*** seeking an interlocutory injunction to restrain the Bank and the 2nd defendant ("the Auctioneer") from selling the suit properties. The application was based on the grounds set out in the plaint and which I have reproduced above and the supporting affidavits of James Murigu Nguyo and Clement Warutere Ndegwa sworn on 13th January 2020. The defendants opposed the application through the affidavit of Faith Nteere, the Bank's Assistant Legal Manager, sworn on 20th January 2020.

4. As the application for consideration is one for an interlocutory injunction, the applicable principles have been settled since ***Giella v Cassman Brown*** **[1973] EA 358** where 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. The same principles were reiterated by the Court of Appeal in ***Nguruman Limited v Jane Bonde Nielsen and 2 Others*** **NRB CA Civil Appeal No. 77 of 2012 [2014] eKLR** where it stated 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.*

5. Both parties agreed to canvass the application by written submissions in support of their respective positions. In determining whether there is a prima facie case with a probability of success, counsel for the Plaintiffs raised the following three issues in his written submissions which I have paraphrased and propose to consider in resolving the application for determination;

(i) Whether the Bank issued and served proper statutory notices as required by **sections 90** and **96** of the ***Land Act***.

(ii) Whether the Bank carried out valuation for the Plaintiffs properties.

(iii) Whether it is just and equitable to put up both properties for sale when the 2nd Plaintiff's property is sufficient to secure the debt.

Whether the Bank issued and served proper notices under section 90 and 96 of the Land Act

6. The Plaintiffs admitted that the Company had defaulted on the loan to the extent of Kshs. 23,988,453.49 on account number […] which was the loan account with the Bank. They complained that in its claim against them, the Bank combined the loan account and current account when it made a demand through an email dated 10th April 2019 which had the effect of loading their securities with an additional sum of Kshs. 8,897,334.67 on account number […]. The Plaintiffs complain that the statutory notices refer to a default sum of Kshs. 31,693,444.98 as at 6th May 2019 yet this sum is not supported by any of the statements nor does the Bank demonstrate how the amount was arrived at.

7. Counsel for the Plaintiffs submitted that the statutory notices were defective as they did not particularise the extent of default by setting out the principal sum outstanding, the interest due and the arrears taking into account that the plaintiffs' were guarantors and did not have immediate access to the Company's bank statements and accounts. Counsel for the Plaintiffs relied on ***Kisimani Holdings Limited and Another v Fidelity Bank Limited*** **ML HCCC No. 744 of 2012 [2013] eKLR** where the court held that the statutory notice was defective for failing to particularise the chargor's default on various accounts. He also referred to ***Yusuf Abdi Ali Co. Ltd v Family Bank Limited*** **ML HCCC No. 405 of 2014 [2015] eKLR** where the court held that a defective statutory notice is void ab initio.

8. In response to the Plaintiffs' assertions, the Bank through the affidavit of Ms Nteere deponed that the Plaintiffs admitted that the Company

was indebted to the Bank as the facility was restructured by a letter of offer dated 28th September 2018. The Bank took the position that the securities offered by the Plaintiffs were in respect of loan facilities offered by the Bank and not in respect of specific accounts hence the Plaintiffs were fully liable for the Company's indebtedness.

9. Through Ms Nteere, the Bank produced two statements of account. The Plaintiffs agree that account no. […] was the loan account showing a balance of Kshs. 23,988,453.49 as at 30th December 2019. Although account no. . […] is titled current account it is in overdraft thus confirming that it is one of the facilities advanced by the Bank. It is into this account that the Kshs. 4,000,000/- payment admitted by Plaintiffs was made in order to reduce indebtedness. From the evidence, I hold that both accounts represent the indebtedness of the Company to the Bank.

10. The amount in both statements represents the aggregate amount demanded by the Bank in the letters dated 10th April 2019 addressed to the Plaintiffs demanding Kshs. 30,785,953.98 due and owing as at 9th April 2010. These letters were simple demands to the Plaintiffs and were not invalid merely because they did not disaggregate the principal sum and interest. Although the Plaintiffs did not plead this argument in respect of the statutory notices issued by the Bank, I will deal with the same argument in relation thereto in the interests of justice and for purposes of completeness.

11. Under **section 90(2)** of the ***Land Act***, a notice issued under **section 90(1)** shall adequately inform the recipient of the following matters;

> *(a) the nature and extent of the default by the chargor;*
>
> *(b) if the default 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 months, by the end of which the payment in default must have been completed;*
>
> *(c) if the default consists of the failure to perform or observe any covenant, express or implied, in the charge, the thing the chargor must do or desist from doing so as to rectify the default and the time, being not less than two months, by the end of which the default must have been rectified;*
>
> *(d) 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 in accordance with the procedures provided for in this sub-part; and*
>
> *(e) the right of the chargor in respect of certain remedies to apply to the court for relief against those remedies.*

12. The question then is whether the statutory notices dated 14th May 2019 comply with the provisions of **section 90(2)** of the ***Land Act***. The provisions do not demand that the chargee should set out the minutiae of what is due in terms of breaking down the principal, interest and arrears. The details necessary are those that adequately inform the chargor of the nature of the default and will depend on the nature of default and what is necessary to rectify the default. In this case and under the letter of offer dated 28th September 2018, the loan ought to have been paid by 28th September 2019. This was not a case where payment of arrears only or interest only would regularize the loan account. It is a case where the total amount representing the principal and interest was due for payment and the Bank was entitled to demand the full amount. The Plaintiffs would only discharge the properties by paying the outstanding sum.

13. Based on the material before me, I find and hold that the Company was indebted to the Bank and the amount demanded from the Plaintiffs represented the indebtedness which the Plaintiffs duly guaranteed.

14. The Plaintiffs unequivocally stated that they were not served with the 90-day statutory notice required under **section 90** of the ***Land Act***. The statutory notice so issued 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 the opportunity to rectify the breach or redeem the property if he or she wishes. Thus, service of this notice is a mandatory pre-requisite if the Bank wishes to exercise any of its statutory remedies.

15. 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 that it has not received it. In ***Moses Kibiego Yator v Eco Bank Kenya Limited*** **NKU E& L No. 426 of 2013 [2014] eKLR** the court reiterated the same position and observed as follows:

> *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 chargor, and that in the ordinary course of events, the notice must have reached the chargor.*

16. In order to discharge its burden, the Bank relied on Ms Nteere's deposition together with the annextures. The Bank's advocates issued the statutory notice dated 14th May 2019, addressed it to the 1stPlaintiff using his address stated in the charge document and thereafter sent it by registered post as evidenced by the certificate of posting dated 17th May 2019. The Bank's advocates also issued a statutory notice dated 15th May 2019 to the 2nd Plaintiff addressed to him using the address specified in the charge document and dispatched it by registered post as evidenced by the certificate of posting dated 17th May 2019. All this evidence is prima facie evidence of the fact that the Bank sent and the Plaintiffs received the statutory notices sent to them by registered post. This evidence was not controverted by the Plaintiffs at all.

17. Under **section 96(2)** of the ***Land Act***, the Chargee is required to send to the chargor a 40-day notice of intention to sell the charged property after expiry of the 90-day notice issued under **section 90** of the ***Land Act***. The Bank submitted by deposition, the two notices dated

27th August 2019 sent to the Plaintiffs to their addresses stated in the respective charge documents by registered post on 29th August 2019. The postage of these notices was also evidenced by certificates of posting. The Auctioneer also issued Notifications of Sale of the suit properties dated 11th November 2019 under the ***Auctioneers Rules***. From the notices annexed, the same are endorsed by the Plaintiffs as having been received.

18. From the totality of the evidence, I am satisfied that the statutory notices issued under **sections 90** and **96** of the ***Land Act*** and the notices issued under the ***Auctioneers Rules*** were duly served on the Plaintiffs.

Whether the Bank should exercise alternative remedies

19. The Plaintiffs deponed that the Bank has put up both properties for sale despite the Company paying Kshs. 4,000,000.00 towards reduction of its indebtedness. They also complained that since the Kajiado property was valued at Kshs. 47,000,000.00 with a forced sale value of Kshs. 35,250,000.00, it was sufficient to discharge the outstanding loan hence it was unconscionable and a clog on the chargee's equity of redemption to sell both properties. The Plaintiffs further deponed that the 2nd Plaintiff was willing to have the Kajiado property cover the entire debt in view of its value.

20. The position taken by the Bank is that having admitted that the Company is indebted, the Plaintiffs cannot dictate to the Bank which property to sell. The Bank maintained that the Plaintiffs voluntarily offered their properties as security hence they are both available for sale once default is established.

21. Under **section 90(3)(1)** of the ***Land Act*** once the chargor has failed to comply with the 90-day notice issued under **section 90(1)** of the ***Land Act***, the Chargee may do any of the following:

(a) Sue the chargor for any money due under the charge,

(b) Appoint a receiver of the income of the charged land,

(c) Lease the charged land, or if the charge is of a lease, sublease the land,

(d) Enter into possession of the charged land; or

(e) Sell the charged land.

22. In this case the Bank opted to exercise its statutory power of sale. I agree with counsel for the Bank that the Bank was not under any duty to the Plaintiffs to give up one security over another. Both Plaintiffs charged the suit properties on the understanding that the Bank would sell any or either of them in the event of default by the Company.

23. Counsel for the Plaintiffs submitted that the action by the Bank would clog the Plaintiffs equity of redemption. The equity of redemption refers to the right to the chargor to pay the debt secured by the property at any time without hindrance from the chargee in order to discharge the security over the property hence the maxim, *"once a mortgage always a mortgage"*. This right is protected under **section 89** of the ***Land Act*** by limiting the rights of the chargor to exercise any of its rights in the event of default only in the manner prescribed by the ***Land Act***. Further, **section 102** of the ***Land Act*** preserves the right of the charge to pay the sums secured by the charge before the charged property is sold and upon payment, the chargor is obligated to deliver the discharge of charge and the documents of title.

24. The sale of either property by the Bank does not, in my view, prevent the Plaintiffs from tendering the amount secured by the charge at any time before the sale hence their equity of redemption is not clogged in any way. The Plaintiffs did not point to any provision in the law or charge documents which limits the chargee's right to dispose of either or all of the suit on account of the amount of the debt. Once the charges statutory power of sale has crystallized, the charge is entitled to sell the property unless the chargor tenders the amount demanded to remedy the breach. Once the property is sold, the chargee recovers it debt and related expenses and any residue is, under **section 101(e)** of the ***Land Act***, is paid to the person immediately entitled to discharge the charge.

25. At this point, I propose to deal with the issue raised at length on behalf of the 2nd Plaintiff by his counsel suggesting that the charging of his property was an unfair and unconscionable transaction which the court ought to consider and set aside. Counsel cited several cases including ***Lloyds Bank Ltd v Bundy*** **[1974] 3 ALL ER 757**, ***Fry v Lane*** **[1886 -90] All ER 1084** and ***Mombasa Bricks & Tiles Limited & 5 Others v Arvind Shah & 7 Others*** **MSA CA Civil Appeal No. 117 of 2018 [2019] eKLR** to support its submissions on this argument and allow the Bank to only sell one property. The short answer to this submission is that the Plaintiffs pleaded nothing of the sort in their plaint as required by **Order 2 rule 10** of the ***Civil Procedure Rules*** and this court cannot go outside the confines of their pleading to determine a prima facie case with a probability of success.

Valuation of the suit properties

26. Under **section 97** of the ***Land Act***, 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. It is the burden of the chargee to demonstrate that is has complied with the provisions of **section 97** of the ***Land Act*** and the ***Auctioneers Rules*** by valuing the property within the prescribed time.

27. The Bank exhibited a valuation report dated 15th August 2019 prepared by Acumen Valuers Limited in respect of the Nairobi property.

The Bank did not produce any valuation report in respect of the Kajiado property. Since the sale of the Nairobi property was scheduled for 23rd January 2020, the report was within the prescribed period. On the other hand, the Plaintiffs exhibited that Valuation prepared by Sedco Valuers (K) Ltd dated June 2018 was in respect of the Kajiado property.

28. I cannot therefore fault the proposed sale of the Nairobi property on account of lack of the valuation. However, in respect of the Kajiado property, I hold that since the statutory power of sale has crystallised and the Bank is entitled to follow the procedures necessary to exercise that power including valuation of the property in compliance with the law, I would therefore only direct the Bank to value the property appropriately if it wishes to proceed with the sale.

Whether damagees are an adequate remedy and the balance of convenience

29. The Plaintiffs voluntarily gave up the suit properties as securities to the Bank for advances to the Company. They understood that in the event the Company defaulted, the properties would be sold to recover the debt. In these circumstances, I can only conclude that damages are an adequate remedy. This position is buttressed by **section 99(4)** of the ***Land Act*** which contemplates that damages are the remedy for any irregular sale of the charged property.

30. Likewise, the balance of convenience does not favour the Plaintiffs. Company is in default; interest continues to accrue therefore issuing an injunction pending the hearing and determination of the suit will delay the day of reckoning.

Disposition

31. Subject to the 1st Defendant conducting an updated valuation of the property KAJIADO/KISAJU/12765 before proceeding to exercise its statutory power of sale, I dismiss the Notice of Motion dated 13th January 2020 with costs to the Defendants.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF JULY 2020.

D. S. MAJANJA

JUDGE

Mr Kariuki instructed by OG Law LLP Advocates for the plaintiffs.

Mr Mugisha instructed by Nyaanga and Mugisha Advocates for the defendants.