REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL CASE NO. 18 OF 2018

(FORMERLY ELC NO. 400 OF 2017)

FLOMANU BEST SOLUTIONS SERVICES LTD.....PLAINTIFF

VERSUS

EQUITY BANK LIMITED.....DEFENDANT

RULING

[1] Before the Court for determination is the Notice of Motion dated **15 December 2017.** The said application was filed by the Plaintiff pursuant to **Sections 1A, 1B, 3A** of the **Civil Procedure Act, Sections 90 and 96(2)** of the **Land Act, 2012** and **Order 40 Rules 1 and 2** of the **Civil Procedure Rules, 2010,** for the following orders:

[a] Spent

[b] Spent

[c] That the Court be pleased to issue an injunction restraining the Defendant whether by itself, its servants and/or agents or otherwise howsoever from selling, advertising for sale, transferring or in any way disposing of or interfering with the Plaintiff's occupation and ownership of **Land Parcel No. UASIN GISHU/KIMUMU/2205** pending the hearing and determination of this suit.

[d] That the costs of the application be provided for.

[2] The application was predicated on the grounds that no statutory notice in accordance with the law was served upon the Plaintiff notifying him of his default; that the alleged statutory notices are defective, illegal and void as the same ought to have been issued by the Defendant and not the Auctioneer; and therefore that the power of sale has not crystallized. It was further the contention of the Plaintiff that the Defendant did not comply with **Section 97(2)** of the Land Act that required that a Valuation Report be prepared and a forced sale value be ascertained before sale. For these reasons, the Plaintiff urged the Court to find that a *prima facie* case has been made out; that it stands to suffer irreparable loss for which an award of damages would not be adequate recompense; and that the balance of convenience tilts in its favour, on the basis of which the orders sought ought to be made.

[3] The application was supported by the affidavit of **Emmanuel Kipchirchir Kipsat**, sworn on **15 December 2017**, in which he averred that the Plaintiff obtained a loan of **Kshs. 1,080,000/=** from the Defendant which was secured by a Charge over the Suit Property; and that the Defendant had, without any justifiable reason advertised the said property for sale by public auction without complying with the provisions of the law prior to such sale. **Mr. Kipsat** further averred that if indeed the foregoing position were to be vindicated at the trial, it would be unjust and most inequitable for the Defendant to be allowed to proceed with the proposed sale at this point in time.

[4] On behalf of the Defendant, a Replying Affidavit was sworn by **Timothy Biwott** on **8 March 2018** to the effect that the Plaintiff was, at its own request, given a loan by the Defendant of **Kshs. 500,000/=** in the year **2013**; and that the said loan was secured by a Charge over the Suit Property dated **24 June 2013**. That there was a further advance and Further Charge that was executed in the Defendant's favour, such that by **13 March 2014**, the Defendant had disbursed to the Plaintiff an aggregate of **Kshs. 1,400,000/=.** It was further the contention of the Defendant that the Plaintiff failed in its duty to service the loan and therefore had accumulated arrears of **Kshs. 879,930.42** as at **20 January 2018** in spite of demand by the Defendant for payment; and therefore that its statutory power of sale had crystallized by the time it instructed **Kolato Auctioneers** to sell the charged property, since all the requisite statutory notices had been issued in accordance with the law. He exhibited all the pertinent documents as annexures to his affidavit and urged for the dismissal of the Plaintiff's application.

[5] The application was disposed of by way of written submissions which were filed herein on **16 March 2018** and **25 July 2018,**

respectively. Counsel for the Plaintiff raised two issues for the Court's consideration, namely: whether the statutory notices were duly served upon the Plaintiff; and whether the Defendant carried out a valuation of the charged property as by law required. Counsel reiterated the Plaintiff's posturing that it was not served with the requisite notices; and that the notices alleged to have been served by the Defendant were not properly served, as nothing other than personal service could do. He relied on the case of **Nyagilo Ochieng & Another vs. Kenya Commercial Bank Limited [1996] eKLR** for the proposition that it was the obligation of the Defendant, as the Chargee, to prove that the notices were indeed served.

[6] With regard to the question whether the Defendant complied with **Section 97(2)** of the **Land Act**, Counsel for the Plaintiff submitted that, although a forced sale value as at **2013** was posted on the Auctioneer's Redemption Notice, no valuation was done; with the result that the forced sale value had been so understated as to amount to an illegality. The Defendant also placed reliance on the cases of **Francis Mogaka Maranya vs. National Bank of Kenya Ltd & Another [1995-1998] 1 EA 177** and **Albert Mario Cordeiro vs. Vishram Shamji [2015] eKLR** to support his submissions.

[7] Counsel for the Respondent approached the matter from the standpoint of the principles enunciated in the case of **Giella vs. Cassman Brown & Co. Ltd [1973] EA 358** and submitted that the Plaintiff had neither demonstrated a *prima facie* case, nor shown that it stood the risk of suffering irreparable harm. The cases of **Maithya vs. Housing Finance Company of Kenya & Another**; **Maltex Commercial Supplies Limited & Another vs. Euro Bank Limited (In Liquidation) HCCC No.82 of 2006; Ethics & Anti-Corruption Commission & 3 Others vs. African Safari Club Limited & 2 Others [2013] eKLR** were relied on by the Respondent to support the submission that charged properties are offered as security on the understanding that they stand the risk of being sold in the event of default; and therefore that so long as the requisite notices are duly served, a chargee's statutory power of sale should not be clogged. On the authority of **Daniel Kamau Mugambi vs. Housing Finance Company of Kenya Ltd [2006] eKLR** it was the submission of Counsel for the Defendant that the Plaintiff, having defaulted in repaying the subject facilities, should not be aided by equity. Counsel therefore prayed that the instant application be dismissed with costs.

[8] Order 40 Rule 1(a) of the **Civil Procedure Rules** provides that:

> **"Where in any suit it is proved by affidavit or otherwise that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongly sold in execution of a decree ... the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders."**

[9] Having given careful consideration to the application, the grounds raised in support thereof, the affidavits and the annexures relied on as well as the submissions made herein by Learned Counsel, there is no dispute that the Plaintiff did approach the Defendant for a loan for which title for the Suit Property, namely, **Uasin Gishu/Kimumu/2205** in the name of one of the Plaintiff's directors, **Emmanuel Kipchirchir Kipsat**, was offered as security. There appears to be not dispute either that the Plaintiff defaulted in servicing that facility; and that this was the reason why the Plaintiff took steps with a view of realizing the security. Accordingly, the key issue for the Court's determination is whether the Plaintiff has satisfied the conditions set out in the case of **Giella vs. Cassman Brown & Co. Ltd** (supra), wherein it was held that:

> **"The conditions for the grant of an interlocutory injunction are ..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."**

[10] As to what amount to a *prima facie* case, the Court of Appeal, in Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others [2003] KLR 123 furnished the following helpful definition:

> **"A prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case in which on the material presented to the Court a tribunal properly directing 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 latter."**

[11] This being an interlocutory application, the Court need not examine closely the merits or otherwise of the Plaintiff's case. In **Nguruman Limited vs. Jan Bonde Nielsen & 2 Others: Civil Appeal No. 77 of 2012,** the Court of Appeal made this point thus:

> ***"We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right, which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right, which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed."***

[12] In the light of the foregoing principles, I have given due consideration to the Plaintiffs' application and noted that it comprises of two prongs, namely: that the Defendant did not serve the requisite statutory notices under **Sections 90** and **96** of the **Land Act**; and that the property was not valued by an independent valuer as required by **Section 97** of the **Land Act**. To begin with, **Section 90** of the **Land Act,** is explicit 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 in 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.

(2) The notice required by subsection (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 remiedies 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.

(3) If the chargor does not comply within ninety days after the date of service of the notice under subsection (1), the chargee may--

(a) sue the chargor for any money due and owing 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.

(4) If the charge is a charge of land held for customary land, or community land shall be valid only if the charge is done with concurrence of member of the family or community the chargee may--

(a) appoint a receiver of the income of the charged land;

(b) apply to the court for an order to--

(i) lease the charged land or if the charge is of a lease, sublease the land or enter into possession of the charged land;

(ii) sell the charged land to any person or group of persons referred to in the law relating to community land.

[13] Section 96 of the Land Act, on the other hand provides that:

(1) Where a Chargor is in default of the obligation under a charge and remains in default at the expiry of the time provided for the rectification of the default in the notice served on the Chargor under Section 90 (1), a Chargee may exercise the power to sell the charged land.

(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.

[14] The Defendant annexed to the Replying Affidavit copies of the requisite statutory notices served under **Section 90** and **96** of the **Land Act**, as well as **Rule 15** of the **Auctioneers Rules, 1997.** The copies were marked as **Annexures TB11a, b, and c**. Annexed to the Replying Affidavit are copies of the List of Registered Postal Packets, showing that the Notices were sent by registered post to the Plaintiff and its Guarantors. The Auctioneer's Redemption Notice and Notification of Sale were also exhibited as **Annexure TB12**. Those documents also show that they were served.

[15] I note however that the Plaintiff challenged the mode of service, contending that what was required in this instance was personal service as opposed to service by post. The Plaintiff relied on **Nyagilo Ochieng & Another vs. Kenya Commercial Bank Limited [1996] eKLR** to

support his submission that once the chargor alleges non-receipt of the statutory notice, it becomes the obligation of the chargee to prove that the notices were indeed served. I have no quarrel with that submission. However, it is notable that in **the Nyagilo Ochieng Case**, the Bank did not prove postage but opted to rely on file copies of the notices issued. Accordingly the Court of Appeal made the observation that:

> **"It would have been a very simple exercise for the bank to produce a slip or slips showing proof of posting of the registered letter or letters containing statutory notice or notices. The bank did not do so. Instead an officer from the bank simply produced file copies of the notices to prove that the same were sent. Even on a balance of probability it is not sufficient to say that a file copy is proof of posting. Unless the receipt of statutory notice is admitted, posting thereof must be proved and upon production of such proof the burden of proving non-receipt of such notice or notices shifts to the addressee as is contemplated by section 3(5) of the Interpretation and General Provisions Act, Cap 2, Laws of Kenya."**

[16] Contrary to the submissions of the Plaintiff's Counsel, there is no gainsaying that **Sections 90 and 96 of the Land Act** envisage service in writing. Accordingly**, Section 3(5)** of the **Interpretation and General Provisions Act**, is explicit that:

> **"Where any written law authorizes or requires a document to be served by post, whether the expression "serve" or "give" or "send" or any other expression is used, then, unless a contrary intention appears, the service shall be deemed to be effected by properly addressing to the last known postal address of the person to be served, prepaying and posting, by registered post, a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would have been delivered in the ordinary course of the post."**

[17] Clearly therefore, the burden shifted to the Plaintiff to prove that he did not receive the notices by showing, for instance, that the address used did not belong to him. The notices were evidently sent to the very address that the Plaintiff had supplied for purposes of the Letters of Offer, the Charge and Further Charge. Hence, there being no proof to the contrary by the Plaintiff, service herein is deemed to have been duly made of the requisite notices.

[18] As to whether the charged property was valued for purposes of the sale**, Section 97** of the **Land Act** states that:

> **(1) A Chargee who exercises a power to sell the charged land, including the exercise of the power to sell in pursuance of an order of court, owes a duty of care to the Chargor, any Chargee under a subsequent charge or under a lien to obtain the best price reasonably obtainable at the time of sale.**
>
> **(2) A Chargee shall, before exercising the right of sale, ensure that a forced sale valuation is undertaken by a Valuer.**
>
> **(3) If the price at which the charged land is sold is twenty-five per centum or below the market value at which comparable interests in land of the same character and quality are being sold in the open market-**
>
> > **(a)** ***There shall be a rebuttable presumption that the Chargee is in breach of the duty imposed by subsection (1); and***
> >
> > ***(b) The Chargor whose charged land is being sold for that price may apply to a court for an order that the sale be declared void, but the fact that a plot of charged land is sold by the Chargee at an undervalue being less than twenty-five per centum below the market value shall not be taken to mean that the Chargee has complied with the duty imposed by subsection (1).***

[19] Since no valuation report was exhibited to demonstrate compliance with the aforestated requirement of the law, I would agree with the Plaintiff that, in this respect, it has shown that it has a right under **which has apparently been infringed by the Defendant. As to whether the Plaintiff stands to suffer irreparable loss, it is now well settled that where there is breach of the law, an applicant cannot be compelled to accept damages as recompense. Thus, In Kanorero River Farm Ltd and 3 others –vs- National Bank of KenyaLtd (2002) 2 KLR 207 Ringera, J.** (as he then was) held as follows at page 216:

> **"I would for those reasons alone accede to the Plaintiff's prayer for interlocutory injunction in respect of the two properties on the grounds that the 1st and 2nd Plaintiffs have a very strong prima facie case with a probability of success. I would not be deterred by any argument that the National Bank could compensate them in damages if it failed at the trial. In my opinion, no party should be allowed to ride roughshod on the statutory rights of another simply because it could pay damages."**

[20] Likewise, in the case of **Joseph Siro Mosioma vs. Housing Finance Company of Kenya Limited & 3 Others [2008] eKLR, it was** held that:

> ***"...damages is not automatic remedy when deciding whether to grant an injunction or not. Damages is not and cannot be substitute for the loss which is occasioned by a clear breach of the law, in any case, the financial strength of a party is not always a factor to refuse an injunction. More so a party cannot be condemned to take damages in lieu of his crystallized right which can be protected by an order of injunction."***

[21] The same position was taken ***in Sharok Kher Mohamed Ali & Another vs. Southern Credit Banking Corporation [2008] eKLR*** *thus:*

> ***"... a party deprived of his property through an illegal process would suffer irreparable loss and/or damage. In any case, a party entitled to a legal right cannot be made to take damages in lieu of his right. In essence the damages and/or loss that would be suffered by the Plaintiffs would be significant if an injunction is not granted. My position is that a party in contravention of***

the law cannot be rewarded for his contravention. (see also Olympic Sports House Limited vs. School Equipment Centre Limited [2012] eKLR)

[22] *As to whether the balance of convenience is in favour of the Plaintiff, the decision of the Court of Appeal in* ***Charter House Investments Ltd vs. Simon K. Sang and Others Civil Appeal No. 315 of 2004*** *is instructive, that:*

> ***"Injunction is an equitable and discretionary remedy, given when the subject matter of the case before the court requires protection and maintenance of the status quo. The award of temporary injunction by courts of equity has never been regarded as a matter of right, even where irreparable injury is likely to result to the applicant. It is a matter of sound judicial discretion, in the exercise of which the court balances the convenience of the parties and possible injuries to them and to third parties.***

[23] *Moreover, it is imperative that t*he Court opts for the lower rather than the higher risk of injustice. This was held to be so in the case of **Suleiman –vs- Amboseli Resort Ltd (2004) 2 KLR 589** in which **Ojwang Ag. J** (as he then was) quoted the following words of **Justice Hoffmann** in the English case of **Films Rover International vs. Cannon Film Sales Ltd (1986) 3 All ER 772**:

> **"The principal dilemma bout the grant of interlocutory injunctions, whether prohibitory or mandatory, is that there is by definition a risk that the Court may make the 'wrong' decision, in the sense of granting an injunction to a party who fails to establish his right at the trial (or would fail if there was a trial) or alternatively, in failing to grant an injunction to a party who succeed (or would succeed) at trial. A fundamental principle is therefore that the Court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been 'wrong' …"**

[24] In the instant matter, it is my considered view that the path leading to the lower risk of injustice would be to stop the impugned auction pending compliance with the express stipulations of the applicable law. This means that the Defendant is at liberty to issue fresh notices and to comply with **Section 97** of the **Land Act**, granted that the Plaintiff has not questioned the contention by the Defendant that it is in default. Accordingly, I would grant orders in his favour in the following terms:

[a] That a temporary injunction be and is hereby issued to restrain the Defendant whether by itself,its servants and/or agents or otherwise howsoever from selling,advertising for sale,transferring or in any way disposing of or interfering with thePlaintiff's occupation and ownership of **Land Parcel No. UASIN GISHU/KIMUMU/2205** pending compliance by the Defendant;

[b] That the costs of the application be in the cause.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 17TH DAY OF JANUARY, 2019

OLGA SEWE

JUDGE