



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 325 OF 2018

BAMBOO TREE HOLDINGS LTD.....APPLICANT

Versus

NATIONAL BANK OF KENYA LIMITED.....DEFENDANT

RULING

1. Bamboo Tree Holdings Limited (**Plaintiff or Bamboo**) is a borrower in default but resists the attempt by the lender (**National Bank of Kenya Ltd or the Defendant**) to enforce its Statutory Power of Sale over Kajiado/Kaputei North/24053 (**the charged property**). In a Motion of 9th August 2018, Bamboo seeks that the Bank be restrained from selling or otherwise transferring or dealing with the charged property pending the hearing and determination of the suit.

2. As in the Plaint, the motion impugns the realization process on three grounds:-

- a) **The Defendant did not issue any Notice for purposes of section 56(2) of the Land Registration Act.**
- b) **The Defendant did not issue any Notice to the Guarantors for Notice to sell the property as prescribed by the Land Act.**
- c) **Further no valuation has been undertaken by the Defendant for the intended sale as prescribed by the above said Act.**

Two of them are easily disposed of.

3. Section 56(2) of The Land Registration Act reads:-

“2) A date for the repayment of the money secured by a charge may be specified in the charge instrument, and if no such date is specified or repayment is not demanded by the charge on the date specified, the money shall be deemed to be repayable three months after the service of a demand, a written, by the chargee”.

The law here requires that a formal demand for repayment must be made in writing if no date for repayment is specified in the charge instrument. That demand is a three months demand. The object of this requirement is that for default to be deemed, the chargor must have failed to pay on the date specified by the charge to be that of repayment and if the charge is silent within three months of service of a demand as provided by the provisions of section 56(2).

4. Yet as it is clear, the three months demand is unnecessary if a date for repayment is specified in the charge. For the purposes of the dispute before Court paragraph 2.2. of the charge fixed a due date in the following terms:-

2.2 On the seventh day next after any monies shall have been advanced or otherwise become due to the Bank, the chargor shall pay to the Bank every such sum and every other sum banking facilities or for which the chargor may otherwise become liable to the Bank as aforesaid together with commission, and other usual Bank charges, legal and other costs and expenses together with the interest thereon as provided in clause 3 below.

5. The law places an obligation on a chargee exercising its Statutory Power of Sale to obtain the best price reasonably possible (section 97(1) of the Land Act). In tandem with this requirement, a chargee must undertake a current valuation of the charged property before selling the property. Of course the valuation ought to be done by a valuer (Section 97(2) of the Land Act).

6. A current valuation has been held to be a valuation carried out not more than 12 months prior to the sale. This is deduced from the

provisions of Rule 11 (b)(x) of the Auctioneers Rules which reads:-

“(1) A court warrant or letter of instruction shall include, in the case of—

(b) immovable property—

(x) the reserve price for each separate piece of land based on a professional valuation carried out not more than 12 months prior to the proposed sale”.

7. While the chargor had complained that no valuation had been undertaken as required by law, the Bank produced a valuation by Premier Valuers Ltd of 21st June 2018. A copy of the report was annexed to the Replying affidavit of Michael Mwita sworn on 28th August 2018. A date for sale had not been fixed yet but the valuation was current at the date of this application (9th August 2018).

8. I turn to the third issue. In paragraph 9 of the Plea the Plaintiff contends that the 40 day notice is not compliant because no notice to sell has been issued to the Guarantors of the debt. Although the Plaintiff does not cite the provision of the law that is said to be violated, it is section 96(3)(h) of the Land Act which provides:-

3) A copy of the notice to sell served in accordance with subsection (2) shall be served on—

(h) any other person known to have a right to enter on and use the land or the natural resources in, on, or under the charged land by affixing a notice at the property;

9. It is common ground that the Plaintiff is both borrower and chargor. It is also true that in addition to the charge over the suit property, Amin Manji and Anwar Amershi, (Directors of the company) gave joint and several personal guarantees. On the face of it, a copy of the 40 day notice of 18th July 2018 was not served upon the Guarantors. Is this reason to stop the realization process in its tracks?

10. In the design of our land law, a chargors equity of redemption is jealously guarded. Even after default of repayment of the debt, the law requires that a chargor be given two statutory notices before the chargee exercises his power of sale. These are a 3 month Notice under section 90 of the Land Act and thereafter a 40 day notice under section 96(2) of the Land Act. A further relief to the chargor is that even after expiry of the two statutory notices, a sale of the charged property by public auction ought to be preceded by a 45 day notice under Rule 15(d) of The Auctioneers Rules. The law is therefore designed to give the chargor these extended periods after default in payment to redeem his property. Any curtailment of the periods set out by statute are to be frowned upon.

11. Now, Section 96(3) of the Act requires that a copy of the 40 day notice be served on the following:-

“3) A copy of the notice to sell served in accordance with subsection (2) shall be served on—

(a) the Commission, if the charged land is public land;

(b) the holder of the land out of which the lease has been granted, if the charged land is a lease;

(c) a spouse of the chargor who had given the consent;

(d) any lessee and sublessee of the charged land or of any buildings on the charged land;

(e) any person who is a co-owner with the chargor;

(f) any other chargee of money secured by a charge on the charged land of whom the chargee proposing to exercise the power of sale has actual notice;

(g) any guarantor of the money advanced under the charge;

(h) any other person known to have a right to enter on and use the land or the natural resources in, on, or under the charged land by affixing a notice at the property; and

(i) any other persons as may be prescribed by regulations, and shall be posted in a prominent place at or as near as may be to the charged land. A chargee who has withdrawn from possession of charged land may not again enter into possession of that land, otherwise than by complying with the provisions of section 94 if the chargor is in a fresh default under the charge”.

12. The object of the requirement is that persons who in one way or the other have an interest in the charged property or debt and who fall in the category set out in section 96(3) ought to have notice of the intended sale. For instance a tenant of the charged land or building thereon ought to have notice of the sale as it could lead to a change of ownership of the land and therefore the landlord. Such a change may have implications on the tenancy. That said, it has to be emphasized that the law under section 96(3) does not relate to the chargor's equity of redemption, it is a protection to third parties. For that reason it is only the said third parties who can complain of non-service of a copy of the notice. The chargor cannot take up the matter on behalf of the third parties to frustrate an intended realization of the charged property.

However any chargee who flouts the provisions of section 96(3) does so at his/her peril because a sale that proceeds in breach of these provisions can attract an action by an aggrieved third party (for damages or perhaps reversal of the sale!)

13. In the matter before Court the Guarantors are the directors of the Plaintiff. The 40 day notice to the Plaintiff was marked to the attention of Mr. Amin Manji a director of the Plaintiff and one of the guarantors. The two guarantors are not party to the suit. The Court is not told that they have any grievance in respect to none service of the Notice and why they have kept away from the proceedings. For now, nothing turns on the fact that the 40 day notice was not served on them. It does not violate the chargor's equity of redemption and cannot be a basis to restrain the chargee from exercising its statutory power of sale.

14. The upshot is that the Plaintiff has failed to establish that it has a prima facie case and the application does not get past the first test for grant of a temporary injunction. The Motion of 9th August 2018 is hereby dismissed with costs.

Dated, Signed and Delivered in Court at Nairobi this 15th day of February, 2019.

F. TUIYOTT

JUDGE

Present:

Oriri for Muoka for Plaintiff

Mbugua for Wanjohi for Defendant

Nixon- Court Assistant