REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CIVIL CASE NO 31 OF 2018

HASLINGTON LIMITED.....PLAINTIFF

VERSUS

AFRICAN BANKING CORPORATION LIMITED..... DEFENDANT

R U L I N G

1. Before me is the notice of motion dated 27th August 2017 which was filed by Haslington Limited (the Applicant) contemporaneously with the suit against African Banking Corporation Limited (the bank). Expressed to be brought under the provisions of Order 40 Rules 1 and 2 of the Civil Procedure Rules, the motion seeks a "permanent injunction" to restrain the Defendant, by themselves, agents, servants, nominees, officers or otherwise **"from issuing a notice of notification of sale, advertising for sale, selling, alienating, disposing or in any way dealing or interfering with the Plaintiff's property known as Title Number Thika Municipality Block 9/1228 Kiambu County."** The grounds on the face of the motion are *inter alia* that the Respondent bank has illegally issued and served a notice of sale in violation of the mandatory provisions of the Land Act; that the Respondent's statutory power of sale has not arisen; that the bank is guilty of collusion and has discriminated against the Applicant.

2. The motion is supported by the affidavit of **Jiten Dhanani** described as a director of the Applicant. To the effect that at the Applicant's request the Respondent bank extended a credit facility of Shs.45 million to the Applicant, which was secured by a charge in the said sum created over the Applicant's property described as **No. Thika Municipality Block 9/1228** (the suit property). The facility was also secured by personal guarantees executed by other directors. That the Applicant continued to honor its obligations pursuant to the charge until February 2018 when, due to liquidity problems arising out of the prevailing economic situation the Applicant fell behind in payments. The Applicant sought a restructuring and rescheduling of the loan to enable it liquidate the suit property , but despite identifying a buyer , was shocked to learn in July 2018 that a statutory notice had been issued and sent to the Applicant by the bank. The Applicant denies receiving the said notice.

3. The Applicant asserts that the statutory power of sale had in the circumstances not arisen and the bank's actions are illegal. Stating further that the value of the suit property stands at KShs.50 million, the deponent contends that the outstanding loan is KShs.29,714,000/=, the Applicant having already paid KShs.38,316,960/= in liquidation of the debt and that the sale of the suit property below the stated value is consistent with a collusion by the bank to sell the property at a throw-away price. The deponent complains that no recovery effort has been directed at the personal guarantors and that the Applicant stands to suffer irreparable damage if the sale proceeds.

4. The Respondent bank through an affidavit in reply sworn by the Senior Legal Officer, Faith Nteere, and filed on 26/10/18 firstly took issue with the competence of the application as framed. Confirming the financial arrangements between the parties and execution of the charge to secure a sum of KShs.45 million and that the terms of the charge were amended by a letter dated 14/6/16 to accommodate the Applicant to liquidate the outstanding sum of KShs.35,403,878.00 by monthly installments of KShs.1,018,808.80, the deponent contends that the Applicant had defaulted in its obligations prior to and after February 2018. Pursuant to which, a statutory notice was issued on 12/3/18 under Section 90(2) of the Land Act and dispatched by registered mail to the Applicant's postal address. And that subsequently a 40 – day notice to sale under Section 96(2) of the Land Act was served upon the Applicant by registered post, the latter which is admitted by the Applicant.

5. The deponent disputes the value attributed to the suit property by the Applicant, citing the forced sale value as per the valuation report obtained by the Respondent. Moreover, that in addition, the Applicant owed a sum of KShs.6,231,063.84 in respect of an overdraft facility in its favour.The deponent deposes that the bank is entitled to exercise its option of choice under the remedies provided in Section 90(3) of the Land Act and is not obligated to elect to sue for the recovery of the debt.

6. By a further affidavit filed on 7.11.18, the Applicant reiterated earlier depositions and with specific reference to the initial statutory notice, dismissed the same as not conforming with the form stipulated under Section 96(2) of the Land Act. A copy of a valuation report by **Redfearn International Ltd.** is attached as evidence of the 'dismal' value in the valuation report relied on by the Respondents and its breach of the duty owed to the Applicant to obtain the best reasonably obtainable price for the suit property. Concerning the overdraft facility, the Applicant was dismissive.

7. The application was canvassed by way of written submissions. The Applicant's submissions for the most part are a rehash of the

Applicant's affidavit material, the Applicant reiterating the failure by the bank to serve a proper statutory notice and alleged undervaluation of the suit property, and that the Applicant stands to suffer irreparable loss if the bank proceeds to exercise the power of sale. The Applicant relied on the decision in **J. M. Gichanga v Co-operative Bank of Kenya (2005) eKLR.** It submits to have brought its application within the principles in **Giella v Cassman Brown** and in addition, cites the principle that equity does not assist a wrongdoer. Moreover, that this court under its inherent jurisdiction may issue a permanent injunction even at interlocutory stage.

8. The Respondents begin their submissions by taking issue with the permanent nature of the orders sought in the motion asserting that under order 40 Rule 1 Civil Procedure Rules, only a temporary injunction is envisaged. They cited the Court of Appeal Decision In **Olive Mwihaki Mugenda And Another V Okiya Omtata Okoiti [2016] eKLR.** They therefore urge the court to strike out the application. Further and without prejudice to the foregoing, the Respondent argues that the Applicant's case does not meet the threshold for the grant of an interlocutory injunction as enunciated in **Giella v Cassman Brown.** Placing reliance on the Court of Appeal decision in **Kenya Commercial Finance Co. Ltd v Afraha Education Society (2001) IEA 87,** the bank reiterates that the principles in **Giella's** case apply in a sequential manner.

9. The Respondents rely on the definition of a prima facie case as stated in **Mrao Ltd v First American bank of Kenya Ltd and 3 Others [2003] eKLR** to contend that the Applicant has not made out the claim that the statutory notice dated 12/3/18 was not served on it. And that the denial has been controverted through the Respondent's annexures **"FN 4a"** and **"FN 4b"** in regard to the dispatch of the said notice to the chargor's last known address as in the case of **Ibrahim Musa and Sons Ltd and Another v First National National Finance Bank and Another [2002] e KLR** as cited in the Court of Appeal decision in **National Bank of Kenya Ltd v Isaac Malika Lubanga and Another Court of Appeal No. 10 of 1028 (UR).**

10. The Respondent further dismisses the complaint as belatedly raised by the Applicant regarding the form of notice stating that the issue was not part of the Applicant's pleaded grounds, and in any event, there is no prescribed form with which such notice ought to comply, save for the notice incorporating the matters envisaged in Sections 90(2) and 90(3) of the Land Act. Further that where a notice is found to be defective, the remedy is not an injunction but an order directing the bank to serve a compliant notice. See **National Bank of Kenya Ltd v Shimmers Plaza Ltd [2009] eKLR**. Pointing to the Applicant's Admissions of default in its obligations to the bank prior to and after February, 2018, the Respondent argues that the chargee cannot in such circumstances be restrained in its exercise of the statutory power of sale, as stated in **Labelle International Ltd v Fidelity Commercial Bank and Another (2003) 2 EA 541** and in the **Isaac Malika Lubanga Case.**

11. Asserting that the chargee's power of sale has arisen the bank asserts that it cannot be compelled to pursue any particular remedy among those prescribed under section 90(3) of the Land Act. Regarding the valuation of the suit property prior to sale, the bank submits that by dint of Section 97(2) of the Land Act , the bank was only obligated to secure a recent forced sale valuation by a valuer and that by so doing the bank had discharged its obligation. Taking issue with the valuation report proffered via the Applicant's further affidavit, the bank points out that it was undertaken in 2016, and is in respect of a commercial property while the suit property is residential; that the valuation does not contain a breakdown of values for land and developments. As to the scope of the obligation by the chargee under Section 97(2) of the Land Act, the bank relies on the decision in **Stephen Kipkatam Kenduiywa t\a Kapchebet Farm v Sidian Bank Ltd and Another [2017] e KLR.** That where the court finds fault with a forced sale valuation, the remedy is to direct that a fresh valuation be undertaken– see **Orion East Africa Ltd v Ecobank Kenya Ltd and Another [2015] e KLR.**

12. Besides , the bank submitted, the Applicant's debt exceeds the value of the charged property whose delayed realization will only prejudice the bank's efforts to recover the outstanding debt derived from public funds as stated in **John Kariuki t/a Jolester Merchants v National Bank of Kenya Ltd [2006] IEA 96**. Whereas, the Applicant can be adequately compensated through damages. Thus the Respondent urged the court to dismiss the application before it.

13. The court has considered all the material canvassed in respect of the instant motion. The basic facts surrounding the motion are not in dispute. These include the extension of a loan facility in the sum of KShs.45m by the bank to the Applicant in the year 2014, which facility was secured by a charge created over the suit property and personal guarantees in favor of the bank. There is no dispute as to the disbursement of the funds under the said arrangement and that pursuant to the terms of the charge, the Applicant was to repay the loan sums through periodic installments. It is also not disputed that by February 2018 the Applicant fell into arrears and was unable to observe to obligations to the bank. Further that on or about 9th July 2018 the Applicant received a letter dated 29th June 2019 being the 40 - day notice of the bank's intention to realize the security issued pursuant to Section 96(2) of the Land Act, which notice referred to the statutory notice of 12th March 2018 , now in contention.

14. Before considering the merits of the application I find it apposite to state that the sole live prayer in the notice of motion is prayer No. 5 which seeks a 'permanent injunction' against the bank. Neither rule (1) nor (2) of Order 40 of the Civil Procedure Rules invoked on the face of the motion admit the issuance of a permanent injunction at interlocutory stage. The rules clearly refer to interlocutory injunctions and were the court to grant prayer 5 of the motion as framed, the effect would be to substantially determine the matter at interlocutory stage, as indeed prayer (1) in the plaint is an exact replica of prayer (5) in the motion.

15. In the **Olive Mwihaki Mugenda** case (supra) the Court of Appeal stated *inter alia* that:

> **"Applying the decisions of this court in *Vivo Energy Kenya Limited v Maloba Petrol Stations Limited and 3 Others [2015] eKLR and Stephen Kipkebut t/a Riverside Lodge and Rooms vs Naftali Ogola (2009) e KLR* it has often been stated that an order which results in granting of a major relief claimed in the suit ought not to be granted at an interlocutory stage ..... we are convinced and satisfied that the learned judge erred in law in granting final orders at an interlocutory stage when the main Petition had not been heard."**

16. The Applicant's attempt to invoke the inherent power of the court and provisions of the Environment and Land Court Act in defence of the obvious anomaly in prayer 5 of the motion is without legal foundation and smacks of obduracy. The prayer as crafted *prima facie* renders the entire motion incompetent.

17. That said, in order to administer substantial justice, the court will proceed to consider the motion as one seeking a temporary injunction as envisaged in Order 40 Rule (1) of the Civil Procedure Rules. Both parties have cited the case of **Giella v Cassman Brown,** the *locus classicus* in so far as the grant of such temporary injunctions is concerned. In **Nguruman Ltd,** the Court of Appeal restated the principles in **Giella v Cassman Brown** and observed that the role of the judge is merely to consider whether the principles for the grant of an interlocutory injunction had been met and that the Court ought to be careful not to determine with finality any issues arising.

18. The Court further observed that:

> **"...Since the fundamentals about the implications of the interlocutory orders of injunctions are settled, at lease over four decades since Giella case, they could rather be questioned nor be elaborated in detailed research. Since those principles are already ..... by authoritative pronouncements in the precedents they may be conveniently noted in brief 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) demonstrated irreparable injury if a temporary injunction is not granted.**
>
> **c) allay any doubts as to (b) by showing that the balance of occurrence is in his favor."**

19. In addition the Court stated that the three conditions apply separately as distinct and logical hurdles to be surmounted sequentially by the Applicant. That is to say, that the Applicant who establishes a *prima facie* case must further establish irreparable injury, being injury for which damages recoverable could not be an adequate remedy. And that where the court is in doubt as to the adequacy of damages in compensating such injury, the court will consider the balance of convenience. Finally, where no *prima facie* case is established the court need not look into the question of irreparable loss or balance of convenience.

20. As to what constitutes a *prima facie* case, the Court of Appeal expressed itself as follows:-

> **"Recently, this court in Mrao Ltd. V. First American Bank of Kenya Ltd & 2 others [2003] KLR 125 fashioned a definition for *"prima facie case"* in civil cases in the following words**:
>
> > **"In civil cases, a *prima facie* case 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 to call for an explanation or rebuttal from the latter. A *prima facie* case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard, which is higher than an arguable case."**
>
> **We adopt that definition save to add the following conditions by way of explaining it. The party on whom the burden of proving a *prima facie* case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. 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."**

21. With the foregoing principles in mind I will proceed to consider the two contested complaints which are key to the Applicant's case. The first relates to the alleged failure by the bank to serve a statutory notice and the second the alleged breach of the duty owed to the chargor to obtain the best reasonably obtainable price in respect of the charged property to be realized. Although the Applicant raised other issues in the supporting and further affidavit, including the choice of the remedy of sale rather than suing the guarantors and the form of the statutory notice, these matters were not pursued in any serious manner in the Applicant's submissions.

22. Thus the determination of the motion appeared to rest with the determination of the two contested key issues. It bears stating however that, there in nothing in the provisions of section 90(3) of the Land Act to suggest a limitation to the chargee's choice of remedy in the face of a chargor's breach. As the Court of Appeal observed in **Aberdare Investments Limited v Housing Finance Co. of Kenya and Another [1992] 2 EA 1:**

> **"The choice of remedy for recovery of an unpaid loan under a mortgage is that of the mortgagee, and the mortgagor cannot tell the mortgagee to take such action as may suit the mortgagor."**

23. With regard to the forms of the statutory notice, I agree with the Respondent's submissions that this issue was not pleaded in the plaint or the motion, and alternatively, that in the bsence of a prescribed form as anticipated under Section 90(5) of the Land Act, all that is required is for the statutory notice to incorporate the matters prescribed as part of the notice by dint of Section 90(2) and (3) of the Land Act.

24. Section 90 of the Land Act provides 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 ecipient 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.

(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) ……..

(5) The Cabinet Secretary shall, in consultation with the Commission, prescribe the form and content of a notice to be served under this section"

25. There is no dispute at least that effective from February 2018, the Applicant was in default and therefore the bank was entitled to commence the process envisaged under Section 90 and 96 of the Land Act. Clause 30:5 of the Charge Document provides *inter alia* that any notice required or authorized by law or by the charge **"shall be deemed to have been properly served by the bank on the chargor if left at the charged property ..... or sent by registered post to his last known postal address ..."** The Applicant admits receipt of the 40-day notice under Section 96 through registered mail at its postal address while denying receipt of the statutory notice under Section 90 also sent to the same address by registered mail.

26. A cursory look at the two notices as annexed to the replying affidavit as **"FN 4A "and "FN 5A"** and the respective posting evidence **"FN 4B" "FN 5B"** puts paid the Applicant's assertion. It is disingenuous for the Applicant to claim receipt of the latter notice while denying the first when both were sent to its undisputed address by the same medium of registered post. The notice **'FN 4A'** on the face of it substantially complies with the provisions of Section 90(2) of the Land Act.

27. Moving on to the contested valuation of the suit land, the duties owed by to charger by the chargee during the exercise of the statutory power of sale are set out in Section 97 of the Land Act which provides:

(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 a court, owes a duty of care to the charger, any guarantor of the whole or any part of the sums advanced to the charger, 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 charger 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).

(4) ...."

28. The chargee must prior to exercising the right of sale ensure that a forced sale valuation is undertaken by a valuer and is under specific duty to "obtain the best price reasonably obtainable at the time of sale." **Annexure " FN 6"** to the replying affidavit is the valuation report by **Acumen Valuers Ltd** dated 11th September 2018 in respect of the valuation conducted pursuant to the bank's instructions. The report assigns to the suit property a market value of KShs.31.000,000/=, mortgage value of KShs.26,350,000/= and a forced sale value of Ksh.23,250,000/=. Irked by these values the Applicant dedicated paragraphs 10 to 17 of the further affidavit to disparage the valuation. Specifically, the deponent attached a valuation report annexure **"JD 7"** by Redfearn International which is dated 29th August 2016 and which contains the following values:

a) Market value – KShs.60 million

b) Market value – (with special assumptions (forced sale conditions – KShs.48 million.

29. It would seem that the valuation by Redfearn International Limited was carried out at the request of the bank in July 2016. The court has looked at the two valuation reports prepared at the instance of the bank. Two years apart, unlike the case in the Respondent's authority in **Stephen Kipkatam Kenduiywa t/a Kapchebet Farm v Sidian Bank Ltd and Another.** The Applicant emphasizes what he views as the suppression of the true value of the suit property, based on the primary fact that the value of the suit property was seemingly depreciating with time rather than appreciating, as naturally expected.

30. Reviewing the reports, it is difficult to reconcile the disparities in both the market and forced sale values. The 2016 report by Refearn International Limited prognosticated that due to governmental regulation on transfers of undeveloped lease holds their valuation was "subject to greater uncertainty than normal". Acumen Valuers for their part assert that they adopted a "comparable sales of land, contractor's and investment approaches "and that the local property market was generally on an "upward trend". What cannot be disputed is that the former report presents a commercial property while the latter refers to a residential hostel. The Applicant in its affidavit alludes to a downturn in the economy leading to liquidity problems for the Applicant.

31. The above notwithstanding, it is true that the proper or true forced value of the suit property would only likely emerge at the auction, and the court ought not to attach more weight to the variation in the two reports than is due. Neither the court nor the bank has expertise in the area of valuation of property. There is no evidence beyond the suspicion cast by the Applicant that the bank somehow influenced the 2nd valuation in order to sell the property at a throw-away price. Moreover, it is difficult to see how the bank stood to benefit by conspiring with the valuer to attach a forced sale value below the outstanding debt owed to it. Thus in my considered view, these variations, without more, cannot justify the issuance of an injunction to restrain the chargee in the pendency of the suit, with the clear likelihood that the growing indebtedness may soon exceed the value of the suit property. Notably, as at 29th June 2018 the loan arrears stood at KShs.29,105,725.52.

32. The key words in Section 97(1) are "**the best price reasonably attainable at the time of sale".** The court is not satisfied that the issue canvassed with regard to the forced sale value is substantive enough by itself to lead to the conclusion that a prima facie case has been made out. As observed by the Court of Appeal in **Orion East Africa Ltd v Ecobank:**

> **"In an application for an interlocutory injunction it is good practice for the trial court to look at the whole case not only to the strength of the Applicant but also to the strength of the defence advanced by the Respondent then make an appropriate order".**

33. On the question of irreparable damage, the court has no doubt that damages recoverable in law would be an adequate remedy for any injury that the Applicant might suffer in this case. Once a chattel is charged to secure a debt under a contract the chargor must surely contemplate the eventuality that the property could well become a commodity for sale in the event of default in repayment. On all accounts, the value of the property is capable of ascertainment and the bank capable of making recompense. Besides, where as in this case, the chargor, has not mustered proof of a prima facie case within the required threshold, irreparable injury cannot arise as it is in default. See **Nguruman Ltd v Jan Bonde Nielsen**.

34. For all the foregoing reasons I must find that the Applicant's motion lacks merit and will dismiss it with costs. In doing so however, in view of the matters arising from the two valuation reports presented by either party, and in line with the decision of the Court of Appeal in the **Orion East Africa** case, I will direct that the bank shall not proceed with the exercise of its statutory power of sale of the suit property until a fresh forced-sale valuation is undertaken by a valuer other than **Redfearn International** or **Acumen Valuers Ltd.**

DELIVERED AND SIGNED AT KIAMBU THIS 8TH DAY OF FEBRUARY 2019

C. MEOLI

JUDGE

In the Presence of:

Mr. Tombe holding brief for Mr. Opiyo for the Plaintiff/Applicant

Mr. Mutua for the Respondent/Defendant

Court clerk - Nancy