



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAJIADO

CIVIL CASE NO 49 OF 2018

STEPHEN MWENDA KINYUA.....PLAINTIFF

VERSUS

SIDIAN BANK LIMITED.....DEFENDANT

RULING

By a Notice of Motion dated 21th December 2018 the Applicant herein seeks the following orders;

- 1. THAT this application be certified as urgent and be heard ex-parte in the first instance.***
- 2. THAT pending the hearing and determination of this application inter-partes an order of injunction does issue restraining the Defendant, their servants, auctioneers, licensees, agents or any other persons acting on their behalf from howsoever advertising for sale, selling, auctioning, alienating, transferring, disposing, dispossessing or in any way interfering with right of ownership and proprietorship to TITLE NUMBER NGONG/NGONG/48217.***
- 3. THAT pending the hearing and determination of this application inter-partes an order an order does issue restraining of any transfer and or cancelling any transfer(s) or any entries made pursuant to any illegal actions of the defendant in respect of TITLE NUMBER NGONG/NGONG/ 48217***
- 4. THAT this Honourable Court be pleased to issue such other equitable order (s) as it may deem fit.***
- 5. THAT the cost of this application be borne by the Defendant.***

The application herein is premises on the following grounds:- the different has illegally and unlawfully sold by action the plaintiff's property being the suit property herein; the plaintiff has never been served with 90 days' notice, 40 days or any notice by the Auctioneers, the plaintiff only received a message from the defendant bank on 18th December, 2018 at 1158hrs and a similar message at 1333hrs asking him to make payment of Kshs.3,625,080,31 by end of that day which jolted him to check what was happening; on the 20th December,2018, the plaintiff received a call from Mr. Stephen Ndungu who wanted to find out if the property was still available or had been sold by the bank which totally shocked the plaintiff; the plaintiff then discovered from the auctioneers that an auction was purportedly carried out on 23rd November, 2018 and or 5th December, 2018; there is every danger that the property will be transferred to a third party any time unless the plaintiff receives protection from this court; there has been no recent valuation of the security property and lastly the plaintiff is in dire need of protection from this Honourable Court.

This Application is also supported by the supporting affidavit sworn by STEPHEN MWENDA KINYUA. The Applicant deponed that he is the registered owner of the suit property having acquired the same on 11th August, 2015 for a sum of Kshs. 12,250,000.00/=. (Annexed and marked "SMK1" is a copy of the Title Deed and Sale agreement dated 11th August, 2015). He then offered the suit property to guarantee a loan facility totaling Kshs. 10, 000,000.00/= to run his company business but the property was charged for Kshs. 22.000, 000.00/=. (Annexed and marked SMK2 is the Copy of the charge document). He asserted that despite a few financial challenges, the loan with the defendant has been regularly serviced.

It was deponed that on the 18th December, 2018, at 1158hrs and 1333hrs he received a similar message from the defendant which demanded for the payment of Kshs. 3, 625, 080. 31 the same day which he owes bank. He immediately inquired from his accountant the amount he owed the bank since he was not aware of arrears but before he could get the answers on 20th December, 2018 he was called by Stephen Ndungu a stranger who is a property dealer in Ngong who was interested in buying the suit property. He also received a letter via post from Nairobi Channel Auctioneers titled notification of sale showing that the property was sold in an auction on 23rd November, 2018. (Annexed

and marked as SMK3 is a copy of the said letter of notification).

He asserted that that is when he visited the Auctioneers as well as the defendant bank where he was given a letter dated 27th August, 2018 which purportedly gave him 90 days' notice to redeem property which he never received. (Annexed and marked as SMK4 is a copy of the letter dated 27th August, 2018). It was further stated that the Auctioneers verbally confirmed to him that they sold the property on 5th December, 2018 but have refused to divulge further details.

The Applicant is very categorical that he did not receive the 90 and/or 40 days' notice as required by the law and there is every danger that the property maybe transferred to a third party any time pursuant to said illegal auction.

The Defendant opposed the Application by way of a replying affidavit dated 25th January 2019 sworn by SARAH CHEPSOI the Legal Manager of the Defendant. The Defendant bank acknowledged the existence of contract between the Borrower and the Defendant Bank which involves the advancement of a loan facility and a guarantee in form of the suit property was provided by the Plaintiff as stated by the Plaintiff herein-above. It is also not in dispute that the Borrower defaulted in repayment of the loan facility sometime in January 2018 which prompted the Defendant Bank to commence the process of realizing the property as an exercise of its rights under the charge.

It was asserted that on the 7th of March 2018 both the Plaintiff and the borrower were issued with the mandatory 90 days' statutory notice under section 90 of the Land Act contrary the Plaintiff's allegations that the same was not issued to him. (copies of statutory notice and certificate of posting registered postal article dated 7th March, 2018 and 21st March, 2018 were produced marked as SC 3 a & b).

The Defendant deponent stated that upon the expiry of the 90 days' statutory notice, the Plaintiff and the Borrower were issued with the mandatory forty (40) days Statutory Notice of Sale under section 96 (2) of the Land Act on 2nd July, 2018 (*herein marked as SC4 a & b and the certificate of posting registered postal article dated 6th July, 2018*).

On the 5th of September 2018 the Defendant Bank instructed the Nairobi Channels Auctioneers vide a letter of instruction dated 5th September 2018 to proceed and auction the suit property. This is after the Defendant confirmed it had conformed with all statutory conditions precedent to proclamation, seizure and sale. The Auctioneers proceeded and notified both the Borrower and Plaintiff of the intended sale of the suit property by way of auction vide a Notification of sale which notice was sent to them via post on 10th September 2018. (*the letter of instruction, Auctioneers notification of sale dated 10/09/2018 together with postage receipts was produced and marked as SC 5 a, b & c respectively*).

It was also stated by the Defendant that contrary to the plaintiff's averments, the Defendant vide a letter to Advert Valuers Limited instructed the valuers to conduct a comprehensive valuation in respect of the suit property detailing among others particulars, the current value and the forced sale value. (*Copies of the Valuation report dated 28th November, 2018 are herein marked as SC6*).

The Defendant asserted that on the 5th of December 2018 the auction was held and the suit property was sold to the highest bidder at Kshs. 7, 750, 000.00/= who then deposited 25% of the purchase price. Further that before the completion of said transaction, vide a letter dated 24th December, 2018, Mr. Aloise Marete the Managing Director of the Borrower/principal debtor approached the Defendant and beseeched it to cancel the auction and grant the Borrower/principal debtor until 7th January, 2019 to clear the outstanding loan facility. (*Annexed and marked as SC7 is a copy of the Borrower's letter dated 24th December, 2018 attesting as such*)

The Defendant bank therefore consulted the third party/highest bidder, vide a letter of even date, it rescinded the sale transaction and consequently refunded the third party the deposit they had paid. According to the Defendant, this was on the condition that the Borrower/principal debtor would repay the outstanding balance of Kshs. 3, 970, 519.19/= as at December 2018 on or before 7th January 2019. It asserted that the Borrower has only made good Kshs. 900,000.00/= and the outstanding balance is therefore Kshs. 2, 835, 658.03 as at 16th January 2019.

It was deponed that the orders sought by the application herein are not only inconsequential but have been overtaken by events given that by rescinding the sale transaction, the Plaintiff suffers no prejudice whatsoever and the auction has already taken place and the same was revoked by the Defendant. Further that the instant application is fatally defective and incurable given that the Supporting Affidavit was seemingly sworn by Stephen Mwenda Kinyua on 21st December, 2017 whereas the Notice of Motion Application is dated 21st December 2018.

ISSUES FOR DETERMINATION

I have carefully considered the application, the affidavits tendered by both parties in support and in rebuttal of issues herein as well as the judicial precedence and the law of the subject of amendments, I take the following view of the matter. The main issue for determination herein is whether or not the Applicant is entitled to the relief sought.

The crux of the matter is that the Defendant Bank and the Plan and Trend EA, Limited, the borrower entered into a contract whereby the Defendant advanced a loan facility totaling to Kshs. 10,000,000.00/= for running the said Company business. The Plaintiff offered the suit property; Title Number Ngong/Ngong/48217 which he acquired on the on the 11th of August, 2015 for a sum of Kshs. 12, 250,000.00/= to guarantee the loan facility. (*A copy of the Title deed and sale agreement dated 11th August, 2015*).

It is not in dispute that the borrower defaulted repayment of the said loan facility which triggered the Defendant Bank to exercise it's the remedies available to it as a chargee by invoking the relevant provisions of the Land Act No.6 of 2012. The Defendant Bank claims that it issued both the Plaintiff and the Borrower/Principal debtor with the mandatory ninety (90) days Statutory Notice under Section 90 of the

Land Act on 7th March, 2018. It also claims that it issued with the mandatory forty (40) days Statutory Notice to sell under Section 96(2) of the Land Act on 2nd July, 2018. It further told the court that the said notices were served on Plaintiff through registered post on 21st March, 2018 and 6th July, 2018 respectively. On the other hand, the Plaintiff denied having received the said notices on or soon after the day they were served. He alleged that he only received a text message from the defendant which reads as follows:

“Dear Plan and Trend (EA) limited, your loan of Kshs. 3,625,080.31 for account ** (Account No. Censored) is non-performing. Pay Kshs. 3,625,080.31 today.....”***

On the 20th December, 2018 he received a call from a stranger (name withheld) who stated he is a property dealer interested in buying his suit property and he inquired if the same was sold at the auction. He further alleged that he only received the copy of a letter dated 27th August, 2018 which purportedly gave him the mandatory 90 days’ statutory notice to redeem property upon paying a visit at the offices of the Auctioneers as well as that of the Defendant Bank. Section 90(1) and (3) of the Land Act No.6 of 2012 Laws of Kenya states 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.

(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;

Section 96 of the Land Act No.6 of 2012 Laws of Kenya provides for the chargee's power of sale. The same provides as follows: -

“96. Chargee’s power of sale (1) Where a chargor is in default of the obligations under a charge and remains in default at the expiry of the time provided for the rectification of that 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.

(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; (e) any lessee and sub-lessee of the charged land or of any buildings on the charged land; (f) any person who is a co-owner with the chargor; (g) 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; (h) any guarantor of the money advanced under the charge; (j) 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 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.

Section 90(1) in my view lays down the circumstances under which the statutory notice is issued by the chargee to chargor. Clearly as provided for under the aforementioned section, a statutory notice is issued where there is default of payment in performance of the expressed and implied covenants in a charge. A notice must be served to the chargor by the chargee in writing clearly stating the payment of any amount owing or performance and observance of the agreement as the case may be. The said notice is mandatory on the part of the chargee thus it is mandatory that the chargee, as the law requires under the sections, issues the requisite statutory notice notifying the chargor of the intended sale of the charged property by auction.

In light of the above and in the present case both the Defendant and the Plaintiffs confirmed that the Plaintiffs obtained financial accommodation from the Defendant which was secured by the suit property. The same is evidenced by a charge created between, Mwenda Stephen Kinyua (the Chargor) and Plan & Trend (EA) Limited (as the Borrower) to Sidian Bank Limited (as the Chargee) over property Title No: NGONG/NGONG/48217 AS THE Charged Property (herein referred to as the suit property). Further, the Plaintiffs in their submissions, Plaintiff and supporting affidavit admitted having failed to service the loan according to the terms set out in the charge. It was as a result of the said default that the Defendants properly and in accordance with section 90(1), served the Plaintiff and the borrower with a statutory notice demanding for the Plaintiffs to clear the outstanding amounts / arrears. I have seen a statutory notice (annex “SC 3(a)”) served to both the Plaintiff and the Borrower herein under section 90 of the Land Act (Cap 6 of 2012), Laws of Kenya) relating to the suit property dated 7th of March 2018 which was served by way of a registered post. The said notice sought immediate payment of Kshs. 500, 703. 78/= which was the amount required to rectify the default that occurred on the 27th of January 2018 after the borrower failed to pay/regularize the outstanding

arrears.

However, it is paramount that the said statutory notice complies with the aspects enshrined under section 92(2) which lays down the aspects to be included in the aforesaid notice. In *Cieni Plains Company Limited & 2 others v Ecobank Kenya Limited (2017) eKLR (supra)* it was stated *inter alia* that;

“As read together with section 90(3), section 90(2) of the Land Act obligates the chargee to firstly, state the nature and extent of default. Secondly, where the default consists of non-payment, to state the amount required to be paid within three months for the purposes of making good the default or where the default is non-observance of a covenant in the charge, then the notice is to state what the chargor is to do or desist from doing so as to rectify the default. Thirdly, the notice ought to state the fact that if the default is not rectified within the time stated in the notice, then the chargor would thereafter sue for money due and owing under the charge, appoint a receiver of the income of the security property, lease the security property, enter into and keep possession of the security property or sell the security property. The fourth and final requirement under section 90 is that the notice needs to state that the chargor has the right to apply to court and seek any relief or challenge the exercise by the chargee of any of the statutory remedies. The notice crystallizes after the expiry of ninety days from the date it is received by the chargor.”

The general purpose of the notice is majorly to protect the chargor. This was stated in the case of *First Choice Mega Store Limited v Ecobank Kenya Limited [2017] eKLR*

” [37] ...The law regulates the contractual relationship between the parties by ensuring that the purpose of a charge (pledged property) is not defeated. The purpose is mainly for the property to act as security and no more. The chargor must have the chance, nay right, to redeem the property. In the absence of a notice it would be much easier for unscrupulous chargees to rid the chargor of the equity of redemption. The borrower who pledges and charges his property must be confident that the property will be held as security and when the lender must then act and start the process of selling the same, the borrower will have both notifications of such action and an opportunity to redeem his property.

[38] It would be appropriate to however also conclude that there is a need always to preserve a balance between the respective rights of both the chargee and the chargor. In the words of Lord Bingham of Cornhill, spoken in *Royal Bank of Scotland Plc v Etridge [2002] 2 AC 733, [2]*, the law “must afford both parties a measure of protection”. The lender who thus also feels able to advance money on security, including non-possessory security, like land, in reasonable confidence reasonable confidence that it may at an appropriate time enforce the security is also protected.

[39] A purposive construction of section 90 is necessary. Section 90 must thus be read and understood with the open fact that the chargee also has a right to pursue his various remedies. Any interpretation, which curtails that right, should not be favored given that it is the same section that triggers the application of a chargee’s rights and remedies.”

In the instant case, the Plaintiffs did not fault the contents of the mandatory 90 days’ statutory notice. Neither did I find any discrepancy with regards to the same. As regards the 40 days’ notification of sell, it is trite that where the notice required to be served in forms of section 96 of the Land Act is not given to the lessee or chargor and who have recognized interests in land, that failure to notify them goes into the core of the validity of the issuance and service of the notification for Sale. It must be noted that if the sale of the suit property is carried through in the absence of a proper notice to sell it, it will amount to a clog on the Chargor’s equity of redemption. The Notification for Sale under section 96(2) quoted above is mandatory and it is part of the protection of the equity of redemption provided under section 89 of the Land Act, 2012.

In the instant case, the evidence on record shows that the 40 days Statutory Notice of Sale was served under section 96 (2) of the Land Act, 2012, Laws of Kenya (a copy of which is annexed and marked as “SC-4a” following the failure by the Borrower to liquidate the debt with the Defendant Bank. Annexure “SC- 5(b)” is a Notification of Sale dated 10th September 2018, served by the Nairobi Channels under Auctioneers’ Rules 1997 and a letter of instructions dated 5th of September 2018, notifying the Plaintiff and the Borrower herein on behalf of the creditor (Defendant Bank) of the intended sale of the suit property by way of Public Auction on the 23rd of November 2018 at 11.00am. All the above-mentioned notices were sent to both the Plaintiff and the Borrower by way of registered post. Accordingly, any attempt by the Plaintiff to deny service of this particular notice would be futile.

Furthermore, a 45 days’ Notice of Redemption was also served pursuant to rule 15(d) of the Auctioneers Rules of 1996 appraising the Plaintiff and the Borrower that they had 45 days from the date of service to redeem the suit property by paying to the chargee the amount outstanding amounting to Kshs. 4, 014, 656.25 as at 5th of September 2018. The same was accompanied with a warning that failure to rectify the amount outstanding, the suit property was to be subjected for by public auction in accordance with the instructions given by the Defendant Bank. According to the Affidavit sworn by Mungai Kirathi, the auctioneer trading under Nairobi Channel Auctioneers, he served the said notice of redemption to the Assistant Manager “Mr. Marete” in person. It was also deponed that the called the Plaintiff to inform him of the same and that he accepted and signed the same on behalf of the Plaintiff. The same is not controverted by the Plaintiff in any manner and in the circumstances, the court finds that the Plaintiff and the Borrower were both fully aware of the intended sale of the suit property. Therefore, Plaintiff’s contention that he did not receive the notices on or soon after the dates depicted in in the various notices cannot hold water. In *Enoka Watako Makokha v Co-operative Bank of Kenya [2015] eKLR*, the Court of Appeal held that service of notice by registered post is effective service. In the case of *PETER KURIA MUNYUIRA Vs. HOUSING FINANCE COMPANY of KENYA LIMITED & ANOTHER HCCC No. 457 of 2006*, Warsame J. (*as he then was*) said;

“A notice sent through registered post takes effect after the collection of the registered mail of the chargor from the Postal Corporation of Kenya. It is therefore incumbent upon the chargee to ensure the registered mail sent through any process is received and there must be evidence of receipt and the date it was collected or received by the addressee”.

I’m also inclined to comment on the issue of the Valuation report that was produced by the Defendant Bank herein. Initially the Plaintiff

herein acquired the suit property for a sum of Kshs. 12, 250, 000.00/= on the 11th of August 2015 as depicted in the Agreement for sale annexed and marked "SMK2". The suit property was provided by the Plaintiff to guarantee a loan facility with the Defendant Bank, totaling Kshs. 10 million but the property was charged for Kshs. 22 million as captured in the copy of the charge document produced by the Plaintiff before this court as annex "SMK2". Further, in the Valuation Report produced by the Defendant Bank, the suit property has a market value of Kshs. 10, 000,000.00/= (ten million) and a forced market value of Kshs. 7,500,000.00/= (seven million five hundred thousand). The same had been sold at a price of Kshs. 7, 750, 000.00/= on the 5th of December, 2018.

Taking judicial notice of the current market as far as land is concerned, it is highly unlikely that value of land depreciates for no valid reason. It assumed that when the Plaintiff purchased the suit property, an evaluation was conducted which was greater or equal to the aforementioned purchase price hence the probability that the same parcel of land reduces value with an amount which is greater or equal to Kshs. 2.5 million is very minimal if not none. I also take note of the fact that the Defendant Bank advanced a loan facility of ten million Kenya shillings to the Borrower which was guaranteed by the suit property at a value of Kshs. 22 million. I am of the view that normally Banks would not accept to charge property that is equal to the loan facility they are giving out, the value of the property ought to be higher than the loan facility and in this case, the defendant bank agreed to charge the suit property at a value of Kshs. 22. million which cleared defeats logic that the same property can be valued at Kshs. 10 million in a period of about two years. In the circumstances of the case, this court doubts the objectivity of the valuation report produced relied upon by the Defendant Bank.

In light of the foregoing, having considered the affidavits, the submissions and averments both in support and opposition of the application, I now look at the application in the lens of the principles on injunctions pronounced in such landmark decisions like Giella V Cassman Brown & Co. Ltd (1973) EA 358 and Mrao Ltd V First American Bank of Kenya Ltd & 2 others (2003) KLR 125.

In Giella V Cassman Brown & Co. Ltd, that;

"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 (E.A. INDUSTRIES -VS- TRUFOODS (1972) EA 420."

The Court in Giella identified three pillars on which rests the foundation of any order of injunction, interlocutory or permanent.

Explaining what amounts to *prima facie* case, the Court in Mrao Ltd V First American Bank of Kenya Ltd & 2 others (supra) said;

"I would say that in civil cases 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". (per Bosire, JA)

In light of the above, this court takes the trajectory of deciding the present case on a balance of convenience. Firstly, I have taken note of the fact that the sale that had been effected by the Defendant Bank was rescinded upon an agreement between the Defendant Bank and the Borrower's representative, sentiments of which have not been controverted by the Plaintiff and the Borrower in their submission and Affidavits. I completely agree with the Defendant on the view that if it desires to proceed with the recovery of its facility, which right it reserves, it ought to initiate a fresh recovery process by issuing the Plaintiff and the Borrower the requisite notices afresh. Thus indeed the orders sought by the Plaintiff herein have already been overtaken by events and there is no risk whatsoever that the Plaintiff is may lose the suit property in unfair circumstances.

The applicant has not persuaded this court that upon the facts he has relied on and on application of the law that he has a prima facie case with a probability of success at the trial. Secondly, that an award of damages would not be adequate compensation if the injunction is not issued and finally, the balance of convenience is to tilt in his favour. Accordingly, the applicant's application fails and is hereby dismissed with costs.

Dated, Delivered and Signed in open court at Kajiado this 19th day of February 2019.

.....

R. NYAKUNDI

JUDGE

Representation

Mr. Mr. Owiye for Mr. Kimani for the Defendant/Respondent

Mr. Naikuni for Mr. Kirimi for 1st Plaintiff/Applicant