REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL CASE NO. 1 OF 2018

SEA TURTLE LIMITED.....PLAINTIFF

VERSUS

EQUITY BANK(KENYA) LIMITED.....DEFENDANT

RULING

1. This is a ruling in respect of an application by way of Notice of Motion dated 12th January, 2018 and filed on 17th January, 2018, brought under Order 40 Rules 1 and 2, Order 50 Rule 1 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act, in which the Applicant seeks for;

(a) spent;

(b) spent;

(c) an injunction pending the hearing of the suit, to restrain the Defendant's attempted exercise of its statutory power to sell charged parcels of land known as KWALE/MCHINGIRINI/379 and 380;

(d) a declaration that the 45 days Redemption Notice is a nullity in light of lion-service with the statutory notices under Sections 90 and 96 of the Land Act, 2012;

(e) an independent valuer be appointed to value the property to ascertain its current market value;

(f) costs of the suit.

2. The application is premised on the grounds on the face of it and the supporting affidavit of **COLIN STUART**, where the main gist is that the Applicant, who has been served with a Notification of sale dated 28th December, 2017 by Rariga Auctioneers of his property **L.R NO KWALE/MCHINGIRINI/379 and KWALE/MCHINGIRINI/380** which was to be sold at the expiry of 45 days (see annexure "CS10") despite the penalties and interest accrued on the principal amount borrowed. That despite repeated demands in writing and requests there has been no account rendered by the Respondent to reconcile and establish how much interest and penalties have accrued.

3. The Respondent responded by filing a replying affidavit in which at paragraph 4, it contends;

"That as addressed by the Defendant's advocates on record, which information I verily believe to be true, that the application is fatally defective and in any event without merit for the following brief reasons;

(a) the plaintiff not being the chargor or a spouse of the chargor, lacks the *locus standi* to question the Defendant's exercise of the statutory power of sale. The plaintiff and the chargor are totally distinct people in law and fact.

(b) In any event, all the statutory notices relating to the exercise of the statutory power of sale were served on the chargor.

(c) The dispute, if at all in far as it relates to penalties and interests, is a dispute on accounts which has never been a ground for grant of an injunction.

(d) The application and entire suit is an invitation by the plaintiff to have the court force the Defendant to accept the plaintiff's proposal, which is a jurisdiction the court lacks.

4. On 31st January, 2018, both counsels agreed to dispose of the application via written submissions and the highlighting of the said submissions came up on 30th October, 2018.

THE APPLICANT'S SUBMISSIONS.

5. In the Applicant's submissions, the facts of the case as gathered from the Notice of Motion and the supporting affidavit sworn by COLIN STUART on 12th January, 2018 have been stated.

6. The applicant submitted that it applied for a loan facility from the defendant on or about 25th August, 2015 and the defendant agreed to advance the 1st plaintiff Kshs9,100,000/= to be used to finance the completion of a slaughter house, a storage facility and pay off an outstanding loan. As security for the said facility, a legal charge was created on the 2nd plaintiff's properties **KWALE/MCHINGIRINI/379 and 380** and the 1st plaintiffs directors personal guarantee and indemnity of Kshs9,100,000/=.

7. The Applicant contends that the Defendant delayed in disbursing the funds in terms of the loan agreement for over a year occasioning the 1st plaintiff loss of business opportunity and great debt hence forcing the 1st plaintiff to take a further loan of Kshs1,000,000/= for purposes of amalgamating the two loans thereby bringing the total to Kshs10,200,000/=.

8. The Applicant also contends that unexplained interest and penalties have been levied without any explanation by the respondent on the same.

9. The Applicant then avers that the Respondent intends to sell the suit properties being **KWALE/MCHINGIRINI/379 and 380** on the strength of a valuation report which gives a value of 50% below the value returned on the time of taking of the facility.

10. The Applicant further submits on the issues for determination are;

(a) whether the conditions for issuance of an injunction have been met therein, and

(b) whether the plaintiffs are entitled to the prayers sought.

11. To argue this case on the two issues the Applicant has cited and relied on the case of **GIELLA VERSUS CASSMAN BROWN (1973) E.A 358; NGURUMAN LIMITED VERSUS JAN BONDE NIELSON & 2 OTHERS (2014) eKLR, MANASSELI DENGA VERSUS ECO BANK KENYA LIMITED & ANOTHER (2015) eKLR, and DAVIT NGUGI NGAARI VERUS KENYA COMMERCIAL BANK LIMITED (2015) eKLR.**

RESPONDENT'S SUBMISSION

12. The Respondents case may be retrieved from the Replying Affidavit of GEOFFREY WANYONYI sworn on 27th February, 2018 and written submissions dated 19th March, 2018.

13. According to the Respondent, the admission by the Plaintiff/Applicant at paragraph 3 of the supporting affidavit of COLIN STUART that the suit property belongs to COLIN STUART is overwhelming evidence that the plaintiff cannot establish a prima facie case. He cited the Court of Appeal case in support of this, being;

(a) Venture Capital and Credit –versus- Consolidated Bank of Kenya (2004) IEA 357.

(b) Keziah Njambi Maingi & Another –versus- Barclays Bank of Kenya Limited 92014) eKLR.

(c) Caneland Limited –versus- Africa Banking Corporation Limited (2016) eKLR.

(d) Salomon –versus- A. Salomon & company Limited (1896) UKHL 1.

14. On the issue of whether or not the plaintiff has satisfied the principles that would warrant the grant of an injunction, the Respondent contends that the delay in disbursing the facility is explained vide the letter of offer dated 23rd September, 2015 and a letter dated 23rd August, 2017 (GW-4), a letter of offer dated 11th November, 2016 and email from COLIN STUART dated 9th March, 2017, which show that it was the plaintiff who had refused to comply with the conditions in the letter of offer dated 11th November, 2016 and therefore should not complain.

15. The Respondent, on the issue of unclear penalties and interest contends that all statutory notices relating to the exercise of the statutory power of sale were served on the chargor and that such dispute on accounts or amount owed, has never been a ground for gist of an injunction. They cited the case **of Sophia House Ltd Versus Barclays Bank of Kenya Ltd (2005) eKLR** in support of this.

16. With regard to service of statutory notices, the Respondent has submitted that a three months statutory notice dated 1st August, 2017 and a forty day statutory notice dated 11th November, 2017were but by registered point to P.O Box 5016-80400, UKUNDA, which is the plaintiffs address as well as Mr. Colin Stuart's address and the same were addressed to Mr. Stuart and copied to the plaintiff as required by Section 90(1) and (2) of the Land Act, 2012 and Section 96(2) and 96(3) of the Land Act.

17. The respondent also submits that there is no dispute on valuation of the suit property, which was issued in September, 2016 for purposes of assessing the property and that it does not amount to a prima facie case wth a probability of success. The cited the cases of;

(a) Zumzum Investment Limited Versus Habib Bank Limited (2014) eKLR.

(b) Charles Alex Njoroge –versus- National Bank of Kenya Ltd & Another (2015) eKLR.

18. Finally, according to the Respondent, the Applicant's application is an citation by the Applicant to have this court force the Defendant/Respondent to accept the plaintiffs proposal which it lacks jurisdiction to enforce.

ANALYSIS AND DETERMINATION

19. In her ruling delivered on 16th August, 2018, with regard to the Notice of Motion application dated 12th January, 2018, Justice Njoki Mwangi allowed and ordered the Plaintiff/Applicant to amend the said Notice of Motion. I have gone through the record and not come across any amended Notice of Motion except for the one that was annexed to the application dated 16th March, 2018.

20. Be that as it may, I will proceed to make my determination based on objectivity rather than technicality by taking the annexed draft amended Notice of Motion dated 16th March, 2018 into consideration.

21. In an application for an interlocutory injunction, the onus lies upon an applicant to satisfy the court with evidence and sound legal principles to grant an injunction, being a discretionary remedy.

22. In the celebrated case of **Giella –versus- Cassman Brown & CO. Ltd (1973) E.A 357,** the court set out the principle for interlocutory injunctions. The principles are;

(i) The Plaintiff must establish that he has a prima facie case with high chances of success;

(ii) That the Plaintiff would suffer irreparable loss that cannot be compensated by an award of damages;

(iii) If the court is in doubt, it will decide on a balance of convenience.

23. In the application before this court, of useful guidance is the criteria which was considered in granting an injunction that was laid down in the decision in **America Cynamid CO. –versus- Ethicom Limited (1975) AC 396,** which established the test in the English courts in deciding if an injunction should be granted. This test was enunciated in Ireland in the case of Camus Oil –versus- The Minister of Energy. The test has three elements;

(i) there must be a serious/fair issue to be tried;

(ii) damages are not an adequate remedy;

(iii) the balance of convenience lies in favour of granting or refusing the application.

24. These principles have been reiterated in numerous cases in Kenya. In **Mbuthia versus Jimba Credit Cooperation Ltd;** Platt J.A. echoed the position adopted in the **American Cynamid** case cited above and stated that in an application for interlocutory injunction, the court is not required to make final findings of contested facts and law but only needs to weigh the relative strength of the parties case.

25. The first question to address in this case are whether the applicant has disclosed a prima facie case with a reasonable probability of success. Has the applicant raised any triable issues?

26. In making a determination on the issue of prima facie case with a probability of success, the court in the case of Moses **Muhia Njoroge & 2 Others –versus- Jane W. Lesaloi & 5 Others** cited the Court of Appeal decision in the case of **Mrao Ltd –versus- First American Bank of Kenya & 2 Others,** where it was held that;

"A prima facie case in a civil application included but not confined to a genuine and arguable case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal rom the latter."

27. The second test for determination is whether the Applicant will suffer irreparable loss. The following paragraph in **Halisburry's laws of England** is instructive. It reads;

"It is the very first principle of injunction law that prima facie the court will not grant an injunction to restrain an actionable wrong for which damages are the proper remedy. Where the court interferes by way of an injunction to prevent an injury in respect of which there is a legal remedy, it does so upon two distinct grounds first, that the inquiry is irreparable and second, that it is continuous. By the term irreparable injury is meant inquiry which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact that the plaintiff may have a right to recover damages as no objection to the exercise of the jurisdiction by injunction, if his rights cannot be

adequately protected or vindicated by damages. Even where the injury is capable of compensation in damages an injunction may be granted, if the act in respect of which relief is sought is likely to destroy the subject matter in question."

28. In order to show irreparable harm, the party moving the court must demonstrate that it is harm that cannot be quantified in monetary term on which cannot be cured.

29. In determining whether an interlocutory injunction should be granted, where any doubt exists as to the applicant's right, or if the right is not disputed, but its violation is denied, the court takes into consideration the balance of convenience to the parties, which is, the nature of injury the Respondent would suffer if the injunction is granted, should he turn out to be right, or which injury the Applicant, on the other hand, might suffer if the injunction is denied, should he ultimately turn out to be right.

30. After carefully considering the proceedings, affidavit evidence, submissions of parties and the applicable law, the first question to address is whether the applicant has disclosed prima facie case with a reasonable probability of success. The question then becomes, does the applicant's case raise triable issues? If yes, then the first test will have been satisfied.

31. According to the Applicant, the dispute relates to a contractual transaction which is governed by the law of contract, so that, after the main hearing, should the court find in favour of the Respondent then an order for compensation in form of money would be sufficient to the Respondent as opposed to the Applicant who stands to lose his matrimonial property and his place of residence, hence the need to maintain the status quo as a priority at this stage.

32. The Applicant also states that the Respondent is in violation of the law for issuing a notification of sale dated 28th December, 2017 since there was never a demand notice calling for repayment when in default for 90 days as agreed in the loan agreement.

33. Lastly, the Applicant states that notices were never served upon the borrower since it is a separate legal entity from its directors.

34. From the facts in the pleadings, there is no contention that the Applicant was advanced fiancial accommodation which was secured by the suit properties being **KWALE/MCHINGIRINI/379 and 380** respectively and that there were certain monies that were outstanding.

35. For determination is whether or not the Respondent had fully complied with the provisions of the law before purporting to exercise its statutory power of sale as regards the issuance of statutory notice and valuation of the subject project and whether the interest and penalties charged by the Respondent are charged.

36. On the issue of the dispute over the loan account, the Plaintiff/Applicant is clearly in default in terms of repayment of the loan advanced to them by the Respondent. Therefore, to aid the Plaintiff get injunction orders against the Respondent would amount to the Plaintiff benefiting form their own wrong doing. I say so while associating myself with the finding of the Court of Appeal in **Fina Bank versus Ronak Ltd (2001)** 64 at page 68 that;

"In any event, dispute over account were no basis for granting an injunction to the Respondent against the Appellant."

And in Mombasa **HCCC No. 99 of 2013, John Edward Ouko –versus- National Industrial Credit Bank Limited**, Kasango J, held that;

"…. If courts were to allow debtors to avoid paying their just debts by taking some defences I have seen in the recent times for instance challenging contractual interest rates, banks will be crippled if not driven out of business altogether and no serious investors will bring capital into a country whose courts are a heven for defaulters."

Gikongo J. in **Julius Mainye Angeya V. Ecobank Kenya Limited (2014) eKLR** while relying on the case of **Kwality Candies & Sweets Limited –versus- Industrial Development Bank Limited,** held;

A court of equity cannot and should not aid a person whose default the very reason why a statutory power of sale is being exercised. It is setted that a party cannot derive benefit from his own wrong."

37. On the issue of 2nd Plaintiff losing his matrimonial property and his place of residence which he used to guarantee the loan facility that was accorded by the 1st Plaintiff, I fully associate myself with the decision by Gikonyo, J in **Julius Mainye Anyega –versus- Eco-Bank Kenya Limited (2014) eKLR** that;

"The court should resist being used to re-write the contract, instead the court should enforce the contract. Further, the fact that a property is matrimonial property does not warrant the issuance of orders sought. The property once pledges as security becomes a potential commodity of sale. The sentimental attachment pleaded upon is diminished once the property is pledged as security. The Applicant has not established a prima facie case as it is him who is in breach of his duty to the court as he misrepresented to the court and obtained exparte orders."

And **in HCCC Number 82 of 2006, Maltex Commercial Supplies Limited & Another –versus- Euro Bank Limited** (In liquidation) that;

"….. Any property whether it is a matrimonial or spiritual house, which is offered as security for loan/overdraft is made on the order stating that the same stands the risk of being sold by the lender if default is made on the payment of the debt secured."

38. The other issue that was raised by the applicant was that they were not served with the requisite statutory notices which was a term of the lending agreements, that in the event of default, the Respondent would by notice to the borrower (applicant) and copied to the guarantors declare that the Defendants securities had become enforceable. That the Respondent failed to inform the 1st Plaintiff/Applicant of the call for repayment, which was in breach of this term.

39. The Respondent produced a three month statutory notice dated 1st August, 2017 and a forty days statutory notice dated 11th November, 2017 which were sent by registered post to P. O BOX 5016-80400, Ukunda, which is confirmed in the verifying affidavit by the Applicant dated 20th September,, 2018 as their address as well as Mr. Colin Stuart's. Both notices were addressed to Mr. Stuart and copied to applicant. The address is the same one appearing in the loan facility issued personally to the 2nd Applicant on 3rd July, 2016. The Applicants have not shown the court any other address or that what was sent never reached them. How then, would the court believe they were not served?

40. In the circumstances, I find that the Respondent complied with the provisions of Section 90(1) (2) and 96(2) and (3), all of the Land Act, 2012, which provide for the chargor to be served with a three month statutory notice and a eight classes of people other than the chargor to be served. The chargor in this case was the 2nd Applicant. The Applicant's argument on service in this case fails.

41. Finally, having considered all the circumstances of the case, I find as follows;

(a) The right to dispose of the subject property by way of public sale, having both admittedly and apparently been admitted, the plaintiff/Applicant has failed to satisfy this court that they have a prima facie case with a likelihood of success. Consequently, there is no need to interrogate the issue of whether they would suffer irreparable damage if no injunction issued. I therefore decline to restrain the Defendant from exercising its powers under the securities pledged to it by the Applicants/Plaintiffs.

(b) The application dated *12th January, 2018* is found unmeritious and hence dismissed with costs to the Respondent/Defendant.

(c) The Respondent/Defendant to furnish to the Plaintiffs, through the Plaintiff's counsel, a detailed statement of account of all the transaction subject of the suit within 30 days.

Orders accordingly.

Ruling DELIVERED, DATED and SIGNED this 11th day of March, 2019.

_____

D. CHEPKWONY

JUDGE.