



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION- MILIMANI

HCCC NO. 151 OF 2019

RUDUFU LIMITED.....PLAINTIFF/APPLICANT

VERSUS

N.I.C BANK KENYA LIMITED.....1ST DEFENDANT/RESPONDENT

GODFREY GITHINJI KAMIRI T/A

WESTMINISTER AUCTIONEERS.....2ND DEFENDANT/RESPONDENT

RULING

INTRODUCTION

The Plaintiff filed a Plaint dated **29th May 2019**. The statement of claim is that on **20th July 2016**, the Plaintiff took out a loan facility from the 1st Defendant in the sum of **Kshs. 150,000,000** to finance 75% of the purchase price of Land Parcel No. **L.R. No. 209/2669 (I.R. 85115)**.

The security for the said loan facility was a first ranking legal charge and a deed of rental assignments over the suit property plus the Plaintiff and its shareholders guarantees to the 1st Defendant. The Plaintiff carried out extensive and costly renovations on the suit property for the purposes of setting up a **Hotel and Restaurant Business**. The said renovations were funded mainly by the Plaintiff's **Airline Business**.

The Plaintiff duly serviced the loan facilities up to **April 2018** solely from the funds sourced from its Airline Services Business. However, in **2018 Kenya Civil Aviation Authority** introduced new rules which negatively affected the Plaintiff's Airline business. Consequently, the Plaintiff sought a restructuring of the loan facility.

On 28th March 2019, the 2nd Defendant purporting to have been instructed by the 1st Defendant, served a **45 days Redemption Notice** and Notification of Sale to the Plaintiff's Land Parcel No. **L.R. No. 209/ 2669(I.R. 85115)** to recover the outstanding debt of **Kshs. 142,686,246.46** as at 27th March 2019.

The 1st & 2nd Defendants have not served the Plaintiff with any Statutory Notice as required by **Section 90 (1) and (2) of the Land Act** and complied with **Sections 54, 55 and 61 of the Land Registration Act** but has however slated the land parcel for auctioning on 4th June 2019 at 11am.

It is therefore the Plaintiff's prayer that this court issues an injunction restraining the 1st and 2nd Defendants from exercising the Statutory Power of Sale.

APPLICANT'S APPLICATION

By an Application brought under **Section 1A & 3C, Order 40 Rule 1 & Order 51 Rule 1 of CPR 2010** dated 29th May 2019 and filed on 31st May 2019, the Plaintiff sought orders that: -

- 1. A temporary injunction be issued restraining the 1st and 2nd Defendants jointly and severally either by themselves or their agents from selling, advertising for sale, purporting to offer for sale, purporting and otherwise the offering and exercising the Statutory Power of Sale, transferring, or in any way dealing with Land Parcel no. L.R. No 209/2669 (I.R. 85115) pending hearing and determination of this Application *interpartes* and or further orders of the court;**

2. A temporary injunction be issued restraining the 1st and 2nd Defendants jointly and severally either by themselves or their agents from selling, advertising for sale, purporting to offer for sale, purporting and otherwise the offering and exercising the Statutory Power of Sale, transferring, or in any way dealing with Land Parcel no. L.R. No 209/2669 (I.R. 85115) pending hearing and determination of this suit; and

3. Costs be in the cause.

The Plaintiff supported their Application with a Supporting Affidavit by Simon Ngigi Kimani dated 29th May 2019 on the grounds that: -

1. On 28th March 2019, the 2nd Defendant served an illegal, irregular and fraudulent 45 Days Redemption Notice and Notification of Sale against the said Plaintiff's property.

2. The 1st Defendant failed, refused and or omitted to serve the Plaintiff with a Statutory Notice as per the requirements of Section 90 and 96 of the Land Act.

3. The suit property has been deliberately devalued by the Defendants with the aim of selling the same at a throw away price.

4. The 1st Defendant has refused to comply with the provisions of Section 97 of the Land Act requiring it to carry out a forced sale valuation on the suit property before exercising its statutory power of sale.

5. The Plaintiff is bound to suffer irreparable loss and damage if the intended sale and attachment of the same property proceeds as scheduled.

6. The Plaintiff is able and willing to service the balance of the loan.

1ST DEFENDANT'S REPLYING AFFIDAVIT

The 1st Defendant replied to the **Notice of Motion** dated 29th May 2019 by way of Replying Affidavit dated 3rd June 2019.

The Senior Legal Manager of **NIC Bank Kenya PLC**, stated that sometime in July 2016, the Plaintiff had approached the 1st Defendant for a credit facility which was secured by a First Ranking Legal charge over the property known as **L.R No.209/2669- I.R 85115**.

After due consideration and evaluation, the 1st Respondent accommodated the Plaintiff by granting it a Term Loan Facility of **kshs 150,000,000** along with a credit facility of **kshs. 1,000,000**. The facility terms were as follows;

a) **Tenor term- 120 months**

b) **Interest rate- variable of 18.9% p.a with the credit facility at 3% p.a on outstanding debit balances**

c) **Repayment - by way of 120 equal monthly installments**

Directors secured the facility through Personal Guarantees and indemnity of **Kshs 151,000,000** and a Deed of Rental Assignment secured the facility over the suit property **L.R No. 209/2669**.

The charge was duly registered on 16th December 2016 over the suit property.

The Plaintiff failed on numerous occasions to make the requisite payments as contracted and set out in both the Letter of offer and Charge as marked in "**Annexure E**".

At the date of filing the present affidavit, the Plaintiff's facility had been overdue for **438** days and was in arrears amounting to **Kshs. 41,939,643.08** while the cumulative outstanding balance on the facility was **Kshs. 174,624,239.29**. He further stated that the 1st Defendant's Statutory right of sale was exercised by issuing the requisite notices as marked "**Annexure G1 & G2**". The Plaintiff was duly notified of the default vide the Plaintiff's address as set out in the Security documents by way of registered post. A further communication was made on 19th May 2018 notifying the Applicant of the amount required to settle the default and the banks intention to exercise the statutory power of sale as attached in the "**Annexure G3**".

The Senior Legal Manager of **NIC Bank Kenya PLC** also stated that the 2nd Defendant strictly followed the law in advertising the property for sale as attached in "**Annexure I1**" which was the 45 day notice by the Auctioneers.

1ST DEFENDANT'S SUPPLEMENTARY AFFIDAVIT

Pursuant to leave of court granted on 3rd June 2019, the 1st Defendant filed a Supplementary Affidavit. The said Affidavit contains: -

1. The certificates of posting relating to service and issuance of statutory notices by the 1st Defendant (marked as "**Annexure A**");

2. A copy of the email sent to the Plaintiff forwarding a recent valuation report (marked as “Annexure B”);

3. A copy of the email sent to the Plaintiff notifying it of the Bank’s intention to instruct an auctioneer to sell the property (marked as “Annexure C”).

DETERMINATION

This Court is called upon to determine the following issue (s);

a) Did the Plaintiff obtain a facility from the 1st Defendant and thereafter default in servicing the same necessitating the 1st Defendant to exercise their right of statutory power of sale?

b) Did the 1st Defendant and 2nd Defendant comply with mandatory provisions of **Sections 90(1), 96(2) & 97 of Land Registration Act and Rule 15 of Auctioneers Rules** by issuing the requisite notices to the Applicant?

c) Has the Applicant made out a *prima facie* case to warrant the Court to grant equitable remedy of interim injunction to stop the statutory power of sale scheduled today 4th June 2019?

It is not contested that the Plaintiff/Applicant was advanced a facility from the 1st Defendant in 2016 for **Ksh 150,000,000/-** secured by suit property **LR No 209/ 2669 (IR.85115)** where a charge over the said property was registered.

It is also not contested that the Plaintiff/Applicant defaulted and failed or was unable to service the loan in 2018 though due to explained circumstances did not deny debt save for contesting service by the defendants of mandatory statutory notices. In fact the Plaintiff/Applicant confirmed ability and willingness to service the loan.

What is in issue then is whether or not the Defendants fully complied with provisions of law before instituting the exercise of the right to statutory power of sale by issuance of requisite mandatory notices.

The 1st defendant bank by letter marked ‘G’ dated 3rd October 2018 through its advocates **Mbaabu M’ Inoti & Co Advocates** addressed to Directors of **Rudufu Limited** of **P.O.Box 21488-00505** issued statutory notice under **Section 90(1) of Land Act 2012** with regard to **LR 209/2669(1R85115)** registered in the name of **Rudufu Limited**. The notice indicated outstanding arrears balance **Ksh 16,325,727.43** and the total outstanding balance of **Ksh 157,358,163,85/-**. The arrears plus interest and charges accrued were to be settled in the next 3 months from the date of service of this notice in default the 1st Defendant would exercise any of the remedies provided by **Section 90 (3) of the Land Act**.

In the Further Affidavit filed by the 1st Defendant with leave from Court, the 1st Defendant through Counsel annexed to the Supplementary Affidavit copies of **Registered Post** charges of Mail addressed to **Ngigi Kimani and Rudufu Co Ltd**.

The 1st Defendant bank by letter marked ‘G’ dated 25th January 2019, through its advocates **Mbaabu M’ Inoti & Co Advocates** addressed to Directors of **Rudufu Limited** of **P.O.Box 21488-00505** issued statutory notice under **Section 96(2) of Land Act 2012** with regard to **LR 209/2669(1R85115)** registered in the name of Rudufu Limited. The notice indicated outstanding arrears balance **Ksh29,577,512.46** and the total outstanding balance of **Ksh 165,302,220.13/-** as at 25th January 2019. The 1st Defendant notified the Applicant that after expiry of 40 days from date of service of notice if the debt is not paid in full, then the 1st Defendant would proceed to recover the said debt.

The 2nd Defendant whom despite service did not appear or file any document, service of the requisite **45 days** notice as required by **Rule 15 of Auctioneers Act** is confirmed as sent to the Plaintiff/Applicant as the Postal Payment receipt is annexed to the Supplementary Affidavit by 1st Defendant of 3rd June 2019. It shows that **Westminister Commercial Auctioneer** sent registered mail to **Rudufu Limited**.

Further, the letter by 2nd Defendant on notification of sale after 45 day period is annexed to the Replying Affidavit and the advertisement in Daily Nation of 13th May 2019.

The Plaintiff/Applicant did not contest the said service of the 45 day Notice and only took issue with non service of the other 2 notices prescribed by **Section 90 (1) & 96 (2) of Land Act 2012**.

In addition, before the 1st Defendant engaged services of an Auctioneer, 2nd Defendant, the 1st Defendant notified the Plaintiff of having received an offer of Ksh 150 million for the said suit property and invited the Plaintiff/Applicant to consider the same vide email of 4th February 2019 sent to **account@rudufu.com**. Despite the communication, the Applicant did not respond.

From the evidence above, the Applicants claim that mandatory notices as prescribed by **Sections 90 (1) & 96(2) of Land Act** were not served is not borne out by the evidence on record.

In the case of **Elizabeth Wanjiku Kariungi vs Equity Bank (Kenya) Limited [2017]eKLR** the judge observed in distinguishing the case of **Peter Kuria Munyuiru vs HFCK & Anor HCCC 457 of 2006** stated;

“When the Court imposes upon the Chargee the obligation of demonstrating knowledge of when the Chargor received or collected the notice which had been dispatched by registered post, that constitutes an extra burden, which is not anchored in

statute. The Chargor has an obligation to dispatch the notice to the correct postal address. The Chargor's duty is to ensure that the contents of the notice meet the requirements set out in the Land Act."

The 1st Defendant discharged burden of proof that the statutory notices were dispatched by registered post through their advocates to the Plaintiff/Applicant as confirmed by receipts of payment annexed to the Supplementary Affidavit.

With regard to the **45 Days** Redemption Notice and Notification of Sale against the said Plaintiff's property; the Plaintiff/Applicant admitted receipt but did not inform this Court how the notice was an illegal, irregular and fraudulent notice for this Court to consider. In the absence of any other evidence tendered in Court on the impropriety of the 45 day notice, in light of the Applicant's admission of receipt and the 1st Defendant's attachment of the Postage Payment of the same, the Court finds it a valid regular and lawful notice.

The Applicant's claim is that the suit property has been deliberately devalued by the Defendants with the aim of selling the same at a throw away price. The 1st Defendant has refused to comply with the provisions of **Section 97 of the Land Act** requiring it to carry out a forced sale valuation on the suit property before exercising its statutory power of sale.

The 1st Defendant attached email of 4th February 2019 to accounts@rudufu.com the subject being **Rudufu Limited Valuation Report** which report was enclosed with 1st Defendant seeking response on the same. **Ksh135million** was the valuation figure. Since then the Plaintiff/Applicant did not respond. Therefore, **Section 97 of the Land Act** was complied with.

The totality of evidence on record confirms service of statutory notices to the Plaintiff/Applicant. He who comes to equity must come with clean hands. The Plaintiff/Applicant has not denied the amount due and owing in default of servicing the loan. Whereas the Applicant deponed that circumstances beyond his control adversely affected regular payments towards defraying the debt, the Plaintiff Company ought to have approached the 1st Defendant Bank with a view to restructuring the repayments or a mutually acceptable re-scheduling of loan repayments and at least settling the arrears to avert escalation of the amount due and owing.

The Plaintiff Company deponed that it is able and willing to settle the debt and does not contest the outstanding figures. But the Plaintiff has not taken any steps to rectify the default, regularize the loan account and/or redeem the suit property and discharge its obligation to the bank. Thus a *prima facie* case is not made out at this stage to warrant equitable relief of interlocutory injunction.

On the other hand, the 1st Defendant complied with service of the requisite mandatory notices as prescribed by law to the Plaintiff.

Therefore, the Applicant's application of 31st May 2019 is dismissed.

DATED SIGNED & DELIVERED IN OPEN COURT ON 4TH JUNE 2019

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF:

MUSYOKI BENSO ADVOCATE FOR APPLICANT

MAKORI & KARIMI ADVOCATE FOR RESPONDENT

COURT ASSISTANT- JASMINE