



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

CIVIL SUIT NO.379 OF 2018

THOMAS KABAKI WAMWEA.....PLAINTIFF/APPLICANT

VERSUS

KENYA COMMERCIAL BANK.....DEFENDANT/RESPONDENT

RULING

1. By a notice of motion dated 2nd October 2018, the plaintiff/applicant seeks the following orders:

1. Spent

2. A temporary injunction be and is hereby issued to restrain the defendant whether by itself, its servants and or agents from alienating, selling, transferring, auctioning on 5th October 2018 or any other time or otherwise dealing with the plaintiffs property known as apartment B9 on LR No. 330/433 Sunning Hills Apartments situate un Lavington Nairobi pending inter partes hearing of this application.

3. A temporary injunction be and is hereby issued to restrain the defendant whether by itself, its servants and or agents from alienating, selling, transferring, auctioning on 5th October 2018 or any other time or otherwise dealing with the plaintiffs property known as Apartment B9 on LR No. 330/433 Sunning Hills Apartments situate un Lavington Nairobi pending the hearing and determination of this suit.

4. A mandatory injunction be and is hereby issued to restrain the defendant to credit the plaintiff's loan account with the sum of Ksh. 377,348.40 being part –proceeds of sale of 2 houses sold by the plaintiff's partner, Martin Muchai Mbugua on 25th April 2015 and upon crediting the said sum, waives all penalties and late payment charges it illegally levies against the plaintiff from 25th April 2018 so that the plaintiff can continue to service his loan.

5. A temporary injunction be and is hereby issued to restrain the defendant from exercising its statutory power of sale unless it issues the plaintiff with statutory notices as prescribed under the law.

6. The costs of this application be borne by the defendant.

2. The application is supported by the applicant's affidavit sworn on 2nd October 2018 and the affidavit of Martin Muchai Mbugua sworn on the same date. The applicant avers that he obtained a loan from the defendant using his residential house known as Apartment B9 situate on LR No. 330/433 known as Sunning Hills Apartments Lavington Nairobi (hereinafter "**the suit property**").

3. The plaintiff avers that he has been servicing the loans and that in November 2017, his business partner one Martin Muchai Mbugua sold 2 apartments for kshs 20,000,000 to purchasers who were financed by the defendant with a view to redeeming the plaintiff's and his said partners loans. He states that the defendant paid for the apartments in US dollars but that instead of the agreed exchange rate of kshs 99.95 per dollar, the defendant bought the dollar at kshs 98 per dollar thereby giving rise to a short fall of kshs 377,348.40/-. He further states that the failure to credit his account with kshs 377,348.40/- has given rise to the arrears that resulted in the proposed sale by public auction. He denies that any statutory notice, as prescribed by the law, was served on him and that he only became aware of the proposed sale through a newspaper advertisement posted in the Daily Nation on 17th September 2018.

4. At the hearing of the application Mr. Mwangi, learned counsel for the applicant submitted that the applicant has made out a prima facie case with probability of success as he has shown that the proposed sale of his house is as a result of the breach, by the defendant, of the agreement to buy the dollars at the agreed rate. It was also the applicants submission that he had made out a case for the granting of a mandatory injunction.

5. The respondent/defendant opposed the application through the replying affidavit and further affidavit of its Recovery Manager Mortgage Section sworn on 28th January 2019 and 12th February respectively who confirms that the plaintiff obtained a loan facility from the defendant for the sum of kshs 24,000,000 which loan was secured by a First Legal Charge over apartment numbers B2, B8, B9 and B10 on LR No. 330/433- Block B Sunning Hills Apartment Lavington within Nairobi County.

6. He avers that in addition to the First Legal Charge, a loan was further secured by Deed of Assignment of Rent over the said apartments and that it was an obligation under the terms of the contract that in the event of default in monthly payments, the defendant shall exercise its statutory right under the charge including the sale of the charged property by public auction. It is the defendant's case that in the month of March 2016, the plaintiff was in arrears of over kshs 1,108,394.95 and that with the total debt outstanding being kshs 4,108,084.01, the defendant proceeded to issue the First Statutory Notice under Section 90(1) (2) (3) (e) of the Land Act informing the plaintiff of the nature and extent of default and of his rights as a chargor to make good the default.

7. He further states that the statutory notice did not elicit any response from the plaintiff thereby causing the defendant to move to exercise its power of sale over the charged property under Section 96(2) (3) of Land Act.

8. At the hearing of the application, Mr. Okello learned counsel for the defendant submitted that it is an uncontroverted fact that the plaintiff is in arrears to the tune of over kshs 5.5 Million and that the bank complied with the procedures underpinned in the Land Act in the exercise of its statutory power of sale.

9. Counsel submitted that the alleged transaction leading to the alleged shortfall was not a transaction between the plaintiff and the defendant and that there was no such understanding that the defendant would credit the plaintiff account with the said amount. It was the defendant's case that plaintiff has not demonstrated that he has a prima facie case against the defendant so as to entitle him to the orders sought in the application.

10. I have considered the application herein, the respondent's response and the submissions made by the advocates on record. The main issue for determination is whether the applicant has made out a case to warrant the granting of an order of temporary injunction. The reasons advanced by the applicant in seeking the said orders for injunction can be summarized as follows:

a) That he was not served with any statutory notices as envisaged under the Land Act.

b) That the defendant did not credit his account with the sum of kshs. 377,348.40 being part of the proceeds recovered from the sale of property belonging to the plaintiff's partner one Martin Muchai.

11. The principles governing the courts in determining whether or not to grant an injunction are well known. The said principles were set out in the case of **Giella -Vs- Cassman Brown & Company Ltd 1973 EA 353** and restated, together with their mode of application in **Nguruman Limited V. Jan Bonde Nielsen & 2 Others**, CA No. 77 Of 2012, 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) demonstrate irreparable injury if a temporary injunction is not granted, and

(c) ally any doubts as to (b) by showing that the balance of convenience is in his favour.

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit “leap-frogging” by the applicant to injunction directly without crossing the other hurdles in between. (Emphasis added).

12. Having regard to the known principles of injunction as set out in the above cited case, I will now turn to consider if the application meets the threshold set therein. On prima facie case, it is well established that, in order to secure the injunctive relief sought, the applicant must first establish a prima facie case with a high chance of success. In this case, it is not disputed that the applicant owns the suit property which he offered as a security for the loan facility advanced to him by the defendant. It is also not disputed that the applicant has defaulted in the loan repayments and that owing to the said default, the defendant is entitled to exercise its statutory power of sale. The point of challenge by the applicant is that his default was occasioned by the defendant's failure to credit his loan account with the sum of Kshs. 377,348.40 realised from the sale of a third party's property in which an agreement was reached on the dollar exchange rate which agreement, the applicant contends, was breached by the defendant.

13. In a nutshell, the applicant blames the defendant for the default/shortfall in his loan account. I have perused the applicant's annexures marked “C”, “D1”, and “D2” to the supporting affidavit. I find that even though the said annexures indicate that there was email correspondence between the applicant and the defendant over the sale of a third party's property with a view to offsetting the applicant's debt, nowhere in the said correspondence is it indicated that an agreement was arrived at in respect to the applicable dollar rates or that the defendant would credit the applicant's account with the sum of Kshs. 377,348.40 as alleged by the applicant. My take is that communication

made through the email cannot be construed to amount to a legally binding contract that can be enforced by this court as suggested by the applicant.

14. I therefore find that the applicant's allegation that there was an agreement that his account would be credited with the proceeds of the sale of the property of a third party was not proved. Consequently, and having found that it is an uncontested fact that the applicant is indebted to the defendant, I find that the applicant has not established that he has a prima facie case against the defendant so as to entitle him to the interlocutory orders sought.

15. My above findings on the issue of prima facie case would have been sufficient to dispose of this application but I am still minded to address the applicant's grievance that he was not served with the requisite statutory notices as envisaged by the Land Act. Courts have taken the position that lack of or irregular/improper service of statutory notices does not per se entitle a loan defaulter to orders of interlocutory injunction as in such a case, all the court should do is not to stop the chargee from exercising its statutory power of sale but to direct that such sale be conducted upon full compliance with the service of notices as provided for under the Land Act. This is the position that was adopted by the Court of Appeal in the case of **National Bank of Kenya Limited vs Shimmers Plaza Ltd [2009] eKLR** wherein the learned judges held as follows:

“We venture to say that where the court is inclined to grant an interlocutory order restraining mortgagee from exercising its statutory power of sale solely on the ground that the mortgagee has not issued a valid notice, then in our view, the order of injunction should be limited in duration until such time as the mortgagee shall give a fresh statutory notice in compliance with the law. We respectfully think that the learned judge did not exercise his discretion judicially in the circumstances of this case when he granted an order of injunction until the determination of the suit.”

16. Section 90 of the Land Act, 2012 stipulates as follows:-

90. (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 recipient 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;

(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 two months 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;

17. My understanding of the above provision is that as long as the chargor remains indebted to the chargee, the monies must be paid failing which the latter is entitled to exercise its statutory power of sale. The chargee is however required to fully comply with the provisions of the Land Act especially in respect to issuance of the statutory notice to the chargor showing the nature and extent of the default, and if the default is of non-payment, the amount due to be paid and the consequences of the default.

18. I have carefully perused and considered the defendant's replying affidavit and specifically annexures marked “MF-3” and “MF-4” which are copies of Statutory Notices dated 2nd March 2016 and 22nd July 2016 respectively. The said notices were issued under sections 90(1)(2) (3) (e) and 96(2) (3) of the Land Act respectively and are accompanied by Certificates of Postage which, to my mind, is a clear demonstration that they were properly served on the plaintiff. I am therefore unable to find that there was any irregularity in the statutory notices that were served on the plaintiff.

19. In conclusion and having regard to the findings and observations that I have made in this ruling, I find that the instant application is not merited and the order that commends itself to me is the order to dismiss it with costs to the defendant.

Dated, signed and delivered in open court at Nairobi this 13th day of June 2019.

W. A. OKWANY

JUDGE

In the presence of:

Miss Akello for the defendant/respondent

Mr. Mogisha for J. K. Mwangi for plaintiff/applicant

Court Assistant - Ali