



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI

COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. E073 OF 2019

HIGHGROVE HOLDINGS LIMITED.....PLAINTIFF/APPLICANT

VERSUS

I & M BANK LIMITED.....1ST DEFENDANT/RESPONDENT

GARAM INVESTMENTS LIMITED.....2ND DEFENDANT/RESPONDENT

RULING

1. This Ruling relates to 3 applications filed by the Plaintiff/Applicant herein namely; applications dated 5th April 2019, 15th May, 2019 and 30th May, 2019. In the application dated 5th April 2019, the Applicant seeks the following orders:

1. *Spent*
2. *That the purported sale be declared illegal null and void*
3. *That the 1st Respondent be compelled to produce it's true and proper accounts affecting the facility.*
4. *That pending the hearing and determination of this application inter partes, this Honourable Court be pleased to issue a temporary order of injunction against the 1st and 2nd Respondents restraining them from entering, interfere, advertise for sale or sell all that property known as House No. 19 House No. 7 on L.R No. 29998 situated at Highgrove Village Lower Kabete Road in Nairobi County.*
5. *That pending the hearing and determination of the suit herein, this Court be pleased to order that the status quo be maintained.*
6. *That the costs of this application follow the cause.*

2. The application is premised on the grounds that:

1. *That on or about 21st March, 2019 the Applicant herein received a Notice from the 2nd Respondent that unless it redeems all that property known as House No. 19 House No. 7 House No. 3 on L.R No. 29998 situated at Highgrove Village Lower Kabete Road in Nairobi County within 45 days, the 2nd Respondent have instructions from the 1st Respondent to dispose of the said property by Public Auction.*
2. *That the 1st Respondent herein wants to dispose the said property without any proper valuation and the Notice as required by the law.*
3. *That the said notice will prejudice the rights of the Applicant if this Honourable Court does not intervene.*
4. *That no proper reconciliation of the accounts has been done and that Applicant is apprehensive that the 1st Respondent has been overcharging illegal interests on the loan facility and also has not been discharging some of the properties that have been fully paid for as per the agreement with the Applicant.*
5. *That the Applicant is apprehensive that unless this Court intervenes, the Respondents herein will illegally dispose of the*

property for a value below its market value a move by which will be prejudicial to the Applicant.

6. That in this regard, unless this Honourable Court grants the orders herein sought, the Applicant herein is likely to suffer irreparable damages.

3. The application is opposed by the 1st Respondent through the replying affidavit of its Debt Recovery Managers Corporate, Mr. Musa Ng'ang'a Ndumbuya who avers that pursuant to a letter of offer dated 10th January 2017, the 1st Respondent extended a credit facility to the Plaintiff who executed a letter of offer and accepted the terms and conditions contained therein.

4. He further avers that as security for the facility, the Plaintiff executed various charge documents in the 1st Respondents but adds that the Plaintiff lacks the *locus standi* to injunct the bank from exercising its statutory power of sale over Town House No.19 as it is neither the chargor nor the proprietor. He avers that the Plaintiff defaulted in servicing the loan advanced to it by the 1st Respondent and that owing to the default, the 1st Respondent has undertaken all the requisite legal steps towards recovering the debt which steps culminated the issuance of the statutory and auctioneers notices.

5. It is the 1st Respondent's case that it is entitled to proceed with the realization of the charged properties so as to recover the outstanding debt.

6. In the 2nd application dated 15th May 2019, the Plaintiff applicant seeks orders that:

1. Spent

2. That the purported sale be declared illegal null and void.

3. That the 2nd Respondent be held to be acting in bad faith for negligently, illegally and maliciously re-advertising the property which is the subject matter of an ongoing case.

4. That pending the hearing and determination of this application inter parties, this Honourable Court be pleased to issue a temporary order of injunction against the 1st and 2nd Respondents restraining them from entering, interfering, advertising for sale or selling all that property known as House No. 19 House No. 7 on L.R No. 29998 situated at Highgrove Village Lower Kabete Road in Nairobi County.

5. That pending the hearing and determination of the suit herein, this Court be pleased to order that the status quo be maintained.

6. That the costs be borne by the 2nd Respondent.

7. The 2nd application was filed as a follow up to the 1st application and was premised on the grounds that the 1st Respondent was still intent on selling the suit property in abid to defeat justice and thereby render this suit nugatory.

8. The 2nd application was similarly opposed by the 1st Respondent through the replying affidavit of its advocate, **Leah Wanjiru Muhia** who reiterates the contents of the replying affidavit in response to the first application sworn by **Kirit Kumar Kanabar**. She states that the 2nd application is *sub judice* as it seeks the same orders that were sought in the 1st application.

9. In the 3rd application dated 30th May 2019, the Applicant seeks orders that;

1. Spent

2. That the purported sale be declared illegal null and void.

3. That the 1st Respondent be compelled to produce it's true and proper accounts affecting the facility.

4. That pending the hearing and determination of this application inter partes, this Honourable Court be pleased to issue a temporary order of injunction against the 1st and 2nd Respondents/Defendants restraining them from entering, interfering, transferring the suit properties and or engaging in any further dealings with (House No. 3 on LR No. 29998, House No. 7 on LR No. 29998 and House No. 19 on LR No. 29998 respectively and all situate in Highgroove Village along Lower Kabete Road, Nairobi)

5. That pending the hearing and determination of the suit herein, this Court be pleased to order that the status quo be maintained.

6. That the costs of this application follow the cause.

10. The application is premised on the grounds that :

1. That on the 21st March, 2019 the Applicant/Plaintiff herein received a Notice from the 2nd Respondent that unless it redeems all that suit property known as House No. 3 on LR No. 29998, House No. 7 on LR No. 29998 and House No. 19 on LR No. 29998 respectively and all situate in Highgroove Village along Lower Kabete Road, Nairobi within 45 days, the 2nd Respondent/Defendant had instructions from the 1st Respondent/Defendant to dispose off the said property by Public Auction.

2. That the 1st Respondent/Defendant herein has proceeded to unlawfully dispose of the suit property without any proper valuation and the Notice as required by law.

3. That the said unlawful sale will prejudice the rights of the Applicant/Plaintiff if this Honourable Court does not intervene.

4. That no proper reconciliation of the accounts has been done and the Applicant/Plaintiff is apprehensive that the 1st Respondent/Defendant has been overcharging illegal interests on the loan facility.

5. That the Applicant/Plaintiff is apprehensive that unless this Court intervenes, the Respondents herein will unlawfully transfer the property for a value below its market value.

11. The 1st Respondent similarly opposed the application through the replying affidavit of its Legal Manager – Recoveries Department **Mr. Andrew Muchuna** who basically also reiterates the replying affidavit to the 1st and 2nd application.

12. He states that the Applicant's equity of redemption was extinguished at the fall of the hammer at the public auction conducted on 28th May, 2019 and that a purchaser at an auction conducted in exercise of the Statutory Power of sale is immune from the suit by dint of the provisions of Section 99 of the Land Act.

13. He further avers that, the Applicants affidavit in support of the application constitutes an admission of both the debt and the default, and further, that the sale of the suit property having been carried out in accordance with the law, the Applicants remedy will only lie in damages in the event that the properties are found to have been sold at a price below their market value.

14. Parties filed written submissions to the 3 applications which I have considered. At the hearing of the applications, Miss Opany, Learned Counsel for the Applicant submitted that the major prayer in the 3 applications is a prayer for temporary injunction to restrain the 1st Respondent from selling the charged properties on the basis that the 1st Respondent overcharged interest on the loan thereby clogging the Plaintiff's equity of redemption.

15. Counsel submitted that the application satisfied the threshold set down under order 40 Rule 1 of the Civil Procedure Rules and the Principles of Injunction laid down in the case of **Giella Vs Cassman Brown Co. Ltd (1971)EA 358**

16. On *prima facie* case Counsel submitted that the 1st Respondent needed to explain the illegal interest that it had charged on the loan it had advanced to the applicant and further, that there was a dispute on whether the Statutory Power of sale had arisen.

17. In a rejoinder, Mr. Gichuhi, Learned Counsel for the Respondents submitted that since the plaint filed on 5th April, 2019 did not contain a prayer for injunction, the Court cannot grant the orders of injunction sought in the application. Counsel submitted that it was not disputed that the Plaintiff had defaulted in the loan repayments and had persisted in such default as it had not demonstrated that it had settled the debt.

18. Counsel further submitted that the Plaintiff lacks the *locus standi* to bring the application in respect to House NO. 19 as the said property does not belong to it. It was also submitted that the doctrine of Lis pendence is not applicable in this case. For this argument Counsel relied on the decisions in the cases of **Ace Engineering & Building Contractors Ltd Vs National Bank of Kenya Ltd [2019] eKLR** and **Equip Agencies Limited Vs I & M Bank Ltd [2017] eKLR** wherein the doctrine was discussed.

19. It was further submitted that the Plaintiff's equity of redemption was extinguished at the fall of the hammer. Counsel argued that the Plaintiff deliberately concealed the fact that it was duly served with the statutory notices so as to mislead the Court into granting the interim orders.

20. I have considered the pleadings filed herein, the submissions presented by the parties' respective advocates together with the authorities that they cited. The main issue that falls for determination is whether the Applicant has established a case for granting of the orders sought in the application. The Applicant identified the main prayer sought in the application to be the order for temporary injunction to restrain the Respondents from selling the suit properties in execution of its statutory power of sale pending the hearing and determination of the main suit.

21. 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** (supra) and restated 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 rest 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 are 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).

22. Having regard to the known principles of injunction as set out in the above cited case, I will now turn to consider if the instant 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 properties which it offered as a security for the loan facility advanced to it by the 1st defendant. It is also not disputed that the applicant has defaulted in the loan repayments and that owing to the said default, the 1st defendant is entitled to exercise its statutory power of sale. The Applicant however attributes its default to the interest that the respondent allegedly overcharged on the loan. The question which then begs the determination of this Court is whether the subject of interest charged on the loan is a ground for the issuance of orders of interlocutory injunction. The answer to this question can be found in the already existing jurisprudence over the same subject matter.

23. Courts have held that a dispute touching on the amount payable or interest chargeable without more is not a ground for restraining a chargee from exercising its statutory power of sale. In the case of ***Priscillah Krobought Grant vs. Kenya Commercial Finance Co. Ltd. and 2 Others, Court of Appeal at Nairobi, Civil Application No. Nai 227 of 1995 (108/95 V.R)*** (unreported), the court stated as follows: -

"Finally, it will bear repetition, we think if we were to state that a court does not normally grant an injunction to restrain a mortgagee from exercising its statutory power of sale solely on the grounds that there is a dispute as to the amount due under the mortgage – see Barmal Kanji Shah & Another Vs. Shah Depar Devji (1965) E. A. 91, 32 Halsbury's Laws of England (4th Edition) paragraph 725 and Uhuru Highways Development Ltd. Vs. Central Bank Kenya and 2 Others, Civil Application No. Nai 140 of 1995 (unreported) per Kwach J. A."

24. The circumstances in which a mortgagee or charge may be restrained from exercising his statutory power of sale are set out in ***Halsbury's Laws of England Vol. 32 (4th Edition) paragraph 725*** which says: -

"725. When mortgagees may be restrained from exercising power of sales—

"The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has begun a redemption action, or because the mortgagor objects to the manner in which the sale is arranged. He will be restrained however if the mortgagor pays the amount claimed into court, that is, the amount which the mortgagee claims to be due to him, unless, on the terms of the mortgage, the claim is excessive."

25. In the instant case, as I have already stated in this ruling, there is no doubt that the applicant owes the 1st respondent a substantial amount of money in the sum of Kshs. 1,531,365,900.60 and USD 915.26 as shown in the copies of statements of accounts produced by the 1st respondent as annexures to the replying affidavit. This court is in total agreement with the above cited decisions which upholds the view that a chargee cannot, in the circumstances of this case, be restrained from exercising its power of sale merely because there exists a dispute as to the amount owing or interest charged. It is however worthy to note that the chargee may be restrained where the amount claimed is paid in court or is excessive and unconscionable, and or the interest charged is uncontractual or illegal. The existing jurisprudence is categorical that the existence of a dispute touching on the interest rate payable is not an excuse for non-repayment of the principal amount of the loan facility. From the above foregoing, it is clear that the existence of a dispute on interest rate payable does not preclude the applicant from at the very least continuing to repay the principal amount of the loan facility pending the determination of the dispute on interest payable. In this case the applicant has not presented any evidence to show that it is making the repayment of the principal amount or proof of its willingness to do so.

26. My finding is that having noted that it is not in dispute that the Plaintiff is indebted to the 1st Respondent and in view of the fact that it is now trite law that the question of interest charged does not stop the chargee from exercising its statutory power of sale, I find that the Applicant has not established a *prima facie* case so as to warrant the exercise of this Court's discretion to grant orders of injunction. Having found that a *prima facie* case was not established, I find no reason to consider the 2 other conditions for granting an injunction.

27. My above findings on the issue of injunction notwithstanding, I am still minded to consider the issue raised, by the respondent, regarding the Plaintiff's equity of redemption having been extinguished at the fall of the hammer on 28th May, 2019. It was not disputed that, that the suit property was sold at a public auction on 28th May, 2019. In fact, the Applicants 3rd application is an acknowledgement that the suit properties had already been sold and what the Applicant seeks is an injunction to restrain the Respondents from transferring the suit properties to the purchaser(s). Courts have however severally held that the chargor's equity of redemption is extinguished following the auction. This was the position adopted in the case of ***Kamulu Academy Limited & Another Vs British American Insurance (K) Ltd & 2 Others [2018] eKLR*** it was held:

"The sale by public auction extinguishes Equity of redemption at the fall of the hammer whether the property is transferred to the purchaser or not...in the case of Mbuthia Vs Jimba Credit Finance Corporation and another [1986-1989]1EA 340(CAK)

considered when the impact of an auction sale on the equity of redemption. The charged property was sold by public auction to the second Respondent. The Court of Appeal held:- A sale destroys the equity of redemption in the mortgaged property...The Court will not grant to a mortgagor tendering the moneys due under the mortgage an injunction restraining the mortgagee from completing by conveyance a contract to sell the mortgaged property in exercise of his power of sale unless it is proved that the mortgagee entered into the contract in bad faith...This means that the mortgagor's right of redemption is lost as soon as the mortgagee either sells the mortgaged property by public auction or enters into a binding contract in respect of it. On the acceptance of a bid at an auction, there is an immediate sale binding on the chargor. The chargee is then entitled to immediate possession of the charged property under subsection (2) of the Act. In the case of Ze Yu Vs Yang Nova Industrial Produce Ltd [2003] 1 EA 362 (CCK), Justice Nyamu (as he then was) held as follows: - "The existence of a valid sale agreement extinguished the equity of redemption and the Applicant had no remedies touching on the property both as against the former mortgagee and against the person exercising the power. Mbuthia Vs Jimba Credit Corporation [1986]LLR 3292 (CAK), Grant Vs Kenya Commercial Finance Company Limited Civil Appeal Number 227 of 1995 and Central Bank of Kenya Limited Vs Trust Bank and Others [1996]LLR 472 (CAK) applied."

28. In conclusion, having regard to my findings on the question of injunction and equity of redemption, I find that all the three applications are not merited and I therefore dismiss them with costs to the Respondents.

Dated, Signed and delivered in open court at Nairobi on this 11th day of July, 2019.

W. A. OKWANY

JUDGE

In the presence of:

Miss Opany for Orinda for plaintiff.

Miss Muhia for the defendants

Court Assistant – Robert