



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAKURU**

**CASE NO. 86 OF 2019**

**EASTMORE SCHOOL LIMITED .....1<sup>ST</sup> PLAINTIFF**

**JOSHUA MUSEMBI NDOLO .....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**FAULU MICROFINANCE BANK LIMITED.....1<sup>ST</sup> DEFENDANT**

**JOSEPH M. GIKONYO T/A GARAM INVESTMENTS AUCTIONEERS..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The plaintiffs commenced proceedings herein through plaint filed on 26<sup>th</sup> July 2019 in which they seek judgment against the defendants for a permanent injunction, restraining them from inter alia selling, transferring, alienating or interfering with the parcel of land known as Land Title Number Nakuru Municipality Block 16/303 which is situated within Eastmore Girls Secondary School in Lanet location, Nakuru town, damages for breach of contract and of statutory duty and costs. Simultaneously with the plaint, the plaintiffs also filed Notice of Motion dated 29<sup>th</sup> July 2019, which is the subject of this ruling. The following orders are sought in the application:

1. ...

2. ...

3. THAT pending the hearing and determination of this suit, the 1<sup>st</sup> and 2<sup>nd</sup> defendants, being Faulu Microfinance Bank Ltd and Joseph M. Gikonyo T/A Garam Investments Auctioneers. by themselves, their agents, servants, heirs, representatives, successors, assignees, or anyone acting or claiming through or under them, be and are hereby restrained by order of temporary injunction from selling, offering for sale, going ahead with or completing the intended sale set for 01/08/2019 or on any other future date, and from transferring, alienating, disposing off, entering into, remaining on, wasting, or in any other manner whatsoever interfering with the plaintiffs' ownership, title, possession, occupation and use, of all that suit land/property known as Land Title Number Nakuru Municipality Block 16/303, situate within Eastmore Girls Secondary School, in Lanet location, Nakuru town.

4. THAT costs of this application be borne by the defendants.

2. The application is grounded on supporting affidavits sworn by the 2<sup>nd</sup> plaintiff and Sylvia Nduku Musembi and a supplementary affidavit sworn by the 2<sup>nd</sup> plaintiff. The 1<sup>st</sup> defendant opposed it through Grounds of Opposition, a replying affidavit and further affidavit both sworn by Sheila Maina, its Head of Legal department. The 2<sup>nd</sup> defendant neither entered appearance nor participated in the application.

3. The application was canvassed through written submissions. I have carefully considered the application, the affidavits, grounds of opposition and the submissions. The applicants seek an interlocutory injunction. To succeed, they must satisfy the test in **Giella –vs- Cassman Brown & Co. Ltd [1973] E.A 358**. They must establish a *prima facie* case with a probability of success. Even if they succeed on that first limb, an injunction will not issue if damages can be an adequate compensation. Finally, if the court is in doubt as to whether damages will be an adequate compensation then the court will determine the matter on a balance of convenience. All these conditions and stages are to be applied as separate, distinct and logical hurdles which the applicants are expected to surmount sequentially. If *prima facie* case is not established, then irreparable injury and balance of convenience need no consideration. See **Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR**.

4. As to what constitutes a *prima facie* case, the Court of Appeal defined it in **Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others (2003) KLR 125** as:

... 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... [it] is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case.

5. The court clarified the definition further in Nguruman Limited v Jan Bonde Nielsen & 2 Others (supra) as follows:

**We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right, which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title. It is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right, which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed.**

6. There is no dispute that the 2<sup>nd</sup> plaintiff is the registered proprietor of the parcel of land known as Land Title Number Nakuru Municipality Block 16/303 (hereinafter "the suit property") and that the 2<sup>nd</sup> plaintiff created a charge dated 14<sup>th</sup> March 2017 and a further charge dated 7<sup>th</sup> November 2017 over the suit property to secure loans totalling KShs 14 million advanced by the 1<sup>st</sup> defendant to the 1<sup>st</sup> plaintiff. Although in an apparent afterthought the plaintiffs seemed to suggest in their supplementary affidavit that the charges were not registered, the case pleaded in the plaint is that the suit property was in fact charged. Besides, the 1<sup>st</sup> defendant has amply demonstrated that the charges were in fact registered.

7. The plaintiffs acknowledge that although they have made repayments of the loan, they have not regularly done so owing to serious financial difficulties occasioned by challenges in the 1<sup>st</sup> plaintiff's business of a private boarding school. The financial challenges are said to have arisen due to recent government policy of 100% transition of students from primary to secondary schools. In a letter dated 18<sup>th</sup> April 2019 which is exhibited by the plaintiffs, the 2<sup>nd</sup> plaintiff refers to "outstanding arrears of KShs 2,290,605" and commits to pay it by 16<sup>th</sup> May 2018. It is clear that the promised payment was not made since in a subsequent letter dated 15<sup>th</sup> May 2019 the 2<sup>nd</sup> plaintiff sought an extension of 10 days. Clearly, the plaintiffs defaulted on their repayment obligations. The plaintiffs however state that they are making efforts source for funds to enable them repay the loans and that they have communicated to the 1<sup>st</sup> defendant as much. I will not dwell on what has been paid and what is due since the law is clear that dispute on the amount owing alone cannot be a basis for granting an injunction to restrain a chargee from exercising power of sale. See Habib Bank Ag Zurich v. Popin (K) Ltd & Others [1989] LLR 3069 as quoted with approval in Kenya Commercial Bank Ltd v Stephen Mukiri Ndegwa & another [2014] eKLR.

8. Arising from the circumstances of default in repayment, the 1<sup>st</sup> defendant threatened to sell the suit property by public auction in exercise of chargee's power of sale and indeed instructed the 2<sup>nd</sup> defendant who advertised the property for sale by public auction on 1<sup>st</sup> August 2019. The plaintiffs contend that the chargee's power of sale has not crystallized since none of the requisite notices have been issued and further since no valuation has been done. In particular, they argue that no statutory notices were issued as is required under **sections 90 (1) and 96 (2) of the Land Act** since according to them, notices dated 10<sup>th</sup> May 2018 and 18<sup>th</sup> January 2019 purportedly issued by the 1<sup>st</sup> defendant were not addressed to the chargor and that there is no evidence that the notices were served. The plaintiffs also contend that although the 2<sup>nd</sup> plaintiff was served with a notification of sale and 45 day redemption notice under **rule 15 of Auctioneers Rules, 1997** on 18<sup>th</sup> March 2019, it was in regard to a sale that was scheduled for 23<sup>rd</sup> May 2019 but which did not proceed and that in the circumstances a new notice ought to have been issued in respect of the sale that was scheduled for 1<sup>st</sup> August 2019. The plaintiffs further argue that no advertisement of the auction sale was done as is required by **rule 16 (2) of Auctioneers Rules, 1997** and that no forced sale valuation was done as is required by **sections 97 (1) and (2) of the Land Act**. For these reasons, the plaintiffs maintain that they merit the orders sought in the application.

9. The law as spelt out under **section 90 (1) of the Land Act** is that when a chargor is in default of any obligation in a charge, or fails to pay interest or any other periodic payment or any part thereof due under the charge or fails to perform any covenant in the charge and continues in default for one month, then the chargee may serve on him a notice, in writing, to pay the money owing or to perform the obligation. In view of their acknowledged default, the plaintiffs do not dispute that occasion had properly arisen for issuance of a notice under **section 90 (1)**. They simply take the position that no notice was issued and that if at all any was issued, it was not served.

10. From the material placed before the court, I am satisfied that the 1<sup>st</sup> defendant issued a notice dated 10<sup>th</sup> May 2018 addressed to the 1<sup>st</sup> plaintiff and copied to the 2<sup>nd</sup> plaintiff. The notice was sent by registered post through P.O. box 72 -20100 Nakuru which is the postal address specified in the charge documents. I have read the notice and I am satisfied that it complies with the requirements of **section 90 (2) of the Land Act**. The argument that the notice is defective for being copied to the chargor instead of being addressed to him does not hold. The purpose of the notice under **section 90 (1)** is to adequately inform the chargor of the matters specified under **section 90 (2)**. The chargor in this case was not only a recipient of the letter but is also a director of the borrower. I am equally satisfied that the plaintiffs were served with a notice to sell dated 18<sup>th</sup> January 2019 similarly by registered post through P.O. box 72 -20100 Nakuru in compliance with the requirements of **section 96 (2) of the Land Act**. I have also read the notice to sell and I am satisfied that it complies with the requirements of **section 90 (3) of the Land Act**. Since the plaintiffs confirm that they were served with a notification of sale and 45 day redemption notice under **rule 15 of Auctioneers Rules, 1997** on 18<sup>th</sup> March 2019, I am satisfied that the arrangements for the auction sale were properly executed up to that point. No legal basis has been laid either in case law or any legal provision for the argument that a new a notification of sale and 45 day redemption notice were needed for the auction that was scheduled for 1<sup>st</sup> August 2019.

11. So as to stage a valid auction sale, the auctioneer appointed by the chargee must comply with the mandatory provisions of **rules 15 and 16 of Auctioneers Rules, 1997**. An auction sale must be preceded by an advertisement in a newspaper. The defendants have not exhibited any copy of any advertisement in the auction that was scheduled for 1<sup>st</sup> August 2019. The plaintiffs' contention that there was no advertisement therefore seems valid. It must however be remembered that the failure to advertise was in respect of a proposed sale whose date is now past. There is no longer any threat of sale on that date and if a new date of auction is scheduled, the requirements as to

advertisement may be met. There would be no basis upon which to restrain the 1<sup>st</sup> defendant bank from staging a future sale if it complies with the law. As was stated in **Nguruman Limited v Jan Bonde Nielsen & 2 Others** (supra):

**... The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. ...**

12. In view of the foregoing, I see no threat of violation. The application is in fact overtaken by events and no prima facie case has been established. In the result, Notice of Motion dated 29<sup>th</sup> July 2019 is dismissed. Costs shall be in the cause.

13. This ruling is delivered remotely through video conference and e-mail pursuant to the Honourable Chief Justice's "Practice Directions for the Protection of Judges, Judicial Officers, Judiciary Staff, other Court Users and the General Public from the Risks Associated with the Global Corona Virus Pandemic" (Gazette Notice No. 3137 published in the Kenya Gazette Vol. CXXII—No. 67 of 17<sup>th</sup> April, 2020).

**Dated, signed and delivered at Nakuru this 30<sup>th</sup> day of April 2020.**

**D. O. OHUNGO**

**JUDGE**