



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

(CORAM: CHERERE-J)

CIVIL CASE NO. 04 OF 2019

BETWEEN

KENYATTA RICHARD OTIENO.....APPLICANT

AND

KENYA COMMERCIAL BANK LIMITED.....1ST RESPONDENT

JAMES ONYANGO JOSIAH t/a Nyaluoyo Auctioneers.....2ND RESPONDENT

RULING

Background

1. By a letter of offer dated 16th March, 2012, the 1st Defendant/Respondent offered the **Plaintiff/Applicant** a mortgage facility in the sum of Kshs. 3,300,000/-.
2. By a letter of offer dated 11th December, 2013, the 1st Defendant/Respondent at the request of the **Plaintiff/Applicant offered another** mortgage facility in the sum of Kshs. 3,000,000/-.
3. Both facilities were secured by a charge over **KISUMU/NYALENDA 'B'/1770 (hereinafter referred to as the suit property)** registered in the name of Plaintiff/Applicant.
4. Demand letters dated 02.03.15; 04.11.16 and 03.02.17 demonstrate that Plaintiff/Applicant defaulted in repaying the loan facility.
5. By a Statutory Notice dated 14.05.18, issued under section 90 (1), (2), and (3) (e) as read with section 85 and 83 of the Land Act No. 6 of 2012, the 1st Defendant/Respondent gave a 90 days' notice to sell **the suit property** unless Kshs. 7,115,326.81/- was settled.
6. By a Statutory Notice dated 09.10.18, issued under section 96 (2), and (3) of the Land Act No. 6 of 2012, the 1st Defendant/Respondent issued a 40 days' notice to sell **the suit property** unless Kshs. 7,204,399.91 was settled.
7. There's evidence that the 1st Defendant/Respondent commissioned a valuation of **the suit property** which returned a value of Kshs. 16,500,600/- with a reserve price of Kshs. 12,375,000/-.
8. By a notice dated 25th February, 2019, 2nd Defendant/Respondent put up an advertisement to sell **the suit property** on 25th March, 2019
9. The notification of sale prompted the Plaintiff/Applicant to commence this suit by way of a plaint filed on 25th February, 2019.

Application

10. Simultaneously with the plaint, the Plaintiff/Applicant filed a notice of motion dated 25th February, 2019 which is the subject of this ruling, seeking orders **THAT: -**

1) The Honourable Court be pleased to stay execution of the Notification of Sale dated 07th January, 2019 pending the hearing and determination of this suit

2) Defendants/Respondents be ordered to revalue the suit property before sale and sell it in the open market and any balances be credited in favour of the Plaintiff/Applicant

3) Costs of this application be in the cause

11. The application is based on the grounds among others that Defendants/Respondents intend to sell **the suit property** below the market value leaving the Plaintiff/Applicant in further debt.

12. The application is supported by an affidavit sworn by the Plaintiff/Applicant on 22nd February, 2019 in which he reiterates the grounds on the face of the application. The Plaintiff/Applicant concedes that he is in arrears. Annexed to the affidavit are two valuation reports KRO 7 and 8 which he says have valued **the suit property** at Kshs. 12,500,000/- and Kshs. 10,000,000/- with a forced sale value of Kshs. 9,375,000/-

13. The Defendants/Respondents opposed the application on the basis of a replying affidavit sworn on 02nd April, 2019 by Fredrick Mungáthia its Recovery Manager, Mortgage Section who reiterates that all statutory notices have been served and that the debt is admitted. He avers that the value in the valuation report by 1st Defendant/Respondent and the reports filed by the Plaintiff/Applicant are not vastly different. He additionally avers that the Plaintiff/Applicant has not demonstrated that the 1st Defendant/Respondent did not get the best reasonable price.

Submissions by parties

14. The application was argued by way of written submission which both parties dutifully filed.

Plaintiff/Applicant's submissions

15. The Plaintiff/Applicant submits that it an injunction ought to issue for the reason that it is likely to suffer substantially if the suit property is sold at an undervalued rate. In support thereof, it placed reliance on the law and the following authorities;

1) Section 97 (1) and (2) of the Land Act

2) Order 42 rule 1 of the Civil Procedure Rules

3) Re Global Tours & Travels Ltd: Winding Up Cause No. 43 of 2000; Civil Appeal No. 110 of 2011

4) Halsbury's laws of England 4th Edition volume 37

Defendants/Respondents submissions

16. The Defendants/Respondents submit that the debt is admitted and the Applicant has therefore not established a *prima facie* case with a probability of success. It was argued that the Plaintiff/Applicant has not demonstrated that it is likely to suffer loss that cannot be compensated by an award for damages. Finally, it was contended that Plaintiff/Applicant has a remedy in law of the power of sale is irregularly exercised. In support thereof, reliance was placed on the law and the following authorities:

1) Section 99 (4) of the Land Act

2) Mrao Ltd Vs First American Bank of Kenya and 2 others [2003] eKLR

3) Nguruman Limited V. Jan Bonde Nielsen & 2 Others CA No. 77 Of 2012 [2014] eKLR

4) Joseph Hinga Gati v Barclays Bank (K) Ltd [2001] eKLR

Analysis and Determination

17. I have considered the notice of motion in the light of the affidavits thereto and on submissions by the parties. The issues in question are mainly two: -

i. Whether the Plaintiff/Applicant is in default in repaying the loan advanced by the 1st defendant/respondent

ii. Whether an injunction should issue

i. Whether Plaintiff/Applicant is in default

18. The 1st defendant/respondent states that the outstanding loan balance as at 18th December, 2018 was Kshs. 7,291,345.41 which continues to accrue interest. Plaintiff/Applicant concedes that he is indeed indebted to the 1st defendant/respondent.

ii. Should an injunction issue

19. Any discussion on temporary injunctions is not complete without a reiteration of the requirements for grant of injunction as set-out in the **Giella versus Cassman Brown** (supra) as follows:

"First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not be adequately compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."

20. In **NGURUMAN LIMITED V. JAN BONDE NIELSEN & 2 OTHERS**, (Supra), the Court of Appeal restated the principles of injunctions together with the mode of their application 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.

21. 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**).

22. The Court of Appeal in **Mrao Ltd Vs First American Bank of Kenya and 2 Others [2003] eKLR** that applications by a mortgagor for a temporary injunction to restrain a mortgagee from exercising his statutory power of sale should not be treated just like any application for injunction in an ordinary suit.

23. The court in **Mrao Limited case** (supra) interpreted the condition as to prima facie case as follows:

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

24. In this case there's undisputed evidence that the Plaintiff/Applicant is truly indebted to the 1st Defendant/Respondent.

25. This is a clear case of default as the Plaintiff/Applicant has admitted being indebted and there was is therefore no basis, on the authorities, upon which he can obtain an order of injunction. On the material presented to court, the Plaintiff/Applicant has not been demonstrated a *prima facie* case with a probability of success. It has similarly not been demonstrated that the 1st Defendant/Respondent would be unable to compensate it in damages should this case succeed. (See **Nguruman Limited V. Jan Bonde Nielsen & 2 Others (Supra)** and **Joseph Hinga Gati v Barclays Bank (K) Ltd(Supra)**).

26. Section 97 (1) of the Land Act provides that:

"a chargee exercising power of sale owes a duty of care to the chargor, any guarantor of the whole or any part of the sums advanced to the chargor, any chargee under a subsequent charge or under a lien to obtain the best price reasonably obtainable at the time of sale."

27. The Halsbury's Laws of England, Vol 32 (4th edition) paragraph 725 states as follows: -

"725. 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 being 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.

28. From the foregoing therefore, I find that whether or not the sale would be at the best price reasonably obtainable at the time of sale is not a matter for determination at this stage. Secondly, the fact that the Plaintiff/Applicant objects to the valuation report by the 1st Defendant/Respondent does not entitle him to an order of injunction for the reason that he has a remedy in the event that the suit property is sold at an undervalue.

DISPOSITION

29. On the material presented before the court, it is apparent that the Plaintiff/Applicant has not raised any arguable point on which he would be entitled to this court's exercise of discretion in his favor. In the end the notice of motion dated 25th February, 2019 fails and is dismissed with costs to the Defendants/Respondents.

DATED, DELIVERED AND SIGNED THIS 17th DAY OF October, 2019

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Amondi

For Plaintiff/Applicant -

For Defendants/Respondents -