



REPUBLIC OF KENYA

IN THE HIGH COURT OF KAJIADO

CIVIL SUIT NO. 32 OF 2018

MINOLTA LIMITED.....PLAINTIFF

VS

NATIONAL BANK OF KENYA LIMITED.....RESPONDENT

RULING

By a Notice of Motion dated 25th September 2018 the Applicant herein seeks the following orders;

1. The Application be and is herein certified as urgent and heard ex-parte in the first instance.
2. An interim injunction be and is hereby issued restraining the Respondent, its agents or servants from in any way interfering with the possession of land parcels and buildings herein being LR No. 3734/329 Hse 1 and Staff Quarter No.1, LR No. NRB/BLOCK 153/576/42 Apartments No. 41A, 42B & 43A & LR No. KAJIADO KITENGELA/3322 Pending hearing and determination of this Application inter partes.
3. The Statutory notice dated 15th March 2018, Notification of sale dated 7th August 2018 and 45 days' notice issued on 8th August 2018 be and are hereby suspended pending hearing and determination of this Application inter partes.
4. A joint valuation be conducted over the suit property.
5. An interim injunction be and is hereby issued restraining the Respondent, its agents or servants from in any way interfering with the possession of the suit property pending the hearing and determination of the suit property.
6. The statutory notice dated 15th March 2016, Notification of sale dated 7th August 2013 and the 45 days' notice issued on 8th August 2018 be and are hereby suspended pending hearing and determination of this Application
7. Costs of this Application be on cause.

ISSUES FOR DETERMINATION.

- a. *The validity of the statutory notice dated the 15th day of March, 2018.*
- b. *Validity of the auctioneers' notice which was issued prior to the lapse of the forty (40) days notification of sale.*
- c. *Whether there is need for a joint valuation following the substantial discrepancies in valuation reports by the Defendant and the Applicant.*
- d. *Validity of the charge instrument over L.R. Kajiado/Kitengela/3322.*

The validity of the statutory notice dated 15th day of March, 2018 is subject to contestation herein. The applicant challenges the said statutory notice on the grounds that it purports to be a joint notice for different charge instruments over different properties and registered at different times thus clogging the redemption of the security herein. A further ground that the notice includes other than monies advanced under the charge instruments again to frustrate the redemption of the security.

Mr. Irungu, Learned Counsel for the Plaintiff argued that that the purpose and reason and purpose that the Land Act under section 90(1) gives an elaborate process of the nature of notice and the contents of the notice is to aid the Charger in redeeming the security. Further that

the charger has the right to choose which property to exercise its right of redemption and as such issuance of a single notice on four (4) different properties registered under different charges is a clear attempt to deny the charger to redeem the property it deems fit.

It was also asserted by the learned counsel for the Applicant that the law under section 90(1) contemplates each notice for a specific charge since the charge instruments were registered separately land at different times. The Applicant's view is that the chargee ought to have it a chance to choose which property to redeem if not in a position to redeem all. It was therefore submitted on behalf of the Applicants that issuance of a fused notice clearly clogs the Applicants' right to choose which property to exercise redemption.

On the same issue, the learned counsel for the applicants pointed out that the notices as issued includes amounts not in the charge instrument. In his view, this infringes on the mandatory provisions of section 90(1) which indicates that the amounts so demanded must be monies due under the charge. It was averred that the present notice it includes even recovery costs a whopping almost Four Million Shillings (4, 000, 000.00/=). It was the Applicants' testimony that the default demanded is Kshs.16 000 000/= and subtraction of the amount included and which are not due under the charge brings the figure to less than Kshs.11, 000, 000.00/=. In the Applicant's view, the inclusion of hefty charges goes to frustrate the efforts of the Applicant to redeem the property. Counsel relied on the case of **Kisimani Holdings Ltd v Fidelity Bank Ltd (2013) eKLR** in support of the Applicants' argument.

In response to the Applicants' contention as regards issuance of separate notices in respect of each charge, the learned counsel Mr. Mutua for the Respondent humbly submitted that the same is without any foundation in law or fact. It was averred that none of the legal charges secure any specific credit facility and therefore there is no basis upon which any of the outstanding credit facilities could have been assigned to a particular security. Further that the security clauses in all the three letters of offer duly accepted by the Applicants are clear that credit facilities granted thereunder are cumulatively partly secured by the charges over the suit properties.

The learned counsel for the Respondent further argued that there is no basis for faulting the validity of the statutory notice dated 15/03/2018 for having been issued on the strength of the three legal charges and for demanding payment of all the secured credit facilities. The respondent therefore urged the Court to find as such.

Further, it was the Respondent's counsel view that the statutory notice in contention meets the requirements of section 90 of the Land Act (2012). It was averred that the same captures all the particulars required by the said provision of law to be contained in the statutory notice. In buttressing the legal proposition on various contentious issues to this application learned counsel placed reliance on the following authorities: **Orion East Africa Ltd v Eco Bank Kenya Ltd & another [2015] eKLR**, **Stephen Kipkatam Kendulywa t/a Kapchebet Farm vs Sidian Bank Ltd & another [2017] eKLR**, **Sammy Japheth Kavuku vs Equity Bank Ltd & another [2014] eKLR**.

The law as to the principles applicable in an application for an injunction are now well settled. In the case of **Giella v Cassman Brown 1973 E.A**, **The American Cyanamid v Ethicon [1975] WLR 316** and **Mrao Ltd V First American Bank of Kenya Ltd & 2 Others (Supra)** the court has to consider the following principles before granting injunctive relief:

- (a) *Is there a prima facie case with a probability of success?*
- (b) *Does the applicant stand to suffer irreparable harm if relief is denied?*
- (c) *On which side does the balance of convenience lie?*

“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 adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience (E.A.) Industries vs Trufoods (1972) EA 420.”

Explaining what amounts to prima facie case, the Court in Mrao Ltd V First American Bank of Kenya Ltd & 2 Others (Supra) said;

“I would say that in civil cases it is 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.” (per Bosire, JA).

The above principles would be the ones to be applied in determining whether the applicant has brought himself within the ambit of any of these grounds. In light of the above, this court takes the trajectory of deciding the present case on a balance of convenience.

The law as regards issuance of statutory notice by chargee is clearly set out under section 90 of the Land Act, 2012 which lays down the requirements of a valid statutory notice. Section 90 provides that;

“90. Remedies of a chargee

(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.

According to section 90(2) the notice to be served shall adequately advice the chargor of;

” (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;

(c) if the default consists of the failure to perform or observe any covenant, express or implied, in the charge, the thing the chargor must do or desist from doing so as to rectify the default and the time, being not less than two months, by the end of which the default must have been rectified;

(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.”

Section 90(3) provides that if the chargor does not comply within two (2) months after the date of the notice 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;”

Section 90(1) in my view lays down the circumstances under which the statutory notice is issued by the chargee to chargor. Clearly as provided for under the aforementioned section, a statutory notice is issued where there is default of payment in performance of the expressed and implied covenants in a charge. A notice must be served to the chargor by the chargee in writing clearly stating the payment of any amount owing or performance and observance of the agreement as the case may be. This notice is mandatory on the part of the chargee thus it is mandatory that the chargee, as the law requires under the sections, issues the requisite statutory notice notifying the chargor of the intended sale of the charged property by auction.

The effect of a statutory notice issued in terms of section 90(2) of the Land Act, 2012 is that it triggers the security realization process, which leads to the chargee ultimately exercising its remedies enshrined under section 90(3) of the said Act. The notice is issued pursuant to a default or breach of any of the covenants under the charge. There is no prescribed format promulgated as yet by the Cabinet Secretary in charge of Lands and Housing as he is mandated under section 90(5) hence different formats of the notice have emerged leading to a veritable maze where challenges and questions on what truly constitutes a valid notice are numerous. See *Cieni Plains Company Limited & 2 others v Eco bank Kenya Limited (2017) eKLR*.

Furthermore, it is important that the said statutory notice comply with the aspects enshrined under section 92(2) which lays down the aspects to be included in the aforesaid notice. In *Cieni Plains Company Limited & 2 others v Eco bank Kenya Limited (2017) eKLR (supra)* it was stated *inter alia* that;

“As read together with section 90(3), section 90(2) of the Land Act obligates the chargee to firstly, state the nature and extent of default. Secondly, where the default consists of non-payment, to state the amount required to be paid within three months for the purposes of making good the default or where the default is non-observance of a covenant in the charge, then the notice is to state what the chargor is to do or desist from doing so as to rectify the default. Thirdly, the notice ought to state the fact that if the default is not rectified within the time stated in the notice, then the chargor would thereafter sue for money due and owing under the charge, appoint a receiver of the income of the security property, lease the security property, enter into and keep possession of the security property or sell the security property. The fourth and final requirement under section 90 is that the notice needs to state that the chargor has the right to apply to court and seek any relief or challenge the exercise by the chargee of any of the statutory remedies. The notice crystallizes after the expiry of ninety days from the date it is received by the chargor.”

The general purpose of the notice is majorly to protect the chargor. This was stated in the case of *First Choice Mega Store Limited v Ecobank Kenya Limited [2017] eKLR*

” [37] *...The law regulates the contractual relationship between the parties by ensuring that the purpose of a charge (pledged property) is not defeated. The purpose is mainly for the property to act as security and no more. The chargor must have the chance, nay right, to redeem the property. In the absence of a notice it would be much easier for unscrupulous chargees to rid the chargor of the equity of redemption. The borrower who pledges and charges his property must be confident that the property will be held as security and when the lender must then act and start the process of selling the same, the borrower will have both notifications of such action and an opportunity to redeem his property.*

[38] *It would be appropriate to however also conclude that there is a need always to preserve a balance between the respective rights of both the chargee and the chargor. In the words of Lord Bingham of Cornhill, spoken in Royal Bank of Scotland Plc v Etridge [2002] 2 AC 733, [2], the law “must afford both parties a measure of protection”. The lender who thus also feels able to advance money on security, including non-possessory security, like land, in reasonable confidence reasonable confidence that*

it may at an appropriate time enforce the security is also protected.

[39] A purposive construction of section 90 is necessary. Section 90 must thus be read and understood with the open fact that the charge also has a right to pursue his various remedies. Any interpretation, which curtails that right, should not be favored given that it is the same section that triggers the application of a chargee's rights and remedies."

In the foregoing and in view of the above arguments and provisions of the law, this court finds that the 90 days' Statutory notice required under section 90 of the Land Act (2012) was properly drafted and served to the charger. This is so because as I view it, it captures all the particulars as required by law. The Applicant contested the statutory notice in question because it purports to be a joint notice for different charge instruments over different properties. I have looked at the charges as captured in pages 15, 50, 51 and 81 of the Respondent's bundle of documents and the same seems to contain express stipulations that permit the defendant to consolidate the Applicant's accounts. I have also looked at the letters of offer dated 30/08/2013, 27/03/2014 and 04/05/2017 marked as annexures MMM1, MMM2 and MMM4. Specifically, the security clauses of the letters of offer are the same and were duly accepted by the Applicant and they all show that the credit facilities granted were cumulatively partly secured by Charges over the suit properties. Therefore, in the court's view, the statutory notice issued by the Respondents cannot be faulted since the facility seems to have been consolidated thus no specific amount can be said to correspond with a specific charge instrument. The finds the aforesaid statutory notice is valid.

The Applicant challenged the validity of the auctioneer's notice saying that it was issued prior to the lapse of the forty (40) days notification of sale. It was stated that the Notification of sale was issued on the 8th day of August, 2018 and he Respondent went ahead to issue the Auctioneers 45 days' Notice. The Learned Counsel argued that section 96(2) which provides that before exercising the power to sell the charged land the charge shall serve on the chargor notice to sell in the prescribed form and shall not proceed to complete any contract for the sale of the charged land until at least 45 days have lapsed from the date of that notice to sell. It was the Applicants view that the fusion of the Notice contemplated by Section 96 (2) and that under the Rule 15 of the Auctioneers rules is an attempt by the Respondent to clog the Applicants right of redemption. The learned counsel relied on **Olkasasi Ltd v Equity Bank Limited (2015) eKLR** in support of his argument. He also relied on Justice Gikonyo's decision in **Palmy Co. Ltd v Consolidated Bank of Kenya HCCC 527/ 2013** to further support his position. It was therefore the learned counsel's humble submission that the fusion of the notices clogs the Applicant's right of redemption and as such causing the Applicant irreparable loss and damage thus warranting grant of injunction.

On the issue of validity of the notification of sale dated 7th August 2018; the learned counsel for the Applicant pointed out that the provisions of section 96(2) provide that the charge is to serve the chargor with a notice to sale in prescribed form. It was the Applicant's humble submission that the Respondent in the rush of disposing of the property and clogging the Applicant's right of redemption failed to issue this notice. It was alleged that the aforementioned notice served by the Applicant failed to meet the threshold of the prescribed format as per the aforesaid section. It was further argued that the same statutory notice seems to have been issued by the auctioneer who had received instructions from the Respondent before the Respondent complied with the requirement under the Land Act (2012). In the Applicant's view the same is fatal and cannot be cured. The learned counsel argued that service of the notices is paramount and cannot be wished away. Reliance was placed on **Yusuf Abdi Ali Co. Ltd v Family Bank Ltd (2015) eKLR** in support of the Applicant's arguments. It was therefore argue that the notice issued in this instance by the auctioneer other than the chargor fails to state the exact amounts and hence fails to meet the standards provided for in section 96(2) of the Land Act (2012). In the premises, the Applicant reiterated that the said notice is fatally defective and cannot stand.

Further, in response to the Respondent's contention as regards the statutory notice dated 15/03/2018 the Respondent admitted that the same does not comply with the requirements of section 90 of the Land Act (2012)

In respect of the above limb, the Applicants contention was not controverted by the Respondent in any way. It is clear from the evidence on record as rightfully put forward by the Applicant that the auctioneer's notice was issued prior to the lapse of the 40 days' notification of sale. I have looked at the notification of sale which the Respondent issued on 8 August 2018 and the auctioneer's 45 days' notice and the difference between the aforesaid dates on which the notices were issued is 32 days thus the same clearly shows a discrepancy as far as the issuance of the notification of sale is concerned. Section 96(2) of the Land Act apparently requires the charge before exercising the power to sale the charged land to serve on the charger a notification of sale in the prescribed form and cannot proceed to issue an auctioneer's notice until at least the 40 days' notice has lapsed from the date of issue of the notice of sale. In the premises, there is a clear violation of the law and in that regard the Respondent cannot be said to have complied with the mandatory requirements of the law as stipulated in section 92(2) of the Land Act (2012).

Sufficient consideration in this matter has been given to the notification of sale issued to the charge and 40 days' redemption notice. It is my view from the affidavit evidence there are irregularities which characterize the transition period between the lapse of the redemption notice with that of 45 days' on notification of sale. In this computation of time taken together, there seems to be an apparent error on the face of the record indicative of a notification of sale issued before the lapse of 40 days' notice of redemption.

As regards whether there is need for a joint valuation following the substantial discrepancies in valuation reports by the Respondents as alleged by the Applicant, the Applicant averred that on 9th April 2014 the Respondent herein requested NW Realite Limited to conduct valuation in relation to the suit property. According to the Applicant the valuation was estimated to be the open market value of Kenya Shillings 110Million and a forced sale value of 80 Million Kenya Shillings. The Applicants contested the valuation report that the Respondent is currently purporting to rely on conducted on 21 May, 2018, which indicates the market value at 90 Million Kenya Shillings and a forced sale value of 67,500,000 Shillings. He argued that the same cannot be said to be normal since the said valuation report purports to entail that the suit property has lost value of 20 Million Shillings on the market value and 30,500,000 Shillings on forced market value. It is so unlike the Kenyan market whereby real estate loses value. It also alluded to the valuation report done in 2016 that gives the value of the property a whopping 185 Million Shillings and a forced sale value of 130 Million Kenya Shillings. He therefore argued that the provisions of section 97 of the Land Act (2012) envisages that the charge owes the charger a duty of care to obtain best price reasonably obtainable at the time of sale. Having said so he argued that the valuations and submissions above clearly show that the Respondent is hell bent in breaching this duty of care. Reliance was placed on **Green Africa International Limited v Jamii Bora Bank Limited (2017)**.

In response to the Applicant's allegations alluded above the learned counsel for the Respondent argued that section 97 of the Land Act

(2011) clearly places the obligation to obtain a forced sell valuation on the charge before exercising power of sale. They further argued that there is no basis upon which this Honourable court would have been entitled to order a joint valuation of the suit properties as much as only the valuation in respect of one property is disputed by the Plaintiff. The Respondents also relied on the Auctioneers Rules (2007) at Rule 11(1) (b) (x) which required that a valuation to be relied upon before the exercise of chargee's statutory power of sale be no more than 12 months old. It was therefore submitted that in obtaining the aforesaid valuation report the Respondents fully discharged their obligations as stipulated by the law. The Respondents further relied on the decision of **Stephen Kipkatam Kenduiywa T/A Kapchebet Firm v Sidian Bank Limited & Another (2017) eKLR** in support of their argument. The Respondent urged this Honourable court to hold that the Respondent has fully complied with the requirements of section 27 of the Land Act (2012).

In respect of the hotly contested issue of valuation, the Applicant alleges that his property was grossly undervalued, a claim of which the Respondent argued to the contrary.

I have considered the 2014 valuation marked as ML6 and another valuation conducted in July 2016, marked as ML7 herein. It defeats logic that the valuation done on 9 April 2014 estimated the open market value of the property at 110 Million Shillings and a forced, market value of 80 million and the same property in 2018 is valued at a much lesser market value of 90 Million Shillings and forced value of 67,500,000 Shillings. That in itself raises very pertinent question as to the objectivity of the valuer. Further, taking judicial notice of the Kenyan market as far as sale of property is concerned, it is in very rare cases that such happens. I put forward the question of valuation report that I found not to have been properly prepared due to unreasonable deterioration in value of the suit properties as valued by the 2011 report vis-à-vis the current valuation report prepared for the purposes of selling the suit property.

It follows therefore that the notice of motion dated 25 September 2018 filed by the applicant partially succeeds and the following orders shall abide.

ORDERS

- 1. The parties to this suit to conduct a joint valuation to ascertain the true value of the suit property LR No. Kajiado/Kitengela/3322.*
- 2. The purported auction to be stopped with immediate effect and chargor to issue fresh mandatory notices of sale as required by law.*
- 3. That the applicant to meet the cost of the interim injunction of stopping the scheduled sale dated 19th of October, 2018.*
- 4. Compliance mention on 1st November 2018.*

Dated, Signed and Delivered in Open Court at Kajiado this 18th October 2018

.....

R. NYAKUNDI

JUDGE

Representation

Mr. Mutua for the defendant

Mr. Irungu for the Applicant