



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU
(CORAM:CHERERE-J)
COMMERCIAL CASE NO. 06 OF 2018
(FORMERLY ELC CASE NO. 266 OF 2016)

BETWEEN

WINSTON EDWARD ODHIAMBO.....PLAINTIFF/RESPONDENT

AND

EDOM NUTRITIONAL SOLUTIONS LIMITED.....1ST DEFENDANT/APPLICANT

ROOT CAPITAL INCORPORATED.....2ND DEFENDANT/APPLICANT

RULING

Background

1. The plaintiff/applicant is the registered owner of all that property known as **KISUMU/NYALENDA 'B'/1674** (hereinafter referred to as **the suit property**).
2. Sometimes on 19th May, 2015, the 1st Defendant/Respondent and the 2nd Defendant/Respondent entered into an agreement whereby the 2nd Defendant/Respondent granted a facility to 1st defendant/respondent in the sum of Kshs. 27,000,100/-.
3. The facility was secured by a charge over **the suit property** for the sum of Kshs. 9,630,000/- and a personal guarantee for Kshs. 27,000,100/- by the Plaintiff/Applicant and one Domintina Nyanchama.
4. It was a term of the agreement that the 1st Defendant/Respondent would repay the advanced loan by 12 monthly instalments of Kshs. 2,258,334/- each with interest thereon commencing on 1st September, 2015 with a maturity date of 1st September, 2016.
5. By a letter dated 22nd August 2016, the 2nd defendant/respondent issued a notice to sell **the suit property** unless the outstanding sum of Kshs. 24,212,804.92 plus interest thereof is settled.
6. The notice prompted the plaintiff/applicant to commence this suit by way of a plaint filed on 6th October, 2016.

Application

7. Simultaneously with the plaint, the plaintiff/applicant filed a notice of motion dated 5th October, 2016

which is the subject of this ruling, seeking 5 orders three of which have been spent. The pending prayers are for orders **THAT**:-

1) Pending the hearing and determination of this suit, there be an order of injunction restraining the 2nd defendant/respondent either by itself or through its agents, servants, employees, advocates and/or any other person deriving authority from it from howsoever proclaiming, attaching, alienating, advertising and/or selling by Public Auction , private treaty or otherwise interfering with the plaintiff/applicant's right of ownership, use and/or possession of KISUMU/NYALENDA 'B'/1674

2) Costs of this application be provided for

8. The application is based on the grounds among others that the intended sale is illegal and that the applicant is likely to suffer irreparable loss as he may lose his parcel of land if the injunction is not granted.

9. The application is supported by an affidavit sworn by the plaintiff/applicant on 5th October, 2016 in which he reiterates the grounds on the face of the application.

10. The 2nd Defendant/Respondent opposed the application on the basis of a replying affidavit sworn on 23rd February, 2017 by Peter Onguka who describes himself as the Regional Risk Manager of the 2nd Defendant/Respondent. He avers the 1st Defendant/Respondent defaulted in the payment of the monthly instalments and fell into arrears of Kshs. 22,973,381.59 at 19th April, 2016 which prompted the 1st defendant/respondent to send demand letters dated 19th April, 2016 to the Plaintiff/Applicant, the 1st Defendant/Respondent and Domintina Nyanchama. That when the demand letter elicited no response, the 2nd Defendant/Respondent through its lawyer on 22nd August 2016 issued the plaintiff/applicant with a Statutory Notice to sell **the suit property** unless Kshs. 9,630,000/- plus interest thereof is settled. He further avers that the plaintiff/applicant and Domintina Nyanchama who are co-director of the 1st Defendant/Respondent are aware of 1st Defendant/Respondent's default and that the balance of convenience tilts in favor of not granting the orders sought since the outstanding loan of Kshs. 21,872,176.25 as at 6th December, 2016 remains unpaid.

Submissions by parties

11. On the 6th December, 2017, the court directed the parties to file and exchange submissions. At the time of writing this ruling, only the 2nd Defendant/Respondent had complied.

2nd defendant/respondent's submissions

12. By its submission filed on 6th May, 2018, the 2nd Defendant/Respondent contends that the Plaintiff/Applicant has not satisfied the three requirements for granting an injunction settled in the cases of **Giella vs Cassman Brown [1973] EA 358** and **Mrao Ltd Vs First American Bank of Kenya and 2 others [2003] eKLR**.

13. It was also submitted that the Plaintiff/Applicant had been served with a demand notice under Section 90 (1) of the Land Act by registered post and that the 2nd Defendant/Respondent's Statutory Power of Sale under Section 90 (3) of the Land Act had arisen since the loan amount remains unpaid.

14. In further support of its case, the 2nd Defendant/Respondent placed reliance on the following authorities:-

i. **Enoka Watako Makokha v Co-operative Bank of Kenya [2015] eKLR** where the Court of Appeal held that service of notice by registered post is effective service

ii. **Samson Mwathi Nyutu v Savings & Loan Kenya Limited [2015] eKLR** where the Court of Appeal upheld the chargee's Statutory Power of Sale on the ground that the chargor had not

demonstrated that the chargee would be unable to compensate the him in damages should the appeal succeed.

iii. *East African Development Bank v Hyundai Motors Kenya Limited (Nairobi Civil Appeal No.194 of 2004) (unreported)* which discussed the principles of grant of relief of temporary injunction as enunciated in the *Giella v Cassman Brown case*.

Analysis and Determination

15. I have considered the notice of motion in the light of the affidavits and thereto and on submissions by the 2nd Defendant/Respondent.

16. The issues in question are: -

i. Whether the 1st defendant/respondent is in default in repaying the loan advanced by the 2nd defendant/respondent

ii. Whether a demand notice under Section 90 (1) of the Land Act was effectively served

iii. Whether the 2nd defendant/respondent's Statutory Power of Sale under Section 90 (3) of the Land Act had arisen

iv. Whether an injunction should issue

i. Is 1st defendant/respondent is in default in repaying the loan advanced by the 2nd defendant/respondent

17. Evidence in the form of a statement of account annexed to the replying affidavit shows that the outstanding loan as at 6th December, 2016 was Kshs. 21,872,176.25. It is not disputed that the Plaintiff/Applicant and Domintina Nyanchama are co-director of the 1st Defendant/Respondent who is the chargor in this matter. It is therefore imprudent for the Plaintiff/Applicant to expect this court to believe that he is unaware of 1st Defendant/Respondent's default in repaying the loan advanced by the 2nd Defendant/Respondent.

ii. Was a demand notice under Section 90 (1) of the Land Act was served

18. Section 90 of the Land Act provides as follows:

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.

19. There is evidence that demand letters dated 19th April, 2016 were sent to the Plaintiff/Applicant, the 1st Defendant/Respondent and Domintina Nyanchama by registered post, to the last known address provided by them. As at the time the demand letters were sent, the 1st Defendant/Respondent had defaulted on its obligation to make periodic payment due under the charge and had continued to be in default for more than one month. On the on the authority of the Court of Appeal decision in *Enoka Watako Makokha v Co-operative Bank of Kenya [2015] eKLR*, I find and hold that service of notice by registered post is effective service.

iii. Whether the 2nd Defendant/Respondent's Statutory Power of Sale under Section 90 (3) of the Land Act had arisen

20. Section 90 of the Land Act provides as follows:-

(3) If the chargor does not comply within ninety days 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;

21. The letter by 2nd Defendant/Respondent issuing notice to sell **the suit property** unless the outstanding sum of Kshs. 24,212,804.92 plus interest thereof is settled was sent on 22nd August 2016 which was more than 90 days from the date the demand letters dated 19th April, 2016 were sent to the Plaintiff/Applicant, the 1st Defendant/Respondent and Domintina Nyanchama.

22. Consequently, I find and hold that the 2nd Defendant/Respondent acted lawfully when it issued the Statutory Notice to sell **the suit property** unless Kshs. 9,630,000/- plus interest thereof is settled.

vi. Should an injunction should issue

23. 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."

24. The principles on which the courts will grant an injunction were restated by the Court of Appeal in **NGURUMAN LIMITED V. JAN BONDE NIELSEN & 2 OTHERS, CA NO. 77 OF 2012**, 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.

25. 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**).

26. The Court of appeal in the **Mrao Limited case** (supra) interpreted the condition as to prima facie case. It held:

"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."

27. In this case there's undisputed evidence that the 1st Defendant/Respondent is truly indebted to the 2nd Defendant/Respondent. Part of the outstanding loan was secured by a charge over the *suit property*.

28. 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 2nd Defendant/Respondent would be unable to compensate the Plaintiff/Applicant in damages should this case succeed. The applicant thus fails on the nugatory principle of the matter.

DISPOSITION

29. On the authorities cited, 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 5th October, 2016 fails and is dismissed with costs to the 2nd Defendant/Respondent.

DATED, DELIVERED AND SIGNED THIS 6th DAY OF December 2018

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Felix

For Plaintiff/Applicant - Mr Achura/Omollo

For 1st Defendant/Respondent -

For 2nd Defendant/Respondent - Mr OKoth/Otieno