



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & TAX DIVISION
CIVIL CASE NO.519 OF 2016

JOHN NJOROGE KABUBA.....1ST PLAINTIFF
UPWAYS INVESTMENTS LIMITED.....2ND PLAINTIFF

-VERSUS-

HOUSING FINANCE COMPANY
OF KENYA LIMITED.....1ST DEFENDANT
TAIFA AUCTIONEERS.....2ND DEFENDANT

RULING

1. The Application before the Court is the Plaintiff's Notice of Motion dated **21 December, 2016** and filed on **22 December, 2016**. It is expressed to be brought under the provisions of **Sections 1A, 1B and 3A** of the **Civil Procedure Act, Chapter 21** of the **Laws of Kenya**, as well as **Order 40 Rules 2, 3, 4** and **Order 51 Rule 1** of the **Civil Procedure Rules, 2010**. The Plaintiff is seeking for the following orders:

1) (Spent)

2) (Spent)

3) THAT this Court be pleased to issue an interlocutory prohibitory injunction restraining the 1st and 2nd Defendants/Respondents, their agents and/or assigns from dealing with, disposing of, selling or otherwise interfering with the title of property known as L.R No. 13330/431 located in the Thome area within Nairobi City County (hereinafter "the suit property") pending final determination of this suit.

4) THAT this Court be pleased to issue an interlocutory mandatory injunction compelling the 1st Defendant/Respondent to issue updated statements of accounts particularizing inter-alia the chronology of loan repayments and separate agreements between the Applicant and Defendant/Respondents herein.

5) THAT this Court be pleased to appoint an independent expert to tabulate the loan interest on account number 600-0011540 from inception of the loan to date.

6) THAT this Court be pleased to appoint an independent valuer to authoritatively ascertain the market value and forced sale value of the suit property being L.R Number 13330/431.

2. The application was hinged on the several grounds set out therein, and was further supported by the annexed affidavit of the Managing Director of the 2nd Plaintiff, **John Njoroge Kabuba**, who is the 1st Plaintiff herein. The said Supporting Affidavit was sworn on **21 December, 2016**, and in terms of background to the application, it was averred therein that by a Letter of Offer dated **30 November 2012**, the 1st Defendant agreed to advance a total of **Kshs. 125,000,000** to the 2nd Plaintiff; whereupon the 1st Plaintiff, proceeded to execute a Commercial Benefit Agreement with the 2nd Plaintiff providing that the 1st Plaintiff would be entitled to sell the 2nd Plaintiff's property in the event of default in the repayment of the facility. This was because the 1st Plaintiff, as the registered proprietor of the suit property, had executed a Charge on **27 March 2012** and a Further Charge on **11 January, 2013** over the suit property in favour of the 1st Defendant, to secure the loan facilities that were extended to the 2nd Plaintiff; one of which was for the purchase of **LR 13330/445** and **13330/446**.

3. It was further averred by the 1st Plaintiff that one of the other directors of the 2nd Plaintiff also provided collateral in the form of a Charge over **LR No. Nairobi/Block 72/2420**, which Charge was registered on **8 January 2013**; and that after numerous discussions between the Plaintiffs and the 1st Defendant, it was agreed that the property known as **LR No. Nairobi/Block 72/2420** be disposed of and the proceeds thereof, amounting to **Kshs. 55,000,000**, be deposited into **Account No. 600-0011540** and applied towards reducing the loan. It was further the contention of the Plaintiffs that instead applying the sale proceeds as agreed, the 1st Defendant proceeded, contrary to their instructions, to divide the amount of **Kshs. 55 million** for the payment of two loan accounts, namely: **Account No. 600-0011540** and **Account No. 600-0012083**, respectively, thereby compounding the Plaintiff's default situation.

4. The 1st Plaintiff further contended that as from **February 2014**, the 1st Defendant's Business Operations Development advised the 2nd Plaintiff to consider putting up a mixed development on **LR 13330/445** and **LR. 13330/446**, which were of higher value in comparison to the 1st Plaintiff's property **LR No. 13330/431**; and that on the basis of that advice, the 2nd Plaintiff made numerous attempts to obtain approvals from the 1st Defendant to proceed with the proposed mixed development, under the name "**Pillar Place**" but that the 1st Defendant did not respond for a period of over 9 months, during which the 2nd Plaintiff was subjected to the payment of compounded penalty interest. The correspondence in that respect were exhibited herein by the Plaintiffs and marked as **Annexure JKN5** to the Supporting Affidavit. The proposal was ultimately rejected by the 1st Defendant, and the rejection was closely followed by a Notification of Sale of the suit property.

5. The Plaintiffs instituted the present suit simultaneously with the instant application contending that the Defendants had grossly undervalued the suit property, citing the Notification of Sale dated **2 December, 2016**, in which the Defendants were of the common posturing that the market value of the suit property was **Kshs. 110 million**, with a forced sale value of **Kshs. 82.5 million**. According to the Plaintiffs, the suit property had a current market value of **Kshs. 200,000,000/=** and a forced value of **Kshs. 150,000,000/=** as at the time the instant application was filed. They placed reliance on the Valuation Report dated **9 December, 2016** prepared by **Townlands Valuers**.

6. The 1st Plaintiff further asserted that the 1st Defendant had not exhausted all avenues for the repayment of the loan; and that it was more prudent and equitable for the Defendants to sell the 2nd Plaintiff's properties comprised in the Titles **LR 13330/445** and **LR 13330/446** which had been valued by **Advent Valuers Ltd** at **Kshs. 1.7 Billion**, and thereby attract a higher purchase price instead of **LR. 13330/431**. He thus urged the Court to grant the restraining orders sought pending the hearing and determination of this suit.

7. The application was opposed by the 1st Defendant, vide the Replying Affidavit sworn by **Eunice Kamau**, on **12 January 2017**. The deponent averred that the 1st Defendant had offered the 2nd Plaintiff loan facilities amounting to **Kshs. 125 million**, and that the 1st Defendant was otherwise not privy to the Commercial Benefit Agreement alluded to by the 1st Plaintiff at paragraph 4 of the Supporting Affidavit. The 1st Defendant however denied that it advised in favour of the mixed development known as **Pillar Place**. To the contrary, it was the 1st Defendant's case that due to the perennial default of the 2nd Plaintiff in servicing the loan facilities, it was the 2nd Plaintiff that proposed the mixed development project to enable it obtain funds to offset the outstanding loan facilities. In proof thereof, the deponent referred to the 2nd Plaintiff's letter dated **20th November 2014** (marked as annexure "**JKN5**"); in which, the 1st Plaintiff in his capacity as a Director of the 2nd Plaintiff, indicated that they had decided to do a mixed development project on the suit property to enable them liquidate the outstanding loan.

8. It was further the 1st Defendant's case that as part of the aforesaid proposal, the 2nd Applicant made highly onerous requests including the following:-

i. That the loan arrears, at the time standing at Kshs. 12,000,000 together with the equivalent of 6 months repayments amounting to Kshs. 15,000,000 be capitalized thereby bringing the existing loan to Kshs. 186,000,000; and

ii. That the Bank provides a further loan of Kshs. 215,000,000 to enable the 2nd Applicant undertake the Pillar Place project.

iii. That the Bank releases two other titles it was holding as security for monies lent, being L.R NO. 13330/445 and 13330/446 in order to allow the 2nd Applicant proceed with the Pillar Place development.

9. It was averred on behalf of the 1st Defendant that the above proposals were not acceptable and that vide the letter dated **5th November, 2015**, the 1st Defendant rejected the said "Mixed Development Proposal," the main reason being that the 2nd Plaintiff was a perennial defaulter who was now not only seeking a capitalization of millions in outstanding loan arrears, but was also seeking further advance in hundreds of millions as well as a discharge of securities securing existing facilities.

10. The 1st Defendant further contended that in spite of the foregoing, it made a counter-offer to the 2nd Plaintiff on the repayments of the loan which offer was made without prejudice to the three month Statutory Notice issued on **10 September 2015**. The 1st Defendant's proposal to the Plaintiffs was that it was prepared to release the titles over **LR Nos 13330/445 and L.R 13330/446** on condition that the Plaintiffs settled all the outstanding balances in relation to the two properties in the sum of **Kshs. 124 Million**; and that the two titles be substituted with a Charge over **LR No. 10875/57** so long as all outstanding arrears were settled and a valuation conducted over the said **LR No. 10875/57**; and in addition thereto, the monthly repayments were to resume on a regular basis. According to the 1st Defendant, the Plaintiffs were unable to meet the aforesaid requirements.

11. With regard to the issue of valuation of the property, it was the 1st Defendant's contention that the purported valuation of the **Pillar Place** project by **Advent Valuers Ltd** was nothing but a projected valuation for a purely theoretical project, which would have taken years to complete while the arrears and interest continued to accrue. As for the suit property, the 1st Defendant averred that they instructed **Messrs. Njihia Muoka Rashid & Co. Ltd**, Registered Valuers, to conduct a valuation of the same; and that it was on the basis of this valuation dated **26 August, 2016 (annexed as EK11 to the Replying Affidavit)** that the 1st Defendant placed the market value of the suit property at **Kshs. 110,000,000**. It was therefore the 1st Defendant's assertion that they fully discharged their obligation under **Section 97(1) of the Land Act, 2012**. It was further their case that aside from the purported valuation report by **Townsland Valuers**, the Plaintiffs had not demonstrated any *prima facie* evidence that there was an undervaluation.

12. The 1st Defendant averred that they accorded the Plaintiffs numerous opportunities to regularize their default even after they had issued the Statutory Notice. An example was given that after such numerous opportunities, an entity calling itself **Sygec International** wrote to the 1st Defendant a letter dated **20 September 2016**, indicating that it was willing to settle the full outstanding loan balance that is the subject of this suit up to a maximum of **Kshs. 230 Million** within 60 days from the date of the letter. The 1st Defendant averred that on the basis thereof, the 1st Defendant held back from instructing the Auctioneer to proceed and issue the Redemption Notice; but that even this promise was not kept, whereupon the 1st Defendant proceeded to instruct **Taifa Auctioneers** to issue the 45 day Redemption Notice per **Annexure EK15**.

13. The 1st Defendant also pointed out that the properties **L.R Nos. 13330/445** and **13330/446** were separately charged to the Bank to secure a separate loan advanced to the 2nd Plaintiff on loan account number **600-0012083**; and therefore the said properties were not available for the settlement of the outstanding loan in respect of the other loan account number **600-0011540** which was secured by the suit property. The 1st Defendant further added that the 2nd Plaintiff had also defaulted on loan account No. **600-0012083** and recovery steps had been initiated in that regard for the realization of the securities. The 1st Defendant added that the Plaintiffs themselves had, vide their letter dated **6 October 2016** indicated a willingness to sell the suit property in order to settle the existing debt, and that because the Plaintiffs had not availed the said purchaser, there would be no basis for restraining the 1st Defendant from exercising its Statutory Power of Sale.

14. As regards the Loan Statements, it was the deponent's assertion that the said statements were well maintained by the 1st Defendant and had been duly supplied to the Plaintiffs. (*The 1st Defendant attached copies of the said Loan Statements to its affidavit and marked as Exhibit "EK3"*). It was thus the 1st Defendant's case that the allegation raised by the Plaintiffs that the sums due had not been verified was nothing but a red herring, intended to delay it from realizing the securities. Thus, the Defendants urged the Court to find that the Plaintiffs have not established a good case to warrant the issuance of the orders sought.

15. The application was disposed of by way of oral submissions made herein on **13 January 2017**. I have carefully considered those submissions together with the pleadings and the annexures thereto. The main issue for determination is whether the conditions for the issuance of an interlocutory injunction as set out in the case of **Giella vs. Cassman Brown & Co. Ltd [1973] EA 360** have been met by the Plaintiffs herein. The Court, in **the Giella Case** (supra) held thus:

"The conditions for the grant of an interlocutory injunction are ...well settled in East Africa. 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."

16. There is no dispute as to the indebtedness of the 2nd Plaintiff, and whereas the Plaintiffs averred that the 1st Defendant had failed to issue them with updated statements of accounts despite several demands to do so, the 1st Defendant, in its Replying affidavit refuted these allegations and stated that they had consistently apprised the Plaintiffs on the position of the loan. The 1st Defendant demonstrated this by attaching the relevant Statements of Account to the Replying Affidavit, which have not been disputed or challenged in any way by the Plaintiffs. It is noteworthy too that in their various correspondences to the 1st Defendant seeking for accommodation in repaying the loan, the Plaintiffs never raised their dissatisfaction in respect of the Statements of Accounts.

17. To further prove the Plaintiffs' indebtedness, the 1st Defendant averred that the most recent accommodation the Plaintiffs had sought for with regard to the loan repayments was on **6 October 2016**

when they indicated that, in order to redeem the outstanding loan, they were looking for a buyer for the suit property and had received an offer of **Kshs. 210 million**. An excerpt of the letter, marked EK17 reads as follows:

"We have started looking for a buyer to purchase the above plot 431 (now that the apartments are occupied substantially) as an alternative way of settling your debt in the event that our funding is delayed further. To date we have an offer which we are waiting for confirmation in writing for KShs 210 Million to allow any further negotiation and closure. Kindly note we have always indicated in our letters to the bank that this option is open to settle your debt but which we have avoided as we looked for development finance on the Pillar Place project."

Clearly therefore, the Plaintiffs had thereby made an express admission that the 1st Plaintiff was indeed indebted to the 1st Defendant.

18. Accordingly, as long as the facilities remained outstanding and the respective account in arrears, the Bank would be in its place in terms of seeking to realize the securities. I would agree entirely with the 1st Defendant's submissions that it would be inequitable for the Bank to be restrained from exercising its statutory power of sale based purely on Plaintiff's projected proposals to settle the debt, noting that they had made several proposals in the past which they did not follow through on. Besides, from the documents annexed to the Replying Affidavit, particularly the Statutory Notices, it is manifest that the Defendants followed the due process with a view of realizing the securities. In any event, the Plaintiffs did not deny the issuance of the relevant statutory Notices.

19. As to whether the Court should appoint an independent expert to tabulate the loan interest on **Account Number 600-0011540**, it is instructive that Counsel for the Plaintiffs did concede in his submissions that the interest has since been re-calculated and a report to that effect is available for the Plaintiff's use herein. This is therefore a prayer that has since been overtaken by events.

20. As to whether a prima facie has been made in respect of the value of the suit property, it is noted that there are two conflicting valuation reports on the court record. The 1st Defendant relied on the Valuation Report dated **26 August 2016** whereby the valuers put the market value of the suit property at **Kshs. 110,000,000/=**, with the forced sale value at **Kshs. 82,500,000/=**. On the other hand, the Plaintiffs exhibited the Valuation Report dated **9 December 2016** from **Townlands Valuers** where the open market value was put at **Kshs. 200 million** and the forced sale value at **Kshs. 150 million**. The latter Valuation Report was prepared approximately three (3) months after the 1st Defendant's valuation and therefore it could very well be assumed, as purported by the Plaintiffs, that the property's value had appreciated within the period aforesated. That aside, the Plaintiffs did not place any cogent material before the Court to show that there was an undervaluation. It was upon the Plaintiffs to demonstrate to the Court by way of prima facie evidence that the 1st Defendant had undervalued the suit property. I would thus be of the same view as was expressed by **Kasango, J** in the case of **Zum Zum Investment Limited vs Habib Bank Limited [2014] eKLR**, namely, that:

"...It is not sufficient for the Applicant to merely claim that the intended selling price is not the best price obtainable at the time by producing a counter-valuation report. The Applicant must satisfactorily demonstrate why the valuation report that the Respondent intends to rely on in disposing of the suit property does not give the best price obtainable at the material time."

21. And in the case of **Palmy Company Limited vs Consolidated Bank of Kenya Limited [2014] eKLR**, the Court stated as follows, which I find persuasive:

"...The onus of establishing on prima facie basis, that the Applicant's right has been infringed by the Respondent by failing to discharge the duty of care under section 97(1) of the Land Act lies on the Applicant..."

...The court needs cogent evidence and material in order to say that prima facie, there has been an undervaluation of the suit property which is an infringement of section 97(2) of the Land Act by the Respondent as to entitle the court to call for an explanation or rebuttal from the Respondent.”

22. In view of the foregoing, it is my considered finding that the Plaintiffs have failed to demonstrate that they have a *prima facie* case with a probability of success to warrant the issuance of either the restraining injunction prayed for in Prayer 3 of their Notice of Motion, or the mandatory orders set out in Prayer 4 thereof. Having failed to establish a *prima facie* case, I find it unnecessary to consider whether the Plaintiff will suffer irreparable injury that cannot be compensated by way of damages or where the balance of convenience would lie. This is because the 3 conditions set out in **the Giella Case** are sequential and to be applied as separate distinct and logical hurdles, a point well explained in the Case of **Nguruman Limited Vs Jan Bonde Nielsen & Others [2014] eKLR** thus:

“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...if prima facie case is not established, then irreparable injury and balance of convenience need no consideration...”

23. For the foregoing reasons, the order that commends itself to this Court is an order for the dismissal of the Notice of Motion dated 21st December 2016 and filed on 22nd December, 2016 with costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 8TH DAY OF FEBRUARY 2017

OLGA SEWE

JUDGE