



IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

COMMERCIAL AND ADMIRALTY DIVISION

CASE NO. 149 OF 2017

GREEN AFRICA INTERNATIONAL LIMITED.....PLAINTIFF/APPLICANT

VERSUS

JAMII BORA BANK LIMITED.....DEFENDANT/RESPONDENT

RULING

1. The Plaintiff seeks an interim injunction to restrain the Defendant from advertising alienating or seeking or purporting to sell or alienate the properties known as Land Reference No. 2279/2 and 3223 Nyeri (jointly“the suit property”).
2. The Plaintiff also seeks an interim interdict to restrain the Defendant from appointing a receiver and or liquidator over the Plaintiff’s business and assets. By its motion dated 6 April 2017, the Plaintiff also seeks additional orders to restrain the Defendant from interfering with the process of subdivision and sale of the subdivisions excised from the suit property.
3. The Plaintiff complains that the Defendant has been levying unlawful and unconscionable interest rate of the loan amount advanced to the Plaintiff by the Defendant pursuant to a letter of offer dated 10 March 2015 with the resultant effect that the Plaintiff’s equity of redemption has been clogged. The Plaintiff also complains that the Defendant has failed to issue the Plaintiff with valid statutory notices under ss. 90 and 96 of the Land Act but has instead opted to issue the Plaintiff with a 14 day notice through an agent to sell the suit property.
4. Finally, the Plaintiff complains that the Defendant though intent in realizing its security through a public auction sale has not undertaken a valuation of the suit property as required under s. 97 of the Land Act.
5. A parallel argument advanced by the Plaintiff to contest the Defendant’s intention to appoint a receiver over the Plaintiff’s property is that the Defendant is in breach of contract. In this regard, the Plaintiff asserts that the suit property was to be subdivided and sold and the sale proceeds remitted to the Defendant in redemption.
6. However, it is contended that in breach of the agreement the Defendant has failed to appoint its lawyers to participate in the sale disposal process and also has placed a public caveat against the sale of the suit property, notwithstanding the fact that the Plaintiff has opened an escrow account through which the sale proceeds were to be channeled.
7. By his response filed vide an opposing affidavit sworn on 18 April 2017 by James Murage, the

Defendant admits having advanced to or placed within the Plaintiff's reach the sum of Kshs. 369 million on the security of the suit property. The Defendant states that after an agreed moratorium, of twelve months, the Plaintiff failed to repay the amount prompting the Defendant to make demand. Additionally, it is stated by the Defendant that further advances of Kshs. 6,400,000/= and Kshs. 12,000,000/= were made to the Plaintiff and the said sums together with accrued interest are yet to be paid.

8. The Defendant contends that it has twice issued statutory notices to the Plaintiff but the Plaintiff is yet to heed the same besides the fact that the Plaintiff is yet to even develop the suit property as had been agreed. As of 12 April 2016, according to the Defendant, the Plaintiff was indebted to it in the sum of Kshs. 438,344,377/75 in aggregate. It is the Defendant's stance that it only placed a public caveat in the daily newspapers when it became apparent that the Plaintiff was misleading the public that the suit property was not charged to the Defendant.

9. For completeness, the Defendant contends that all the requisite notices under the Land Act have been issued and as the amount is due the Defendant should not be restrained from realizing its security.

10. In oral arguments before me on 4 May 2017, the Plaintiff's Counsel Mr. D. Muriithi contended that the statutory notice issued by the Defendant to the Plaintiff was defective and thus invalid, as it referred to advances which were not part of the charge. Counsel contended that the Defendant had alternative avenues of realizing the securities pledged by way of an informal charge. Counsel also urged that the intended sales could not proceed as the requisite notices under the Auctioneers Act had not been issued. Counsel attacked the Defendant for standing in the way of redemption by frustrating the subdivision and ultimate sale of the subplots. It was ultimately counsel's contention that the charge documents were also invalid having been registered with the Registrar of Companies after expiry of the statutory period provided for under the now repealed Companies Act(Cap 486).

11. In opposition, Mr. G. Nyaanga stated that the Defendant had issued all the requisite the statutory notices which were substantially compliant. Counsel stated that the statutory notice did not include other accounts as alleged by the Plaintiff. Counsel finally stated that the notices were also copied to the directors who were the guarantors and that indeed the 45 day notice under the Auctioneers Act had also been issued.

12. In conclusion however counsel stated that the bank had noted a discrepancy in the valuation and had since commissioned another valuation to be undertaken.

13. There are common cause facts which may be stated as follows.

14. The Plaintiff was advanced monies on the security of formal legal charges on the suit property. The Plaintiff was also advanced additional finances on the security of informal charges. The Plaintiff is in default. The Plaintiff has been issued with statutory notices. Both the Plaintiff and the Defendant have undertaken valuations of the suit property, with the Defendant proceeding pursuant to Section 97 of the Land Act, 2012. There is a wide discrepancy on the value returned by the Defendant on its own valuations.

15. There are however facts which are purportedly in dispute but which in my view even at this interlocutory stage ought not to be in dispute. I state so quite conscious that at an interlocutory stage the court should not make any definitive findings of facts: see **Bonde vs. Steyn [2013] 2 E A 8**.

16. Where however, in my view, even at the motion stage facts are such that even though not formally admitted cannot be denied, they must be regarded as admitted and thus not in controversy. In this respect, it is clear that the Defendant did indeed serve the allegedly defective statutory notice upon the guarantors and further that the Defendant has served the 45 day notice obtaining under the Auctioneers Act.

17. In controversy however is the issue whether the statutory notice under Section 90 is invalid for not having pinpointed to the Plaintiff that it has a right to go to court and challenge the Chargee's intended relief. The statutory notice is also stated to include amounts not secured by any formal charge. Also in

controversy is the contention that the Defendant is yet to fully comply with Section 97 of the Land Act.

18. The Defendant has harmoniously conceded that the Defendant may also have an issue with the valuation of the property as it now stands. The Defendant expressly and categorically told the court, through Counsel, that it needed to reconfirm the value of the suit property given and was under the process of doing so.

19. I have no doubt that a chargee who exercises his or her power of sale owes a duty to take adequate precautions to obtain the true market value or proper price for the property when he comes to sell it. As this court stated in the case of **First Choice Mega Store Ltd –v- Ecobank Kenya Ltd [2017] eKLR**.

“Inscrutably, Section 97 of the Land Act imposes the duty to obtain the best possible price reasonably obtainable at the time of sale”.

20. The Defendant in the instant case is cognizant of this duty and is more than willing to oblige having detected the possibility of blemishes in the earlier valuations. The differential or discrepancy in the valuations is more than Kshs. 500,000,000/=. This is hefty and warrants the question marks posed by the Plaintiff. I would agree that the Defendant may only dispose of the suit property once a true valuation is actually settled.

21. With regard to the statutory notice, whilst I hold the view that the statutory notice served upon the Plaintiff is not patently defective, I would in the circumstances of this case adopt the approach taken by the Court of Appeal in the case of **National Bank of Kenya Ltd –v- Shimmers Plaza Ltd [2009] eKLR**. The court stated as follows:

“The duration of an order of injunction is at the sole discretion of the trial Judge and depends on the circumstances of each case. In this case, the duration of the injunction until the determination of the suit frustrated the statutory right of the bank to realize the security upon giving a notice which complies with the law. We venture to say that where the court is inclined to grant an interlocutory order restraining a mortgagee from exercising its statutory power of sale solely on the ground that the mortgagee has not issued a valid notice, then in our view, the order of injunction should be limited in duration until such time as the mortgagee shall give a fresh statutory notice in compliance with the law”

22. The Plaintiff has asserted that there is defect when the notice does not include a rider that the Plaintiff is entitled to apply to court for relief against the chargee’s remedies outlined under s. 90(3) of the Land Act. The prejudice to the Plaintiff is not evident at this stage but I see no reason why in the circumstances of this case, the Defendant may not be obliged to rectify that defect given that the Defendant blissfully admitted this omission.

23. Quite apart from the statutory notice which the Defendant has admitted to have some defect, I do not find that the Plaintiff has made any prima facie case. When the Plaintiff claims that its right of redemption is being clogged by the Defendants failure to play along in some arrangement to subdivide and sell the property but the Plaintiff does not avail evidence on how far it had committed the sales even by way of professional undertakings or executed agreements, the Plaintiff’s arguments in these respects falls flat. Likewise when the Plaintiff alleges that the Defendant has applied usurious and penal rates of interest without showing the actual rates and the Defendant counters with an exhibition of contractual rates, the Plaintiff’s case again proceeds to crumble.

24. The Plaintiff is also currently heavily indebted to the Defendant and that is a factor that the court should not ignore.

25. With regard to the question whether the Defendant is likely to suffer irreparable damage if the property was to be sold in realization of the security, it is clear to me that it cannot be so. The Plaintiff admits that it is actually in the process of subdividing the suit property with an intention to sell the subplots and redeem the loan due to the Defendant. There is no indication of intent to hold on to the suit

property out of any sentimental attachment or otherwise. In any event, once a property is pledged as security it becomes commercial property and value can always be placed on it: see **Sammy Japheth Karuku v Equity Bank Limited & Another [2014]eKLR**.

26. The Plaintiff requested that this court do make any order it deems fit in the circumstances. I will intervene in limited manner by ordering:

a) That the Defendant do immediately issue the Plaintiff with a ninety (90) day fresh statutory notice compliant with the provisions of Section 90 of the Land Act.

b) The Defendant is in the meantime restrained from selling or disposing of the suit property until after the expiry of the statute notice period and issuance of the consequent notices under s. 96 of the Land Act and, further, after a current valuation has been undertaken and availed to the court and permission to sell issued by the court. The Defendant is at liberty to cause a joint valuation to be undertaken for expediency purposes.

c) The Parties are at liberty to apply.

d) Each party will bear its own costs of the application.

Dated, signed and delivered at Nairobi this 12th day of May, 2017.

J.L.ONGUTO

JUDGE