REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO.355 OF 2015

STEPHEN K. MELLY.....1ST PLAINTIFF/APPLICANT

NAOMI MELLY.....2ND PLAINTIFF/APPLICANT

LOYSONS INVESTMENTS LIMITED.....3RD PLAINTIFF/APPLICANT

- VERSUS -

ECOBANK KENYA LIMITED……1ST DEFENDANT/RESPONDENT

ONESMUS MACHARIA T/A

WATTS AUCTIONS.....2ND DEFENDANT/RESPONDENT

RULING

1. The Notice of Motion dated 16th July, 2015 and filed herein on 21st July, 2015 is brought under Order 40 Rules 1, 2 and 4, Order 51 Rule 1 of the Civil Procedure Rules as well as Sections 1A, 3A and 63 (c) & (e) of the Civil Procedure Act, for the following orders:

a. That the application be certified urgent and heard *ex parte* in the first instance. ***(Spent).***
b. That pending the hearing and determination of this application *inter partes*, there be interim prohibitory orders of injunction against the Respondents, their servants, employees and/or agents, restraining them from selling, disposing, alienating, transferring,leasing,wasting,interfering and/or otherwise dealing with **Title No. NAIROBI/BLOCK 22/118/16** situate in **Sunning Hills Apartments, Block B:5, Ring Road, Kileleshwa, Nairobi** (hereinafter referred to as the suit property) ***(Spent).***
c. That pending hearing and determination of the main suit, there be interim prohibitory orders of injunction against the Respondents, their servants, employees and/or agents, restraining them from selling, disposing, alienating, transferring, leasing, wasting, interfering and/or otherwise dealing with **Title No. NAIROBI/BLOCK 22/118/16** situate in **Sunning Hills Apartments, Block B:5, Ring Road, Kileleshwa, Nairobi.**
d. That costs of this application be provided for.

2. The application is based on the Supporting and Supplementary Affidavits sworn by the 1st Plaintiff/Applicant, **Mr. Stephen Kibiego Melly,** and the following grounds:

i. the 2nd Defendant/Respondent, under the instructions of the 1st Defendant/Respondent, has advertised the suit property belonging to the 1st and 2nd Plaintiffs/Applicants for sale by public auction on the basis of a second and further loan of **Kshs. 8,850,000** advanced to the 3rd Defendant/Applicant on 15th May 2014; and that there was no consent given by the 1st and 2nd Applicants for use of the suit property to secure the second loan.
ii. That the 1st Respondent engaged in a prohibited tacking as the purported use of the suit property to secure the second or further loan advanced to the 3rd Applicant does not comply with the mandatory statutory provisions set out in Section 82(3) as read with sections 84(2) and 84(5) of the Land Act, given that there was no memorandum securing the said loan; and therefore the statutory notices issued are illegal/irregular.
iii. That the previous loan of the Kshs. 13,000,000 secured by a charge over the suit property has been fully repaid, and therefore if the injunction sought is not granted, the Respondents will proceed to illegally sell the suit property.

iv. That the statutory notices and Notification of sale are defective in that they refer to different account numbers, amounts and description of the suit property.
v. That though the loan was advanced for the benefit of the 3rdApplicant, the 1st and 2nd applicants had made a proposal to the1st Respondent to restructure the loan to enable them pay Kshs. 200,000 per month instead of Kshs. 336,000 per month but that the1st Respondent had refused and/or ignored to respond to this proposal.

vi. That it is in the interests of justice and fairness that the application be allowed.

3. In the supporting Affidavit, the 1st Applicant deposed that sometimes in the year 2013, the 1st Respondent advanced to the 3rd Applicant a loan of Kshs. 13,000,000 (the first loan) which was secured against the suit property; and that the 3rd Applicant has since fully repaid that loan. He further deponed that it was within his knowledge that the 1st Respondent advanced to the 3rd Applicant a second loan amounting to Kshs. 8,850,000 for purposes of purchasing a CAT Grader and Backhoe Loader from Maya Machinery Co. Ltd in China; and that things did not work well for the 3rd Applicant. Nevertheless, the 3rd Applicant made efforts to pay over Kshs. 1,000,000 towards reducing the second loan and, though not beneficiaries of the second loan, the 1st and 2nd applicants have paid Kshs. 2,000,000 towards the loan and are willing to keep repaying, for which reason, they proposed a re-structuring from Kshs. 336,000 to Kshs. 200,000 per month.
4. The 1st Applicant further deponed that the Statutory Notice and the Notification of Sale that were issued in respect of the suit property were defective/illegal for:
    a. reflecting that the suit property is situate in Block A of Sunny Hills Apartments whereas the same is situate in Block B of the Sunning Hills Apartments.
    b. indicatin that the Account No. variously as 007AFLD141610001 007AMLD14161000100700150133548O1
    c. being issued in respect of the suit property when there was no mandatory compliance with the relevant provisions of the Land Act with regard to tacking.

5. The Defendants/Respondents opposed the application. In the Replying Affidavit sworn by **Elizabeth Hinga** filed on 30th July 2015, it was the 1st Respondents case that on 2nd May 2013 the 1st Respondent advanced a Kshs. 13,000,000 loan the 3rd Applicant which was secured by a charge over the suit property. It was further deponed in the Replying Affidavit that in Clause 9.7 of that Charge provision was expressly made to the effect that the same was a continuing security and that the Bank could make further or other advances to the Borrower on the basis thereof; and that subsequently a further advance of **Kshs. 8,850,000** was made by the 1st Respondent to the 3rd Applicant pursuant to Clause 9.7 aforesaid. Hence, according to the 1st Respondent, it acted within its rights and in accordance with the applicable law in issuing the statutory notices for sale.
6. In response to the averments that the notices are defective for citing the wrong account numbers and description of the suit property, the 1st Respondent averred that the two account numbers are

interlinked, one being the number for the current account through which the loan was disbursed while the second being the number for the closed account in respect of the first loan. More importantly, it was averred in the Replying Affidavit that the 1st and 2nd Applicants, having been making repayments towards the second loan, are therefore estopped from questioning the legality or propriety thereof.

7. The Court has considered all the averments in the respective affidavits as well as the written submission filed herein, including the authorities cited by Learned Counsel. The principles guiding the grant of a temporary injunction were set out in the renowned case of **Giella Vs Cassman Brown and Company Limited [1973] E.A 358**, namely: that the applicant must show a *prima facie* case with a probability of success; secondly that he stands to suffer irreparable harm which would not adequately be compensated by an award of damages; and thirdly, if the Court is in doubt, it will decide an application on the balance of convenience.
8. As to what amounts to a *prima facie* case, the Court of Appeal in the case of **Mrao –vs- First American Bank (K) Ltd** had this to say**:**

> **"…a prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case."**

9. Applying the foregoing principles to the instant case, it is incumbent upon the Applicants to satisfy the court, albeit on a prima facie basis, as to the following issues:-

- **Whether the right to tack the second loan was available to the 1st Respondent and if so whether it was properly exercised;**
- **Whether the Statutory Notices issued under the Land Act as well as the Notifications of Sale and Advertisements made under the Auctioneers Act were properly issued.**

10. According to the Counsel for the applicants, the second loan was advanced in contravention of section 84(2) as read with section 84(5) of the Land Act, as there was no Memorandum executed by the 1st and 2nd Applicants consenting to the advance of the further loan on the security of the suit property. He relied on the case of **Kisimani Holdings Ltd & Another vs. Fidelity Bank Limited [2013] eKLR.** The 1st Respondent however argued that since it reserved the right to tack in the Charge under Clause 9.7, it could provide further loans to the 3rd Applicant without a Memorandum to that effect. Clause 9.7 of the Charge reads as follows:

"This Charge being a continuing security, the Bank may make further advances and give credit to the Chargor on a current or continuing account and such further advances shall, in accordance with section 82 of the LA, rank in priority to any subsequent charge of the Premises."

11. Section 82 of the Land Act does provide that a Chargor may make provision in the charge instrument to give further advances or credit to the chargor on a current or continuing account. However, as was pointed out by the Applicants' Counsel, this right is subject to the other provisions of the Land Act; and in the Applicant's case it is argued that there was need for the 1st Respondent to observe and comply with the provisions of section 84 thereof. Section 84(2) provides thus:

"the amount secured by a charge *may* be reduced or increased by a memorandum which *shall*---

a. **comply with subsection (5);**
b. **be signed--**

i. **in the case of a memorandum of reduction by the chargee; or**
ii. **by the chargor; and**

c. **state that the principal funds intended to be secured by the charge are reduced or increased as the case may be, to the amount or in the manner specified in the memorandum**." (Emphasis added)

12. It was the submission of Counsel for the Respondents that section 84 is discretionary. It is noteworthy however that it uses '**may**' with particular reference to the reduction or increase of the amount secured by the charge. However once the parties agree to increase or reduce the amount secured by the charge, then it becomes mandatory for a memorandum to be prepared giving effect to that agreement, and that is why the section provides that the memorandum '**shall**' comply with subsection (5), be signed, and state that the principal funds are reduced or increased as the case may be, and the amount.
13. I accordingly share the view taken by Havelock, J in **the case of Kisimani Holdings Ltd & Another vs. Fidelity Bank Limited** case that:

"...section 84 of the Land Act, 2012 allows the amount secured by a charge to be reduced or increased but by a memorandum which must be endorsed on or annexed to the charge instrument which varies the Charge in accordance with the terms of the memorandum. The memorandum must be signed in the case of a reduction by the chargee or, in the case of an increase, by the chargor. It must also state that the principal funds intended to be secured by a charge instrument are reduced or increased, as the case may be, to the amount specified in the memorandum. It is clear that by not specifically (by memorandum) increasing the amount covered by the Charge instrument ... the Defendant was in breach of this sub-clause..."

In this respect therefore, the Applicants have shown that they have a valid point with a probability of success at the trial.

14. The second point raised by the Applicants is that the Statutory Notice, Notification of Sale and Advertisement issued by the Respondents are illegal, irregular and/or defective for failure to comply with the mandatory provisions of Section 90(2)(b) of the Land Act, and in the following respects

a. that the Statutory Notice did not indicate the amount of arrears outstanding,
b. that the Statutory Notice gave particulars of only one Account No. 007AFLD141610001, whereas the Notification of Sale introduced another account No. 0070015013354801. It was further pointed out that the account number in the Statutory Notice varies from the one shown in the Notification of Sale. In addition the two notices had different sums posted therein as outstanding; being Kshs. 8,620,635/97 and Kshs. 9,130,720.48, respectively.
c. That whereas the Notification of Sale and Advertisement show that the property is situate in Block A of Sunny Hills Apartmetns, the correct position is that the property is situate in Block B of Sunning Hills Apartments.

15. The court was referred to the case of **Koileken Ole Kipolonka Orumoi vs. Mellech Engineering & Construction Limited & 2 others [2015] eKLR** for the proposition that property cannot be sold on the basis of notices which indicate different amounts or where the notices issued by the auctioneer is a departure from the notices issued under the Land Act; and that Rules 15 and 16 of the Auctioneers Rules 1997 require an accurate description of the property to be auctioned. The said notices were annexed to the Supporting and Supplementary Affidavits and they appear to fall short of the mandatory requirements of the law. In the case of **Alfred Osanya vs. Giro Commercial Bank Ltd & Another**, Havelock J had this to say, which I fully endorse:

"...the 1st Defendant's Advocates do not appear to have appreciated the mandatory provisions of section 90(2)(b) which detail that the statutory notice must detail the amount that must be paid to rectify the default and the time. As above, the Term Loans would not be entirely due and owing to the instalment plan agreed with the company. The statutory notice does not detail the amount that must be paid to rectify the default as regards the Term Loans. As a result ... I find that the said statutory notice herein ... to be defective and as a result, invalid."

On this score too, the Applicants have made out a case worth calling for a rebuttal from the Respondents at a full trial.

16. The Court is therefore satisfied that the Applicants have demonstrated a prima facie case with a probability of success, bearing in mind the guidelines set out in the case of **Nguruman Limited Vs Jan Bonde Nielson & 2 Others** Court of Appeal No. 77 of 2012 in which it was stated thus:

"We reiterate that in considering whether or not a prima facie case has been established, the Court does not hold a mini trial and must not examine the merits of the case closely. All that the Court is to see is that on the face of it, the person applying for an injunction has a right, which has been violated or is, threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The Applicant need not establish title; it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities."

17. The second principle set out in **the Giella case** is that an applicant must demonstrate that he stands to suffer irreparable harm. In this regard the Court of Appeal had the following to say in the case of **Nguruman Limited vs. Jan Bonde Nielsen & 2 others CA No. 77 of 2012**:

"Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot "adequately" be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is of such a nature that monetary compensation, of whatever amount, will never be adequate remedy."

18. It was the case of the Applicants that having shown that the Respondents engaged in illegalities for failure to comply with either the Land Act or the Auctioneers Act and the Rules thereunder, they stand to suffer irreparable harm should they be deprived of their property through an illegal process. Counsel relied on the case of **Manasseh Denga vs. Ecobank Kenya Limited [2015] eKLR** to support their argument that the sale of a person's property is not a matter that should be taken casually because it deprives a party of his or her right to own property, a right enshrined in Article 40 of the Constitution of Kenya, 2010 and that a party deprived of his property through an illegal process would suffer irreparable loss and/or damage (see **Joseph Siro Mosiama vs. HFCK & 3 Others [2008], Peter Kuria Munyira vs. Housing Finance Co. of Kenya Ltd & Another HCCC No. 457 of 2006, Lucy Njoki Waithaka vs ICDC).** I find merit in this argument as well, and would find and hold that, in the circumstances of this case, the Applicants have demonstrated that they stand to suffer irreparable harm.
19. As to the third principle, namely balance of convenience, considering that the statutory power of sale has not crystallized, and having found that the intended sale was being pursued in breach of the applicable law, it is my finding that the same tilts in favour of the Applicants, noting that one of the orders made by the court on 30th July 2015 was for the payment by the Applicants to pay **Kshs. 200,000** per month until further orders of the court.

20. In view of the foregoing, I would allow the Plaintiff's Notice of Motion dated 16th July 2015 and filed on 21st July 2015 and grant orders as prayed in paragraphs 3 and 4 thereof. Costs thereof to be in the cause. It is further ordered that the Applicants continue paying of the amount in issue by monthly instalments of Kshs. 200,000 as ordered on 30th July 2015 pending hearing and determination of this suit.

It is so ordered.

SIGNED AND DATED at NAIROBI this …. DAY OF JANUARY, 2016

OLGA SEWE

JUDGE

DELIVERED AT NAIROBI THIS 9th DAY OF FEBRUARY 2016

CHARLES KARIUKI

JUDGE