REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND COURT CASE NO. 356 OF 2015

GEOFFREY OMONDI OTIYO …….…………………………..…. PLAINTIFF

VERSUS

COOPERATIVE BANK OF KENYA LIMITED ……..........….. 1ST DEFENDANT

KEYSIAN AUCTIONEERS ………………………….……. 2ND DEFENDANT

RULING

1. The plaintiff on 22nd July 2015 filed the plaint dated 21st July 2015 and simultaneously with the plaint also filed the Notice of Motion dated 21st July 2015. The Notice of Motion is expressed to be brought under Order 40 Rules 2 and 4 of the **Civil Procedure Rules** and Sections 1A, 1B and 3A of the **Civil Procedure Act** and Sections 90 and 96 of the Land Act, 2012. The applicant at the ex parte stage was granted prayers (1) and (2) of the application such that the prayers that remain for determination seek orders that:-

1. An order of temporary injunction against the defendants, its agents or representatives from advertising for sale, selling, disposing, interfering or in any other manner interfering with the plaintiff's property known as Kanyanda/Kotieno Kotuma B/286 pending the hearing and determination of this suit.

2. An order that the notices issued by the defendants dated 12th May, 2015, and notification of sale therein are illegal, unlawful and null and void and the same be set aside.

3. Costs of the application.

2. The plaintiff's application is supported on the grounds set out on the body of the application which inter alia include the following grounds:-

1. **The defendants/respondents has issued a statutory notice that is contrary to the provisions of section 90 (3), 96 (2) (3) and 97 of the Land Act, 2012 and the charge document.**
2. **The defendants have issued statutory notice of sale by public auction of the plaintiff/applicant's parcel of land under chargees power of sale on loans and advances granted to Priscot Enterprises Ltd and unless restrained they shall proceed on with the sale.**
3. **The defendant's power of sale as chargees under the charge has not arisen and is premature and amounts to trespass upon the plaintiff's property.**
4. **The defendants have neither served the plaintiff as envisaged under the provisions of Section 90 (3) and 96 of the Land Act and hence no right to issue any notice or advertisement to sell under the chargees power of sale can arise.**

5. **The defendant charged unlawful and illegal charges, interests, penalties, commissions and costs that were in violation of Section 44 and 44A of Banking Act as the same were not approved by the Minister in charge of Finance nor provided for by law and therefore not payable.**
6. **The statutory notices issued by the defendant are in contravention of Sections 90 (3) and 96 of the Land Act and Rule 15 of the Auctioneers Rules.**
7. **The defendants have failed to adhere to mandatory provisions of the Land Act 2012.**

The plaintiff's application is further supported on the affidavit sworn in support by Geoffrey Omondi Otiyo the plaintiff herein which to a large measure reiterates the grounds in support of the application.

3. The 1st defendant upon being served with the application filed a detailed replying affidavit dated 21st August 2015 through one Benard Walela, its Branch Manager, Homa Bay Branch in opposition to the plaintiff's application. In the replying affidavit the deponent set out how the security over **LR No. Kanyada/Kotieno Katuma 'B'/286** in favour of the 1st defendant came to be taken. Banking facilities in the sum of kshs. 4,000,000/= were vide a letter of offer dated 28th August 2012 extended to Priscot Enterprises Ltd by the 1st defendant. As security **LR No Kanyada/Kotieno Katuma 'B'/286** registered in the names of Serphina Auma Otiyo, Victor Mwayi Otiyo, Edwon Odhiambo Otino & Geoffrey Omondi Otiyo was charged in favour of the 1st defendant and all the said registered owners executed guarantees in favour of the 1st defendant. The deponent has further outlined the events that he states constituted default on the charge on the part of the borrower and further deposes that the appropriate and requisite notices were served on the relevant parties including the plaintiff as required under the law and contends that there is no basis upon which the orders sought by the applicant can be granted. The 1st defendant/respondent avers that the plaintiff's application for injunction does not satisfy the threshold for grant of temporary injunction as established in the case of **Giella –vs- Cassman Brown & Company Ltd [1973] E. A 358**.
4. The deponent in responding to the plaintiff's claim that appropriate notices were not issued stated that a demand letter dated 26th May 2014 marked **"BW4"** was sent to the borrower and the guarantors while a statutory notice under section 90 of the Land Act marked **"BW5"** was given vide letter dated 8th July 2014. The 1st respondent further states the borrower and the guarantors were served with a redemption notice as required under Section 96 of the Land Act 2012 and upon failing to redeem the debt the 2nd defendant was duly instructed to enforce the security through realization and avers that valuation of the property was undertaken in accordance with section 97 (2) of the Land Act, 2012 as per copy of valuation report marked **"BW6".**
5. The 1st respondent further avers that rather than the borrower and the guarantors acting to redeem the charge, one of the guarantor's Serphina Auma Otiyo to forestall the impending sale of the charged property filed a suit at Homa Bay Chief Magistrate's Court No. 20 of 2015 seeking similar orders of injunction as in the instant suit but the suit was struck out on account of the court's lack of jurisdiction to handle the case. The 1st respondent in consequence avers that the applicant's instant suit and application lacks merit as it is clearly calculated to frustrate the 1st respondent's efforts to recover its debt from the borrower and the guarantors inspite of following all the laid down legal provisions and prays for the applicant's application to be dismissed for being misconceived and baseless.
6. The parties canvassed the plaintiff's application dated 21st July 2015 by way of written submissions. The plaintiff filed his submissions on 17th December 2015 while the respondents filed their submissions on 9th February 2016. I have considered and reviewed the application by the plaintiff, the affidavit in support and in opposition together with the annextures thereto and have further considered the submissions by the parties and the authorities referred to by the parties and the issue for determination at this stage is whether the plaintiff has satisfied the conditions for grant of a temporary injunction to warrant the orders sought in the application.
7. The principles to be considered in an application for injunction are now well settled and a submitted by both counsel are now well settled and are as set out in the case of **Giella –vs-**

Cassman Brown & Co. Ltd (Supra) where **Hon. Justice Sry V. P** stated:-

"The conditions for the grant of an interlocutory injunction are now, I think, 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 be 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."

The plaintiff submits that he has a prima facie case in that he was not served with the requisite statutory notices as provided for in the **Land Act, 2012** and cites notices under Sections 90 (1) and 96 (2) of the Act as notices that were not served on him. The applicant states he is resident in Nairobi and that the alleged notices issued by the 1st defendant to an address in Homa Bay did not reach him and cannot therefore constitute proper service. The applicant submits that lack of appropriate service invalidates the actions by the 1st defendant and contends that the right to exercise its statutory power of sale cannot accrue unless the provisions of the Land Act relating to service of notice have been complied with. Section 96 (2) of the **Land Act 2012** provides:

96(2) Before exercising power to sell the charged land, the chargee shall serve on the chargor a notice to sell in the prescribed for and shall not proceed to complete any contract for the sale of the charged land until at least forty five (45) days have lapsed from date of service of that notice to sell."

8. On the effect of failure to serve a requisite notice the applicant referred the court to the case of **Nicholas Ruthiru Gatoto –vs- Ndarugu Merchants & 2 Others [2014] eKLR** where **Ogola, J** observed thus:-

"35. It is trite law that non-service of a statutory notice is a fundamental breach of the provisions of Section 74 of the Registered Land Act (now repealed) which derogates from the chargor's equity of redemption. In essence without service of valid statutory notice, the power of sale does not crystallize and any act done by the bank to dispose of the suit property amounts to an illegality."

9. The plaintiff further faults the valuation report prepared by the 1st defendant in preparation for the realization of the charged land arguing that the valuation was an under value of the land and if the same were to be used for realization purposes it would be in breach of Section 97 of the **Land Act** since it would result in the property being sold at a price that is below 25% of the market value of the property. The applicant submits the open market value of the charged property is kshs. 15 Million and not Kshs. 10 Million as the valuation by the 1st respondent shows.
10. The 1st respondent submits the plaintiff/applicant has not demonstrated a prima facie case and/or that he would suffer damage that would not be compensable by an award of damages. The 1st respondent reiterates in his submissions that all the requisite notices were duly served on the borrower and all the guarantors. The 1st respondent refers to the letter of 26th May 2014 "BW4" which was copied to the guarantors and is shown to have been sent under certificate of posting to the applicant at P. O Box 83-40300 Homa Bay and to the other guarantors at the same address. A further notice was given to the borrower and the guarantors vide letter dated 8th July 2014 marked as **"BW5"** also sent under certificate of posting to the same addresses. The 1st respondent states that a valuation of the property was carried out as required under Section 97 (2) of the Land Act 2012 as per valuation report annexed as **"BW6"** which placed the value of the property at kshs. 10 Million with a forced sale value of kshs. 7.5 Million. A redemption notice was given to the borrower and the guarantors vide letter of 12th May 2015 **"BW7"** and it is the 1st respondent's submission that all the guarantors including the applicant were all fully aware of the default by the borrower in servicing the loan and of the bank's intention to realize its security and yet chose to do nothing. The auctioneer, the 2nd defendant herein served each of the guarantors with notification

of sale in compliance with the law.

11. The 1st respondent in the premises submits that the applicant and the other guarantors were appropriately served with all the requisite notices and fully complied with the provisions of the law to enable it to realize its security. The 1st defendant asserts the applicant's allegations are baseless and cannot be relied upon to demonstrate a prima facie case with a probability of success.

12. In the present case it is not disputed that the 1st respondent granted banking facilities to **Vincent Otieno Opanyi t/a Priscot Enterprises** in the aggregate sum of kshs. 4,000,000/= which was guaranteed by **Serphina Auma Otiyo, Mwai Otiyo, Edwin Odhiambo Otiyo** and **Geoffrey Omondi Otiyo** who collectively and jointly offered their land parcel title **No. Kanyada/Kotieno Katuma "B"/286** as security to support the guarantee. A charge and further charge over the land was duly registered in favour of the 1st defendant/respondent which the guarantors duly signed. The applicant does not dispute that the loan was outstanding at the time the 1st respondent sought to enforce the security. What the applicant appears to be contesting is the process the 1st respondent employed to enforce the security. The applicant has in his supporting affidavit alluded to the fact that the 1st respondent was levying what he termed as illegal and unlawful interest, charges, penalties, commissions and other costs that were not contracted for or permitted under the law. The applicant however does not state that the chargors have paid what they admit would constitute lawful loan repayments save for what they claim to be the illegal and unlawful levies. The applicant did not exhibit any schedule of payments and/or any bank statements to illustrate what he refers to as the illegal and unlawful charges.

13. I have carefully considered all the material and information placed before the court by the parties. I have in particular considered the various notices that the applicant is contesting and note that all the notices were sent to the borrower and all the guarantors including the applicant at the address given in the charge. There is no evidence that the applicant had given to the 1st respondent any notification of change of address. Under clause 4 of the further charge dated 17th October 2011 any notice or demand for payment by the bank could be hand delivered and/or sent by registered post to the last known address of the chargors and where the notice or demand is sent by registered post, it would be sufficient to prove that the notice of demand was properly addressed and posted. In the present matter the 1st respondent has annexed copies of certificates of posting of the notices and the court is satisfied that the notices were indeed posted to the applicant's address as given in the charge and that this constituted proper service.

14. The applicant has not demonstrated that the 1st respondent was not entitled to make the demand and or issue the statutory notice. The applicant could only show that if he demonstrated the borrower and the chargors were upto date with the loan repayments and that there were no arrears. As stated earlier in this ruling the applicant has not demonstrated that the repayment of the loan was upto date and no bank statements have been availed. Under clause 39 of the further charge:-

"Any notice or demand or certificate as to the amount secured by this charge, signed by an officer or manager of the bank, shall be conclusive and binding on the chargors and or the borrower and, where applicable shall be conclusive evidence of the rights of the bank to exercise the powers conferred or implied by this charge."

The statutory notice of 8th July 2014 was duly signed by the bank's officers and certified the amount in arrears as at 8th July 2014 to be kshs. 4,960,379.14 and warned the guarantors that the bank would after the expiry of three (3) months from the date of service of the notice take action to enforce the security. Courts have repeatedly held that merely because there is a dispute as to the actual amount owing and/or charges levied by a chargee are disputed that should not a valid ground to grant an injunction to restrain a chargee from exercising its statutory power of sale.

15. In the case of **Francis J. K Ichatha –vs- Housing Finance Company of Kenya {C. A Civil Application No. 108/2005)** the Court of Appeal observed thus:-

"Indeed, Mr. Kahonge, the learned counsel for the applicant told us that there is no dispute

that there was default and that the dispute is on the illegal charges, and that the arrears and the debt are admitted. The dispute is essentially on the quantum of the arrears and of the loan at the time the statutory notice was issued. The applicant recognized in the plaint that the dispute was of "Mathematical nature". Thus, this is truly a dispute on accounts. The existence of such a dispute is not a valid ground for restraining the respondent from exercising its statutory power of sale."

In the same case the judges further stated:-

"A plaintiff should not be granted an injunction if he does not have clean hands, and no court of equity will aid a man to derive advantage from his own wrong doing, for the plaintiff seeks this court to protect him from the consequences of his own default. He who seeks equity must do equity. The plaintiff should not be protected or given advantage by virtue of his own refusal to make repayment to the defendant/respondent a debt of which he expressly undertook to pay."

16. In the circumstances of this case the applicant's application which as I have observed is based on ground of non service or appropriate service of the demand notice and statutory notices and disputed levies of necessity must fail. I have held that the notices were appropriately served in accordance with the charge and in compliance with the Land Act and that the mere allegation that there are illegal and irregular charges though unproven cannot result in an order of restraint being given against the chargee. The applicant has not demonstrated any payment of the debt and has not in my view approached a court of equity with clean hands. The applicant and the other guarantors committed themselves to pay the debt/loan advanced to the borrower in the event of default by the borrower. They are under an obligation to pay the debt and they have not shown their commitment to pay. The 1st defendant is entitled to enforce its security to recover the debt.
17. On the whole and having regard to all the material placed before me, I am not satisfied the plaintiff has demonstrated a prima facie case with a probability of success against the defendants. The applicant has equally not demonstrated he would suffer any damage that cannot be compensated for in damages. The guarantors by offering their parcel of land as security to secure the borrowing by the borrower were consciously in agreement that their land had become a commercial commodity in the market which would be liable to be sold under the terms of the charge if they and the borrower defaulted to pay the loan that they offered the security to secure. The applicant and indeed the other guarantors cannot suffer irreparable damage if the property is sold by the chargee in exercise of its power of sale under the charge as that was a consequence and eventuality they agreed could occur once they executed the charge. The charge constituted a contract that bound all parties to it and the applicant cannot walk away from it.
18. The upshot is that I find the plaintiff/applicant's application dated 21st July 2015 to be devoid of any merit and I order the same dismissed with costs to the 1st defendant. The interim order granted in the matter on 22nd July 2015 is hereby vacated and discharged.
19. Orders accordingly.

Ruling dated, signed and **delivered** at **Kisii** this **11th day** of **March, 2016**.

J. M MUTUNGI

JUDGE

In the presence of:

………………………………………….. for the plaintiff

………………………………….……… for the 1st defendant

………………………………….……… for the 2nd defendant

J. M. MUTUNGI

JUDGE