



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO 142 OF 2016

ANDREW KARANI IRERI.....1ST PLAINTIFF/APPLICANT

PATRICIA GICHANGA MWAKINA.....2ND PLAINTIFF/APPLICANT

VERSUS

NIC BANK LTD.....DEFENDANT/RESPONDENT

RULING

1. Before the Court for determination is the application by the Plaintiffs dated **5th April 2016** and filed on **27th April 2016**. The application was brought under the provisions of **Section 3A of the Civil Procedure Act, Chapter 21 of the Laws of Kenya** as well as **Order 40 Rules 1 and 2** as read with **Order 51 Rule 1 of the Civil Procedure Rules, 2010**. The orders sought by the Applicants are:

1. (Spent)

2. (Spent)

3. THAT an order do issue restraining the Defendant, its servants or agents from advertising or offering for sale, selling, transferring, charging or interfering with the Plaintiffs' right and title to ownership, possession and use of the premises comprised in title No RUIRU/BLOCK 3/881 or howsoever selling, disposing off, transferring or relinquishing its ownership of the charges dated 18th February 2013 and 15th August 2014 held by it on Title Number RUIRU/BLOCK 3/881 pending hearing and determination of the suit.

4. The Court be pleased to make any other orders deemed necessary for the ends of justice.

5. Costs hereof be provided for.

2. The application was predicated upon the grounds that **no lawful or valid statutory notices** had been issued or served under any of the charges; that the consolidation of the charge debt under the charges dated **18th February 2013** and **15th August 2014** with the hire purchase debts was oppressive and offended the Plaintiffs' right of redemption and the protection afforded by due process; and that the Defendant, unless restrained, would proceed to realize unsecured debts unrelated to the charge debt. Further, it was averred that the exercise of its statutory power of sale by the Defendant was oppressive,

arbitrary and unlawful and that unless constrained, the Applicants stood to suffer irreparable loss and damage as a direct consequence thereof.

3. The application was supported by the affidavit of the 1st Applicant deposed to on **5th April 2016**, in which, further to restating the grounds adduced in support of the application, it was contended that the 2nd Applicant had not been served with the **Statutory Notices** as per the provisions of **Section 96(3)(c)** of the **Land Act, 2012**.

4. In response to the application, the Defendant filed its replying affidavit on **20th May 2016**, sworn by **Henry Maina**. Therein, it was deposed to that the grounds upon which the application was based constituted a gross distortion of facts as to the dealings between the Applicants and the Respondent, which distortion was merely aimed at delaying the realization by the Defendant of its securities. It was further averred by the Defendant that the debt repayments constituted those facilities that had been offered to the Plaintiffs through the letter of offer dated **11th December 2012**, and that therefore, no debt secured under the hire purchase agreement was recoverable under the charges as alleged by the Applicants. Further, it was deposed to that the Applicant had admitted that he had failed and or refused to satisfy the debt when it was called up by the Respondent, and that they had failed to make an effort to ameliorate the situation despite stating their ability to do so in the letter dated **16th October 2015**. The deponent further averred that no reasonable proposals for repayment of the charge debts had been made by the Applicants despite admission of debt, and that therefore, the Defendant was within its rights to realize the securities held.

5. The principles guiding the grant of a temporary injunction were set out in the celebrated 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; and in the case of **Mrao –vs- First American Bank (K) Ltd, the Court of Appeal** had this to say with regard to what amounts to a *prima facie* case:

“...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.”

6. It appears not to be in dispute that the suit property is a matrimonial home as defined by **Section 2 of the Land Act**. As such, before any dealings with and/or disposition of such property could be had, spousal consent was a pre-requisite. This is a requirement provided for under **Section 79(3)** of the **Land Act** which reads;

A charge of a matrimonial home, shall be valid only if any document or form used in applying for such a charge, or used to grant the charge, is executed by the chargor and any spouse of the chargor living in that matrimonial home, or there is evidence from the document that it has been assented to by all such persons.

In compliance with these provisions, it has been demonstrated that the Charge and the Further Charge documents had the requisite spousal consent of the 2nd Plaintiff annexed thereto as evidenced by the documents appearing at **pages 39 and 98** of the Notice of Motion application.

7. Further, at **Clause 9** of both the **Charge** dated **18th February 2013** and the **Further Charge** dated **15th August 2014**, it was provided that in the event that the Chargee (Defendant/Respondent) wished to exercise its Statutory Power of Sale, the same would not proceed to completion without service of such Notice to Sell on persons as prescribed under **Section 96(3)** of the **Land Act**.

8. Under the provisions of the said **Section 96(3)**, it is provided that;

"A copy of the notice to sell served in accordance with subsection (2) shall

be served on—

- (a) the Commission, if the charged land is public land;
- (b) the holder of the land out which the lease has been granted, if the charged land is a lease;
- (c) a spouse of the chargor who had given the consent;***
- (e) any lessee and sublessee of the charged land or of any buildings on the charged land;
- (f) any person who is a co-owner with the chargor;
- (g) any other chargee of money secured by a charge on the charged land of whom the chargee proposing to exercise the power of sale has actual notice;
- (h) any guarantor of the money advanced under the charge;
- (i) any other person known to have a right to enter on and use the land or the natural resources in, on, or under the charged land by affixing a notice at the property; and
- (j) any other persons as may be prescribed by regulations, and shall be posted in a prominent place at or as near as may be to the charged land.

9. Accordingly, the Respondent was duty-bound to ensure that the 2nd Applicant, as the spouse of the Chargor who had provided consent as by law required, was served with a copy of the notice to sell the suit property. Failure by the Respondent to serve the requisite notice was not only a failure to fulfill its obligation under the Charge and Further Charge, but more importantly, constituted a breach of a statutory imperative as set out in **Section 96(3)(c)** of the **Land Act**. Consequently, any further action towards the realization of the securities offered by the Applicants would be unlawful.

10. The Court is therefore satisfied that the Applicants have demonstrated a prima facie case with a probability of success. Indeed, in the case of **Nguruman Limited Vs Jan Bonde Nielson & 2 Others** Court of Appeal No. 77 of 2012 the Court of Appeal set out the standard of proof in such matters 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.”

11. Having satisfied myself that the Plaintiff has made out a prima facie case, the next issue to examine is whether there is a risk of the Plaintiff suffering irreparable damage for which damages would be inadequate as a remedy. In this regard it was argued on behalf of the Plaintiff that the exercise of statutory power by the Defendant was oppressive, arbitrary and unlawful and that unless constrained, the Applicants stood to suffer irreparable loss and damage.

12. One of the arguments pitched by the Applicants is that the suit property is matrimonial property and that they stand to suffer irreparable damage should the property be in the circumstances outlined herein. Whereas authorities abound to support the position that the mere fact that the charged property is matrimonial property is not sufficient ground for surmising that an Applicant risks suffering irreparable harm, I would agree with the position taken in **Elizabeth Wambui Njunguna vs Housing Finance Co. of Kenya Ltd [2006] eKLR** in which it was held that:

" ...the omission to serve a valid statutory notice is not an irregularity or impropriety to be remedied in damages. It is a fundamental breach of the statute, which derogates from the chargor's equity of redemption."

13. I therefore take the view that the omission to serve the 2nd Plaintiff/Applicant with a notice to sell as envisaged under **Section 96(3)(c)** of the **Land Act** is not an irregularity that can be remedied by an award for damages. Accordingly, it is my finding that the balance of convenience tilts in favour of the Plaintiffs. Indeed, in the case of **Suleiman –vs- Amboseli Resort Ltd (2004) 2 KLR 589**, **Ojwang Ag. J** (as he then was) expressed the following viewpoint, which I find useful:

"Traditionally, on the basis of the well accepted principles set out by the Court of Appeal in *Giella v Cassman Brown*, the Court has to consider the following questions before granting injunctive relief: (i) is there a prima facie case with a probability of success? (ii) does the applicant stand to suffer irreparable harm, if relief is denied: (iii) on which side does the balance of convenience lie? Even as those must remain the basic tests, it is worth adopting a further, albeit rather special and more intrinsic test which is now in the nature of general principle. The court in responding to prayers for interlocutory injunctive relief, should always opt for the lower rather than the higher risk of injustice."

14. From the facts of this case, the course that leads to a lower risk of injustice would be to grant the application. However, I hasten to add that the Respondent is not estopped from exercising its power of sale once it rectifies the mistake and issues a Notice of Sale to the 2nd Applicant in accordance with **Section 96(3)** of the **Land Act**. This position was made by the Court of Appeal in **Civil Appeal No 26 of 2002 National Bank of Kenya Ltd v Shimmers Plaza Ltd; (2009) eKLR** as follows;

"... An injunction is an equitable and discretionary remedy. The duration of an order for 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 injunction 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. We respectfully think that the learned Judge did not exercise his discretion judicially in the circumstances of this case when he granted an order of injunction until the determination of the suit. In the result, we allow the appeal, set aside the order of injunction in terms of the superior Court and substitute therefore an order for injunction thus; "The Defendant/Respondent be and is hereby restrained by itself or its authorized agents, servants or employees from selling, disposing off, transferring or otherwise dealing with Plaintiff's property known as Title Number IR No. 55525 (LR No 1870/IX/128 situate in Westlands, Nairobi until such time as the Defendant/Respondent shall have served the Plaintiff with a valid statutory notice in accordance with the law.""

15. The Applicants have not denied that they had enjoyed facilities extended to them by the Respondent, and neither have they denied that all due processes were executed save for the service of notice of sale. Further, they have not demonstrated that they are willing to satisfy the debt amount. There is therefore absolutely no reason why the Respondent should be restrained from exercising its power of sale, subject to its compliance with the relevant provisions of the law.

16. In the premises, the application succeeds in part, with the Court granting a conditional interim injunction pending the compliance by the Respondent with the provisions of **Section 96(3) of the Land Act**. Upon the fulfillment of this condition, the Respondent will be at liberty to exercise its statutory power of sale. It is further ordered that costs of the application be in the cause.

It is so ordered.

SIGNED, DATED AND DELIVERED at NAIROBI this 2ND DAY OF SEPTEMBER, 2016

OLGA SEWE

JUDGE