



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BOMET

CIVIL CASE NO 2 OF 2015

BOMET TEACHERS

TRAINING COLLEGE LIMITED.....PLAINTIFF

-VS-

BANK OF AFRICA KENYA LIMITED.....1ST DEFENDANT

BENJAMIN KISOI SILA T/A

LEGACY AUCTIONEERING SERVICES....2ND DEFENDANT

RULING

The notice of motion application dated the 13th day of October 2014 seeks the following orders:-

(a) Spent

(b) An interim injunction restraining the respondents either by themselves agents and or servants howsoever from selling, transferring alienating or otherwise interfering with the applicant's possession of title No. Bomet Township/114 Bomet county pending the hearing and determination of this application

The grounds are as follows:-

(a) That Bomet teachers training college Limited is the registered lease hold owner of title No Bomet Township/114 Bomet County.

(b) That the said land was charged to guarantee a bank facility to the extent of 15 million

(c) That the 1st respondent has advertised for sale of the suit property on 24th/10/ 14.

(d) That the applicants were never served with the mandatory statutory notice of sale

(e) That the applicant had reached an advanced stage of offsetting the loan balance as the principal amount outstanding now down to Kshs.8,456,350/= from Kshs.15 million.

(f) That the guarantors had not been served with the 40 days redemption notice.

(g) That the applicant has a prima facie case with a probability of success as lack of statutory notice makes the intended sale a nullity, illegal and unlawful and the applicant shall suffer irreparably if the sale is not stopped.

(h) That the balance of convenience tilts in preservation of status quo until both parties are heard on the merits of the instant application.

Brief facts

It is common ground that on the 13th day of July 2011 the plaintiff obtained and or was granted a loan facility to the tune of Kshs.15 million from the 1st defendant. It charged its land Registration No. Bomet Township/114. The moneys were disbursed to the plaintiffs account on 9/11/2011.

Thereafter the plaintiff/Applicant defaulted in servicing the loan.

It is the contention by the Defendants that the applicant breached the terms of the loan facilities and confirmed to do so even after several written demands were made to the directors with copies to the guarantors culminating into the Defendants exercise of its statutory power of sale processes

The law

Temporary injunctions

Order 40 rule (1) (c) (b) provides:-

(1) Where in any suit it is proved by affidavit or otherwise:-

(a) That any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit or wrongfully sold in execution of a decree, or

(b) That the defendant threatens or intends to remove or dispose off his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit;

The court may by the order grant a temporary injunction to restrain such act, or to make such other orders for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property as the court thinks fit until the disposal of the suit or until further orders".

The principles on injunctions were well settled in the case of Giella –vs-Casman Brown and company Limited Civil appeal No.51 of 1972 where it was held,

(1) The applicant must establish a prima facie case with a probability of success.

(2) Applicant has to demonstrate that it will suffer irreparable injury which cannot be compensated by damages.

(3) Balance of convenience.

It is the contention by the applicant that it has established a prima facie case with a probability for success and it relies in the case of OLYMPIC SPORTS HOUSE LIMITED –vs-SCHOOL EQUIPMENTS CENTRE LIMITED(2012)Eklr Where the court of appeal in the case of NARAO-vs-FIRST AMERICAN BANK LIMITED

Held: -“Where an applicant establishes that his legal right has been infringed by a defendant thereby calling for a rebuttal by the latter, a prima facie case is established”

The applicant’s further contention is that the Respondent advertised for sale of the suit property without issuing a statutory notice to the applicant as required under section 96 of the land act.

Section 96 (2) provides -:”Before exercising the power to sell the charged land, the chargee shall serve on the chargor a notice to sell in the prescribed form and shall not proceed to complete any contract for the sale of the charged land until at least forty days have elapsed from the date of service of that notice to sell”.

Its submitted that the notice was never served upon the charger and neither was as copied to the guarantors and that the intended sale was a nullity, illegal and unlawful.

That there was infringement and therefore a prima facie case has been established on the issue as to whether damages can be an adequate remedy it is contended that the suit property is worth over Kshs.60 million whereas the debt award is Kshs.8, 456,350/= and if the property is auctioned it would be to the highest bidder a fact which may not reflect the market value.

The defendants contention is that as a result of the applicant defaulting on the repayment of a loan advanced to it, it advertised the charged land for sale by auction through a newspaper advertisement of 6.10.2014. The defendant had given 90 and 40 days Notices which were sent to the directors on 30.10.2013 and 25th March 2014 via registered mail.

The bank sent a Notification of Sale and Redemption Notice through its agent legacy Auctioneering Services. The defendants contention is that there is no dispute that the applicant is indebted to the bank for the amounts stated and shown in the Statutory Notices and it’s entitled to exercise its statutory power of sale. Further that the charged land is an asset where value can be ascertained and thus capable of compensation by way of damages.

The main issue by the Applicants is that the Respondents advertised for the suit property without issuing statutory notice as required under S. 96 of the Land Act and same were not served upon the charger and neither was it copied to the guarantors.

I have perused the replying affidavit of Monica Kamau filed on 19/1/2015 and in particular paragraph 9 where in its deponed that the Respondents through their Advocates on record issued three months statutory Notice via registered mail dated 30.8.2013, which notices were not responded to. Paragraph 10 of the said affidavit it is deponed that on 25.3.2014 after the expiry of the period provided under the statutory notice the 1st defendant through its advocates on record issued the Applicants with a 40 days Notice to sell via registered mail which notice elicited no response. These notices are annexed and marked as anextures MK 8 (a) and (b) and MK 9 (a) and (b) respectively.

Thereafter the 2nd Respondent served two Notification of sale to the plaintiffs directors. A fact which is not denied.

Para 11 the Respondent placed a notice of public auction of the property on the Daily Nation of 6.10.2014 annexure FR4

From the foregoing I am satisfied that the Respondent did issue to the Applicant the necessary statutory notices before issuing Notification of sale by public auction.

The contention that its legal rights had been infringed; hence it had established a prima facie case is not factually and legally tenable.

The Applicant does not deny that it has been in default in the amounts stated in the statutory notice. I am of the considered view that no prima facie case has been established.

Are damages adequate compensation?

It has not been contended that the Respondent would not be in a position to pay any damages awarded to the applicant in the event it was successful in its suit.

There is no proof that the Respondent cannot compensate the applicant in damages if so ordered by the court.

The upshot is that this application has no merit and it's dismissed with costs.

Ruling delivered dated and signed this 6th day of November 2016 in the presence of learned counsel for Respondent Mrs. Kirui holding brief Miss Kosgey learned counsel for the applicant absent.

M. MUYA

JUDGE

6/11/2016

Court- Certified copies of the ruling to be furnished to the Applicant and the Respondent.

M. MUYA

JUDGE

6/11/2016