



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
CIVIL SUIT NO. 305 OF 2013

SHOWCASE PROPERTIES LIMITED ::::::::::: PLAINTIFF/APPLICANT

- VERSUS -

KENYA COMMERCIAL BANK LTD. ::::::::::: DEFENDANT/RESPONDENT

R U L I N G

1. Before the court is the Plaintiff's **Notice of Motion** application dated **17th July 2013**. The remaining substantive remedies it seeks are:-
 - a. *That an order for injunction be issued restraining the Defendant from intermeddling with the suit property either by selling, advertising for sale and or alienating and or disposing off, selling by public auction or completing any conveyance or transfer or any sale of land known as L.R. No. 2/61 situated in Kilimani along Kirichwa road. .*
 - b. *That an order to be issued restraining the Defendant from foreclosing on the suit property by relying on the Statutory Notice dated 4th day of April 2013 and/or any notices allegedly served upon the Plaintiff.*
 - c. *That an order be made extending the period of time for compliance by the chargor with the Statutory Notice served by the Respondent and dated 4th day of April 2013, under Section 90 of the Land Act 2012.*
 - d. *That the court in the alternative substitutes a different remedy for the one applied for or proposed by the Respondent, with a more suitable remedy like appointment of a receiver in view of the prevailing circumstances and in line with Section 140 (2) (c) of the Land Act 2012.*
2. The application is premised on the grounds set out therein and further on the annexed affidavit of one **FRANCIS MUHORO GACHANJA** sworn on **16th July 2013** with annexures and a further affidavit filed on **6th November 2013**.
3. The application is opposed through a replying affidavit sworn by one **DONALD OSEKO** on **8th August 2013** and a supplementary affidavit filed on **22nd November 2013**.
4. The parties were given leave of the court to file written submissions, which they were happy to rely on without any further need to highlight the same.

5. The brief background of the application is that on 17th July 2013 the Plaintiff filed the suit herein against the Defendant seeking a permanent injunction to restrain the Defendant from advertising the sale and/or disposing of property number L.R. No. 2/61 on the strength of the Statutory Notice dated 4th April 2013 issued by the Defendant. The Plaintiff also sought a declaration that the said Statutory Notice is *null* and *void* as it does not comply with the form prescribed. The Plaintiff also sought the extension of time for compliance with the said Notice served upon it pursuant to Section 90 of the Land Act 2012. Lastly, the Plaintiff sought for the substitution of the remedy sought by the Defendant with a different remedy which the court may prefer. On 18th July 2013 this court granted an *ex-parte* order for the preservation of the suit property pending the *inter-partes* hearing of and the determination of the application. The suit has been defended and this application has been opposed by the Defendant.
6. Before I proceed further in this matter I must note for the record that there is the HCCC No. 577 of 2011 Nairobi – Showcase Properties Limited – Vs – Bamburi Special Products Limited which is currently going on before my court and which is intricately related to the matter before the court. In that case the Plaintiff/Applicant has sued the Defendant therein Bamburi Special Products Limited for damages arising from alleged negligence the result of which has altogether as we speak stalled the progress of the works in the suit property. The stalling of the works in the suit property has a bearing in the matter before the court in that due to the said delay the Plaintiff is unable to complete the works in the suit property, and hence in a way, unable to meet is financial obligation to the Defendant in this particular case. I mention this fact because in the said suit HCCC No. 577 of 2011 the court has moved to the suit premises and has observed the state of affairs in those premises. It is possible that the knowledge gained by the court in that visit may play a role in the current proceedings given that courts are composed of human beings. Be that as it may I will be as objective in this matter as I can.
7. I have considered the submissions of the parties. What I am called upon to determine is whether this court can grant the orders sought. The principles upon which an injunction can be granted were determined in the celebrated case of **GIELLA – VS – CASSMAN BROWN & COMPANY LIMITED 1972 EA 358**. They are:-

i. ***The Applicant must show a prima facie case with a probability of success.***

In the case of **MRAO LIMITED – VS – FIRST AMERICAN BANK LIMITED & 2 OTHERS, CIVIL APPEAL NO. 39 OF 2002, Mombasa**, the Court of Appeal in stating what a *prima facie* case is had this to say:-

“So what is a prima facie case? I would say that in civil cases it is a case in which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

“. . . But as I earlier endeavoured to show, and I cite ample authority for it, 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.

8. What is for the determination by this court is whether the Defendant is entitled to exercise its statutory power of sale. It is not in dispute that the Defendant has given a loan facility of Kshs.200,000,000/= and that the Plaintiff has since defaulted. The Plaintiff has also not denied owing money to the Defendant. The Defendant is however challenging the legality of the Statutory Notice arguing that under Section 90 (5) the Cabinet Secretary shall prescribe the form and content of a Notice to be served under that Section and that the same was not done and that the Statutory Notice dated 4th April 2012 outrightly recalls the entire loan without informing the Plaintiff the extent of the default since the loan was granted. Section 90 (2) (b) of the Land Act provides:-

“the Notice required under subsection (1) shall adequately inform the recipient if the default consists of non-payment of any money due under the charge, the amount that must be paid to rectify the default and the time, being not less than three (3) months, by the end of which the payment in default must have been completed.”

9. In my view, the Statutory Notice dated 4th April 2012 and marked as “**FMG – 4 (b)**” does not fault the provisions of Section 90 (2) (b) of the Land Act in a situation where the bank has previously *via* letters of demand or otherwise effectively communicated to the borrower the outstanding defaults since the loan was taken. A Statutory Notice is simply a culmination of previous communications between the bank and the borrower. The bank will be allowed to give evidence of previous communications or notices given to the Defendant 90 days preceding the issuance of a Statutory Notice showing that the bank had indeed given the borrower all the necessary information pursuant to the loan repayment default. This court has the duty to interpret that Section of the law in a manner which makes it a living Section and so that it gives validity to any communication between the bank and the borrower which may have taken place within 90 days before the issuance of the Statutory Notice. Any other interpretation will make this court a court in champion of technicalities and not one ensuring justice for all the parties. I therefore hold that the Statutory Notice dated 4th April, 2012 was valid. If it was, and considering the fact that the debt herein and breach of the mortgage facility is not doubted, then obviously, the Plaintiff has not established a *prima facie* case to warrant the grant of the orders sought.

10.(ii) The second issue is whether the Applicant will suffer irreparable injury which would not be adequately compensated by an award of damages.

The answer to the above issue must be in the negative. The suit premises are being build for purposes of sale. This means that should the court not grant the injunctive orders sought and should the Defendant sell the suit properties and it later turns out that the same was done unlawfully, the Plaintiff’s loss is capable of being quantified in damages. This is more so since the Defendant cannot be said to be a party impecunious and who cannot make out the payment. I am satisfied that the general damages would be adequate remedy and that the Defendant is capable of paying the same.

11.(iii) The third issue - the balance of convenience. On this issue I now refer back to the HCCC No. 577 of 2011 where the Plaintiff/Applicant has sued Bamburi Special Products Limited for the supply of defective concrete to the suit property and the matter is currently pending before my court. As I said earlier, I have visited the suit property in the cause of that matter. While I cannot as at now predict the outcome of that case, I must say without any fear of contradiction that if the orders of injunction and other prayers herein were totally denied, and the Defendant proceeded to dispose off the suit property, the Plaintiff/Applicant would suffer incomprehensible inconvenience in that HCCC No. 577 of 2011. As a court which has visited the suit property I cannot close my eyes to the possibility of such inconvenience being visited upon the Plaintiff. This then leads me to consider other prayers which may not necessarily be injunctive against the Defendant.

12. The Plaintiff has also prayed for an order for extension of time to comply with the charge, and also requested for the substitution of the sought remedy with a different remedy under Section 104 (2) (b) of the Land Act, 2012. The Applicant cited the wrong provisions of the law that is Section 140 (1) and (2). That notwithstanding this court can correct an error on its own motion and so I deem that application to have been made under Section 104 (2) (b) and (c) of the Land Act 2012. In addition and/or in the alternative the Plaintiff/Applicant has asked for one (1) year’s grace period before it can resume the loan repayment under the charge facility.

13. There is a reason why this court is called a Commercial Court. Its Rulings and Judgments are foremost aimed to aid business, and not to kill them. Where there is a possibility that the party in default may be helped to come back to a profitable path, this court will most certainly lend a hand. The Plaintiff borrowed Kshs.200,000,000/=. It has since paid over Kshs.69,000,000/= and has fallen into arrears of over Kshs.33,000,000/=. I am inclined to give the Plaintiff a period of 10 months from the date of this Ruling to put its house in order and to commence the loan repayment.

14. In the upshot, I make the following orders

- a. *Save that the Plaintiff/Applicant is given a 10 month period of extension of time under Section 104 (2) (b) and (c) of the Land Act 2012 after which he must start the repayment of the loan, the Notice of Motion application dated 17th July, 2013 is dismissed.*
- b. *The costs of this application shall be for the defendant.*

DATED, READ AND DELIVERED AT NAIROBI THIS 13TH DAY OF MARCH 2014

E. K. O. OGOLA

JUDGE

PRESENT:

Beatrice Kariuki for Plaintiff/Applicant

No appearance for Defendant/Respondent

Teresia – Court Clerk