REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUSIA.

ELC. NO. 66 OF 2014.

TIMOTHY LUCHELI INJENDI……PLAINTIFF

VERSUS

FAMILY BANK CO. LTD.,……. DEFENDANT

R U L I N G.

TIMOTHY LUCHELI INJENDI, hereinafter referred to as the Applicant, filed notice of Motion under certificate of urgency dated 24th March, 2014 against **FAMILY BANK COMPANY LIMITED**, hereinafter referred to as the Respondent, for interlocutory injunction restraining the Respondent against selling, transferring, alienating and or conveying Bukhayo/Mundika/2212 pending hearing and determination of this suit. The application is based on twelve grounds set out on the face of the application and the affidavit of Timothy Lucheli Injendi sworn on 24th March, 2014 in which he inter alia depones to the following;-

1. That the Respondent had not promptly informed the Applicant when the principal debtor fell into arrears of loan payment.
2. That he had not been served with the statutory notice and therefore the Respondent's statutory power of sale had not arisen.
3. That he had not been served with a notification of sale.
4. That the Respondent has not carried out a valuation of the land as required before the commencement of the statutory power of sale.
5. That the Respondent is demanding an amount way above the amount guaranteed.
6. That the suit land is ancestral land and its sale would result to displacement of elderly family members.
7. That he has a prima facie case with a probability of success and damages would not adequately compensate him if the intended sale was allowed to proceed.

The application is opposed by the Respondent through the replying affidavit of Daudi Kimathi Kiema, a Branch Manager with the Respondent, sworn on 22nd April, 2014 in which he among others depones as follows;-

1. That Applicant had charged the suit land Bukhayo/Mundika/2212 to guarantee a loan of Kshs.1,000.000/= to his son named Samson Injendi Lucheli on 19th September, 2011.
2. That the borrower defaulted in the loan repayment which at the time of swearing the replying affidavit stood at Kshs.924,076/=, when he was supposed to have cleared it in 48 months in equal installments of Kshs.30,140/=.
3. That Respondent instructed Pawaba Auctioneers who issued the Statutory Notice to the debtor and chargor pursuant to section 96 (1) of Land Act 2012.

4. That Pawaba Auctioneers had a valuation done on the property before commencing the procedure of the statutory sale.

Counsel for the parties then consented to the application being disposed off through written submissions. M/S. Wambua Kigamwa and A.W. Kituyi & company advocates appeared for the Applicant and Respondent respectively and filed written submissions both dated 17th June, 2014. The court having considered the grounds on the face of the application, submissions by both counsel, supporting and reply affidavits finds as follows:-

1. That indeed the Applicant charged the suit land, Bukhayo/Mundika/2212 with the Respondent to guarantee one Samson Injendi Lucheli a loan of Kshs.1,000.000/=. The Applicant duly executed the guarantee and indemnity document dated 19th September, 2011 which is annexed to the replying affidavit.
2. That the said Samson Injendi Lucheli defaulted in the loan repayment and by 24th March, 2014 when the Applicant filed this application, the outstanding loan and interest stood at about Kshs.924,076/= as shown in the copy of bank statement attached to the replying affidavit.
3. That clause 27 of the Guarantee and indemnity document between the Applicant and Respondent and dated 19th September, 2011, provided for service of notices to the guarantor and stated:

> ***'' Any notice or demand for payment by the bank under this guarantee shall be deemed to have been properly served on the Guarantor if delivered by hand or sent by registered post, telex or fax addressed to the Guarantor or to a person or upon whom the notice or demand is to be made at the registered or principal place of business or last know place of abode of the Guarantor or of such person, as the case may be; in the absence of evidence of earlier receipt, any notice or demand shall be deemed to have been received , if delivered by hand, at the time of delivery or if sent by post, four days after the date of posting (notwithstanding that it be undelivered or returned undelivered) or, if sent by telex or fax, on the completion of transmission. Where a notice or demand is sent by registered post it shall be sufficient to prove that the notice or demand was properly addressed and posted.''***

The Applicant has denied having received the notice which is required to be served to a defaulting chargor under section 90 (1) of the Land Act No.6 of 2012. The Respondent states in paragraph 8 of the replying affidavit that they instructed "Pawaba auctioneers who indeed issue (sic) statutory Notice to the debtor and chargor respectively ……'' The affidavit by Paul Wamoto sworn on 22nd April, 2014 has three annexetures as set out below:

1. Affidavit of service by Paul Barasa Wamoto sworn on 15th April, 2014 .
2. Certificate of posting registered postal article addressed to Samson Injendi Lucheli.
3. copy of a newspaper page carrying out the advertisement for auction.

It is clear from a perusal of the documents set out above that none amounts to a copy of the notice envisaged under section 90 (1) of the Land Act. The documents do not also confirm that any service was effected to the Applicant herein as the person to whom the article was sent to under registered post is named as Samson Injendi Lucheli and not Timothy Lucheli Injendi.

4. That the notice under section 90 (1) of the Land Act is expected to contain the details set out under subsection 2 which includes; nature and extent of default by the charger, the amount that must be paid to rectify the default and time of payment and the consequence if default is not rectified within time given. The Respondent having been aware that the Applicant had denied having been served with such a notice would reasonably have been expected to avail a copy to the court to rebut or controvert such a claim if it actually existed.
5. That it is after the chargor has failed to comply with the notice served under Section 90 (1) of the Land Act that the chargee's power of sale arises bringing in the operations of section 96 (1) of Land Act that states:

'' 96(1). Where a chargor is in default of the obligations under a charge and remains in default at the expiry of the time provided for the rectification of that default in the notice served on the chargor under section 90 (1), a chargee may exercise the power to sell the charged land.''

The court, having found as above that there is no evidence to confirm that Respondent had issued and served a notice envisaged under section 90 (1) of Land Act to the Applicant, further finds that the Respondent's power to sell the charged property had not arisen by the time the auction was advertised. This finding would suffice to deal with the application but the court will proceed to consider the other issues raised.

6. That the affidavit of service by Paul Barasa Wamoto referred to in (3) above does not mention of any service of notice to sell being served on the Applicant. The affidavit only refers to service of ''letter of notice and notification of sale of immovable property to Hellen Mmbone Andeyo from whom the process server got the telephone number of Samson Lucheli Injendi. The process server then called the said Samson on phone and subsequently posted the ''served notice'' to Samson Lucheli Injendi's postal address. This does not amount to service on the chargor who is the Applicant herein, and contravenes both clause 27 of the Guarantee and the Indemnity document as set out in (3) above, and section 96 (2) of the Land Act which states:

'' 96(2) 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 the service of that notice to sell.''

7. That considering the advertised auction was to take place on 3rd April, 2014, the copy of the valuation by Prime Valuers cannot be taken to satisfy the requirement of section 97 (2) of the Land Act which states:

''97 (2 A chargee shall before exercising the right of sale ensure that a forced sale valuation is undertaken by a valuer.''

This finding is informed by the following factors:

a. That the heading of the valuation report at page 1 shows that the purpose of the valuation was to advise the Respondent on ''Current open market value for mortgage purposes.'' This may have been remedied by the inclusion at page 6 under paragraph C of the forced sale value being stated but for the following other factors.
b. That the valuation report is dated 6th January, 2013 which is more than one year before the suit property was advertised for auction. The property values keep on changing and a valuation done more than one year before the advertisement of the auction cannot be relied upon to give a reliable forced sale valuation. A similar issue arose in the case of ***David Gitome Kuhiguka =versus= Equity Bank Ltd., (2013) eKLR*** where Havelock J, held:

'' Ironically, at page 13 of the report, the valuers detail the forced sale value of the suit property at Kshs.30,000.000. However, is this enough to satisfy the requirements of section 97 (2) of the Land Act as aforesaid? In my opinion, it does not do so far two reasons. Firstly, the valuer has clearly stated in its terms of reference that it had been asked to advice on the suit property's current market value for mortgage purposes. In other words, it related to the amount that the Defendant could/would lend to the Plaintiff as per the charge dated 14th March, 2012 being Kshs.5500,000/=. Secondly, the *Valuation by the time that the sale came round in April, 2013, was over a year out of date. With properties in and around Nairobi in the current property market boom, it may well be that, the suit property could have vastly increased in value even for forced sale purposes in the 14th months period. As a result , I find that the Defendant has not complied with section 97 (2) of the Land Act in this connection.''*

(emphasize ours).

> I may add that the property boom is not only in Nairobi but in all areas around the county headquarters. As the Learned Judge found in the case cited above, it is imperative that a chargee gets a current valuation for forced sale valuation purposes and the valuation dated 6th January, 2013 does not suffice for the purposes of section 97 (2) of the Land Act.

8. That the contention by the Applicant that the suit land was ancestral land whose sale would result to displacement of elderly family members would not stop the chargee to realize their powers to sell ones they have satisfied the requirements of the law. The moment the Applicant charged the suit land with the Respondent, the land became a commercial commodity that can be transacted as agreed under the charge documents and in accordance with the provisions of the law should the Applicant be in default. The Applicant can only escape from such a predicament by ensuring the loan he guaranteed by charging the suit property does not run into arrears.

That having found as above, and even though from the materials presented the loan the Applicant guaranteed may be in arrears, the Respondent's apparent failure to comply with the express legal requirements preceding the advertisement of the auction shows the Applicant has a prima facie case with a probability of success as set out in the case of ***Giella –vs- Cassman Brown Co. Ltd.***

The application dated 24th March, 2014 is granted in terms of prayer (1) pending hearing and determination of this suit with costs in the cause.

It is so ordered.

S.M. KIBUNJA,

JUDGE.

DATED AND DELIVERED ON 17th DAY OF JULY, 2014

IN THE PRESENCE OF;

JUDGE.