



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Suit 237 of 2012

JANE WANJA MIRITI T/A SHARLIMON FOODS.....PLAINTIFF

- VERSUS -

BANK OF AFRICA KENYA LIMITED DEFENDANT

RULING

1. This is the plaintiff's notice of motion dated 20th April 2012. The plaintiff prays for an interlocutory prohibitive injunction to restrain the defendant from exercising its statutory right of sale over land known as LR No 3734/1101 Nairobi. There are four key grounds put forth: that the defendant's breach of contract has clogged the plaintiff's equitable right of redemption; that the statutory notice was not served; that the notice is in any event defective; and that the plaintiff will suffer irreparable harm not compensable in damages. Those matters are buttressed further by the deposition of the plaintiff sworn on even date and a supplementary affidavit sworn on 7th June 2012.
2. The motion is contested. There is a replying affidavit sworn by Ben Mwaura on 21st May 2012. The defendant confirms that the parties had a customer and banker relationship. The defendant granted the plaintiff an invoice discounting facility, term loan and house loan. A legal charge was created over the suit property. That was in the year 2009. The account became overdrawn. In May 2010 the parties agreed to restructure the debt. On 31st October 2010, the plaintiff overdrew the account. The defendant issued a demand letter for repayment dated 2nd August 2011. No redress was forthcoming. On 27th October 2011, the defendant's lawyers issued the contested statutory notice.
3. The defendant asserts that it served the notice which was valid in all respects. It then instructed Garam Auctioneers to sell the suit property by auction. The latter issued the mandatory 45 days notification of sale to the plaintiff through her address number 1083 – 00618. The defendant denies breaching the contract and in particular charging non-contractual interest. The defendant's case is that its statutory right of sale has accrued and there is no basis for the prayer of injunction.
4. The defendant further submitted that a dispute over the charge debt cannot found an order for injunction. It was also contended that the plaintiff had acknowledged her indebtedness and sought the bank's accommodation to sell the property by private treaty. Lastly, it was submitted that the plaintiff had not made an undertaking as to damages. The bank's position is that it undertakes to pay any damages that may be due to the plaintiff.
5. I have heard the rival submissions. I take the following view of the matter. The principles governing the grant of prohibitive injunctions are now well settled. When a litigant approaches the court for prohibitive injunction, she must rise to the threshold for grant of interlocutory relief set clearly in *Giella Vs Cassman Brown and Company Limited* [1973] E.A 358. Those principles are first, that the applicant

must show a *prima facie* case with a probability of success; secondly that she stands to suffer irreparable harm not compensable in damages; and thirdly, if in doubt, the court must assess the balance of convenience. Being a discretionary remedy, there is also ample authority that a party, who has misconducted herself in a manner not acceptable to a court of equity, will be denied the remedy. See Kenya Hotels Limited Vs Kenya Commercial Bank and another [2004] 1 KLR 80. See also the Public Trustee Vs Nicholas Kabucho Murimi HCCC ELC 610 of 2011 [2012] e KLR, George Munge Vs Sanjeev Sharma & 3 others HCCC ELC 677 of 2011 [2012] e KLR.

6. Parties are bound by commercial agreements and must keep their part of the bargain. It is not the true province of the courts to rewrite contracts for parties. See Morris & Company Vs Kenya Commercial Bank [2003] 2 E A 605 and National Bank of Kenya Limited Vs Pipeplastic Samkolit and another [2001] KLR 112. See also Balbir Singh Sadhu and another Vs Rose Detho and others Nairobi, High Court case 259 of 2003 [2012] e KLR, National Bank of Kenya Vs Alfayo Onyango Riako [2012] e KLR.

7. When I mirror those principles against the facts, I find further as follows. It is common ground that the defendant bank advanced a term loan, house loan and invoice discounting facility to the plaintiff in the sum of Kshs 26,400,000. The plaintiff defaulted. Despite the restructuring of the debt in May 2010, the plaintiff overdraw her account as at 31st October 2010. Accordingly, the defendant became entitled to recall the debt and to realize the security. The chargee cannot be restrained from selling the property on the ground the plaintiff puts forth: that the interest charged is a non-contractual flat rate of 19% or a high of 34%. I am not persuaded at this stage that those rates fell outside the letters of offer or the charge instrument. Clause 2.6 and 12 of the letter offer of 30th December 2009, for example, reserved the defendant's right to charge interest at 10% above the agreed rate if the account became overdrawn. Those matters are truly within the province of the trial court. The legal principle to be distilled is that a dispute over the charge debt is not a good ground for injunction. See Shimmers Plaza Limited Vs National Bank of Kenya Limited Nairobi, High Court case 895 of 2009 [2012] e KLR, Pelican Investment Limited Vs National Bank of Kenya Limited [2002] E.A. 488, Habib Bank Ag Zurich Vs Pop – In (K) Ltd and another [1989] LLR 3069, Joseph Okoth Waudi Vs National Bank of Kenya Limited Civil Appeal No 77 of 2004, Court of Appeal Nairobi [2006] e KLR.

8. I also note in passing that the plaintiff acknowledges her indebtedness to the bank. She does not contest that she sought accommodation from the bank to sell the suit property by private treaty. Doubt is completely removed by the annexure marked 'BM 8' to the replying affidavit, a marketing report for the sale by private treaty, as well as the plaintiff's statements of account marked "BM 7 a - c".

9. The only salient matter then is whether the bank followed proper steps in realizing the security. From the copy of certificate of title annexed to the supplementary affidavit marked "JWM 5", the suit property is registered under the Registration of Titles Act (now repealed). That fact is not contested by the defendant. Having found that the bank's right to sell has accrued, the bank was required to strictly follow the provisions of section 69 of the Transfer of Property Act (now also repealed) before the sale. That section provided as follows:-

"69. (1) A mortgagee, or any person acting on his behalf where the mortgage is an English mortgage, to which this section applies, shall, by virtue of this Act and without the intervention of the Court, have power when the mortgage-money has become due, subject to the provisions of this section, to sell or to concur with any other person in selling, the mortgaged property or any part thereof, either subject to prior encumbrances or not, and either together or in lots, by public auction or by private contract, subject to such conditions respecting title, or evidence of title, or other matter, as the mortgagee thinks fit, with power to vary any contract for sale, and to resell, without being answerable for any loss occasioned thereby; the power of sale aforesaid is in this Act referred to as the mortgagee's statutory power of sale and for the purposes of this Act the mortgage-money shall be deemed to become due whenever either the day fixed for repayment thereof, or part thereof, by the mortgage instrument has passed or some event has occurred which, according to the terms of the mortgage instrument, renders the mortgage-money, or part thereof, immediately due and payable".

10. A statutory notice by a chargee must then be for 3 months from the date of service of the notice

on the chargor. See *Trust Bank Limited Vs George Ongoya Okoth*, Civil Appeal No 177 of 1998 Court of Appeal, (unreported). The plaintiff says she never received the notice. I have perused the statutory notice issued by the defendant and I am satisfied it gave the plaintiff the requisite 3 months notice. The statutory notice was sent by registered mail to an address number 1083 – 00618. But the plaintiff’s address in the letter of offer and her affidavit is 1082 – 00618. The 45 day’s notification of sale from the Garam Auctioneers is also sent to postal address 1083 – 00618. There is thus an error in one digit that makes a world of difference in the postal service. However, the plaintiff concedes at paragraph 7 and 8 of her affidavit that she received the notification of sale on 2nd May 2012 from Garam Auctioneers but never received the statutory notice. In view of that denial, I would grant her the benefit of doubt at this stage.

11. The notice is impugned for being issued under the wrong statute. I have stated that the property fell under the legal regime of the Registration of Titles Act (now repealed). The material statutory notice is however issued under section 74 of the Registered Land Act (now also repealed). As the point is material, I will set out the statutory notice *in extenso*:

“RE: STATUTORY NOTICE (UNDER SECTION 74 (1) AND (2) OF THE REGISTERED LAND ACT RELATING TO PROPERTY L.R NO. 3734/1101 (Original Number 3734/487/1) (“the property”) CHARGED TO BANK OF AFRICA KENYA LIMITED

We have been instructed by our client, Bank of Africa Kenya Limited, to demand from you, which we hereby do, the IMMEDIATE PAYMENT to us, on their behalf of the sum of Kenya Shillings Twenty Seven Million, Six Hundred and Fifty Thousand, One Hundred and Twenty Nine and Thirty Nine Cents (Kshs. 27,650,129.39).....

The Outstanding Amount arises from the banking facilities granted to you at your request to Sharlimon foods, which were secured by among others, a Charge dated 4th March, 2010 over the Property, full details and particulars whereof are well within your knowledge.

TAKE NOTICE THAT unless we receive in our Chambers the aforesaid amount, further interest that will have accrued as aforesaid together with our debt-collection fees (based on the Advocates Remuneration Order to be notified to you upon written request) within THREE (3) MONTHS from the date of service of this notice upon you, our instructions are at the end of that period with the sale of the Property without further reference to you and at your risk as to attendant costs and other consequences incidental thereto.....

Yours faithfully

Signed

Karen Mate

For: ISEME, KAMAU & MAEMA ADVCOATES

kmate@ikm.co.ke

Cc District Commissioner By Registered Post

Nairobi District

P.o. Box 30124

NAIROBI.

This Notice is sent to you under Section 77 (6) of the Registered Land Act (Cap 300 of the Laws of Kenya) to notify you of the intended exercise of the statutory power of sale with respect to the above property. Please take notice that no further notice shall be issued to you in this regard should the Chargor fail to respond to this notice”.

12. Clearly, the statutory notice has a patent defect. It is anchored on the wrong statute governing the title. It might refer to the correct parties, property and debt the subject matters of the suit. But the error is not one of simple form. It is a material statutory defect that cannot lay a firm foundation for sale of the charged property. I have already stated that service of the notice is in doubt. It matters little that the

plaintiff subsequently became aware of the sale or that she sought to sell the charged property by private treaty. If the statutory provisions in section 69A of the Transfer of Property Act were not followed, the substratum upon which the bank's right to sell was founded collapsed. I am afraid that the statutory notice issued by the defendant's legal counsel under section 74 of the Registered Land Act (now repealed) is not valid and conflicts with section 4 of that Act. See David Kinyanjui Njuguna Vs Ndetika Rural Sacco Society Limited and another Nairobi, High Court case 22 of 2006 [2006] e KLR.

13. In the end, I am satisfied that the plaintiff has established a *prima facie* case with a probability of success. I am also alive to the notion that damages are not always a suitable remedy where there is a clear breach of legal rights. See Joseph Siro Mosioma Vs Housing Finance Company of Kenya Nairobi, High Court case 265 of 2007 [2008] e KLR, Talewa Road Contractors Limited and others Vs Jamii Bora Charitable Trust and 2 others Nairobi, High Court case 573 of 2011 [2012] e KLR. Since I am not in doubt about those two heads of the Giella case (supra), I need not consider the balance of convenience. I thus order that an injunction shall issue restraining the defendant or its agents or howsoever from advertising for sale or selling or interfering with the plaintiff's property known as LR No 3734/1101 (original number 3734/487/1) until such time as the defendant shall serve a valid statutory notice in accordance with the law or the hearing and determination of this suit. I grant the plaintiff costs of the motion.

It is so ordered.

DATED and DELIVERED at NAIROBI this 7th day of March 2013.

G.K. KIMONDO

JUDGE

Ruling read in open court in the presence of

Mr. Obwayo for Mr. Rimui for the Plaintiff.

Mr. Minishi for Ms Mate for the Defendant.