



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ELC CASE NO. 90 OF 2017

JUJA COFFEE EXPORTERS.....PLAINTIFF

VERSUS

NATIONAL BANK OF KENYA.....RESPONDENT

RULING

1. By a Notice of Motion application dated 19th April 2017 and filed herein on 21st April 2017, Juja Coffee Exporters Ltd prays for orders:-

3. That a temporary injunction do issue to restrain and prevent the Defendant by itself and/or its agents, servants, employees, assigns or otherwise howsoever from interfering with the Plaintiff's quiet possession of or marketing and/or advertising for sale or selling, leasing, sub-dividing, receiving or taking possession of the charged suit properties being Title No. Lamu/Block IV/2 to secure the outstanding amounts of USD 36,095, 495.41 plus the sum of Kshs 12,295.739.50(DR) with interest and other charges thereon or in any manner exercising or continuing to exercise a Statutory Power of Sale over the said properties or any thereof pending the hearing and final determination of the suit herein.

4. That the costs of this application be provided for.

2. The said application is supported by an affidavit sworn by Tauhida Tahir Said, a Director of the Plaintiff Company, and is premised on the grounds listed on the body thereof as follows:-

i) That the Plaintiff is the registered owner of the property which was charged to the Defendant as collateral to secure a principal loan;

ii) A Director with a major stake in the Plaintiff has since passed on and the surviving Directors are willing to come to a structured settlement on repayment of the loan;

iii) On 16th February 2017 the Bank's auctioneers had issued a Notice of Sale to sell the properties comprised in Title No. Lamu/Block IV/2 to secure the outstanding sum with interest and other charges thereon;

iv) That the Bank did not issue a Statutory Notice over the non-payment of any monies due under the charge to give the Plaintiff an opportunity to redeem and/or rectify the same within three months as required under Section 90(1) (2)(b) of the Land Act 2012. Unknown to the Plaintiff, the Bank engaged Garam Investments Auctioneers to auction the above mentioned property on 24th April 2017 which act is wrongful, unlawful, in bad faith and in breach of the Land Act, 2012;

v) The Bank's attempts to mischievously exercise the Statutory Power of Sale would unfairly fetter and/or curtail the Plaintiff's business operations yet the surviving Directors are willing to negotiate on a structured settlement for the same;

vi) The continued exercise of the Power of Sale is anchored on mischief, bad faith, fatal notices, illegalities, unfairness, unreasonableness and on an explicable cruel intent to vanquish the Company's finances, operations, business and existence;

vii) The Applicant is willing to come to a negotiated settlement with the Defendant to ensure that the loan amounts are repaid so as to mitigate on the harshness of the possible exercise of the Statutory Power of Sale;

viii) Unless otherwise restrained by this Honourable Court the Bank will unfairly reap from its own illegal/unprocedural acts/omissions and proceed to prematurely exercise a Power of Sale and otherwise dispose of the property or receive it privately to the irrevocable detriment of the Plaintiff; and

ix) It is only fair, just and in the interest of justice that the orders sought herein be granted to preserve the suitland pending the determination of the dispute herein.

3. In a detailed 35-paragraph Replying Affidavit sworn by its Manager Collections & Remedial Department Fatuma Mohamed and filed herein on 8th June 2017, the National Bank of Kenya(the Defendant) avers that the Plaintiff has not adduced any or any substantive evidence or grounds in order to entitle it to the orders sought in their application.

4. The Defendant asserts that it is not in dispute that the suit property is registered in the name of Lamu Ginners Company Ltd and it is therefore not true that it is registered in the Plaintiff's name. It is the said Lamu Ginners Company Ltd that offered the suit property as security to the Bank for the financial facilities advanced by the Bank to the Plaintiff.

5. The Defendant contends that the Plaintiff was supplied with all the counterparts of the security documents that were created and that, in any event, it was always the duty of the Plaintiff as reasonable business men borrowing colossal amounts of money to exercise due diligence and care in maintaining proper records of all securities that they offered in order to enjoy financial accommodation from the Bank.

6. The Defendant further avers that it was a contractual term contained in the Charge documents and there was a Statutory provision that the Bank would be entitled to exercise its statutory power of sale over the suit property in the event that the Plaintiff defaults in meeting its financial obligations to the Bank by inter alia failing to repay the monies advanced to it. The Plaintiff has defaulted in the same and the Bank has accordingly commenced the process of realising the securities. As at 21st April 2017, the outstanding loan due from the Plaintiff stood at USD 37, 532,678.18 and Kshs 12,296,289.49/.

7. The Defendant states that as a result of the Plaintiff's default, it was duly served with the Chargee's three months Statutory Notice dated 28th April 2015. Despite the service, the Plaintiff failed to comply with the Notice. Subsequently the Bank served the Plaintiff with a Forty days Statutory Notice dated 8th April 2016 to remedy the default. It is therefore the Defendant's position that the Plaintiff's contention that it was not served with the requisite Statutory Notices is untrue and a misrepresentation of facts calculated to obtain undue advantage and cloud the Judgment of the Court.

8. I have considered the Plaintiff's application and the Bank's response thereto. I have equally considered the detailed submissions and authorities supplied to this Court by the Learned Advocates for the parties herein.

9. As Spry VP stated in *Giella –vs- Cassman Brown & Company Ltd (1973) EA 358 at 360:-*

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience.”

10. That being the case, the first inquiry that this Court must make is to assess whether the Plaintiff has by the facts presented before me made out a prima facie case with a probability of success at the trial. As to what constitutes a prima facie case, the Court of Appeal offered guidance in *Mrao Limited –vs- First American Bank Ltd & 2 others(2003) KLR 125* where Bosire JA observed as follows:-

“So what is a prima facie case?

I would say that in civil cases, it is a case 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.”

11. In the matter before me, Messrs Juja Coffee Exporters Ltd (the Plaintiff) craves an order of injunction to restrain the Defendant from selling, leasing, sub-dividing, receiving or taking possession of all that property known as Lamu/Block IV/2 in the exercise of its Statutory Power of Sale. The suit and the application before me were apparently precipitated by a letter dated 16th February 2017 issued on the instructions of the Defendant Bank by Messrs Garam Auctioneers(the Auctioneers) notifying the Plaintiff of the intended sale of the suit property which had apparently been charged to secure the amounts of USD 36,095,495.41 and Kshs 12,295,739.50/- from the Bank.

12. From the Supporting Affidavit of Tauhida Tahir Said, the surviving directors of the Plaintiff Company were at the time not fully conversant with the particulars of the outstanding debt. According to her, the face and contact of the Plaintiff was for a long time one Ahmed Tahir Sheikh Said whom they referred to as the Principal Director as he was, in her words, “the primary decision maker” and who held a majority stake, in the company.

13. It was the Plaintiff's contention that at the time the Defendant advanced the facilities said to be outstanding, the Defendant made the choice only after fruitful negotiations with the said “Principal Director” on behalf of the Plaintiff. As it were the said “Principal Director” was taken ill and he passed away on 10th January 2017 before the Plaintiff could redeem the loan.

14. In the circumstances and faced with difficulties of tracing relevant documents in relation to the Auctioneers Notification of Sale dated 16th February 2017 aforesaid, the Plaintiffs through their Advocates on record wrote to the Defendant Bank on 10th April 2017 expressing their willingness to settle any outstanding accounts with the Bank as well as their desire to retain the charged properties and not to subject them to a sale by auction. In addition, the Plaintiffs sought for a meeting to agree on the way forward and asked the Bank to avail copies of

the letter(s) of offer, a copy of the Charge, the Valuation Report, the Statutory Notice and the current Statement of accounts.

15. By their letter dated 12th April 2017, the Bank responded to the Plaintiffs Advocates on a without prejudice basis stating as follows:-

“We refer to the above matter and your letter dated 10th April 2017 whose contents have been noted.

However, the Bank is unable to validate your client’s instructions to your firm on the above matter. Nevertheless, we are willing to meet with your client together with yourselves (if necessary) to discuss the outstanding loan facility with an aim of finding an amicable way forward towards its redemption.

Kindly let us have your concurrence with our request for the meeting indicating date and time.”

16. Aggrieved by the Bank’s failure to stop the auction which was scheduled to take place on 24th April 2017, the Plaintiff moved to Court and filed the present application three days before the date scheduled for the auction. It is the Plaintiff’s case that the Bank did not issue a Statutory Notice as by law required and that no forced sale valuation of the charged property was done prior to the advertisement for sale. It is further their contention that the Plaintiff has unreasonably failed and/or neglected to furnish them with proof of the statutory notice served and that they are ready upon being supplied with documentation to come to a negotiated settlement with a view to clearing any outstanding loan.

17. In their response to the application, the Bank asserts that the Plaintiff is not the registered owner of the suit property as the owners thereof are Messrs Lamu Ginners Company Ltd. It is their case that the said Lamu Ginners Company Ltd offered the suit property as security to the Bank for the financial facilities advanced by the Bank to the Plaintiff.

18. According to the Defendant, the Plaintiff was supplied with all the counterparts of all the security documents that were created and it was, in any event, the duty of the Plaintiff as reasonable businessmen borrowing colossal amounts of money to exercise due diligence and care in maintaining proper records.

19. From the material placed before me, it is apparent that the Plaintiff obtained banking facilities from the Defendant and as security for the said borrowing, the Defendant apparently registered a legal charge over all that parcel of land known as Lamu/Block IV/2 which parcel of land is registered in the name of Lamu Ginners Company Ltd. While the relationship between the Plaintiff and the said Lamu Ginners Company Ltd was not clear from the pleadings placed before me, it is evident from the Defendant’s bundle of documents that it was the Guarantor for the Loan facility.

20. From the averments made by the Plaintiffs, they do not deny that the Plaintiff may be in default in repayment of the principal and interest due in respect of the credit facilities obtained from the Defendant. It is however their contention that they were not in a position to independently verify the proper authority and how much thereof is due.

21. While I agree with the Defendant Bank that the Plaintiff was under an obligation to keep proper records of its financial dealings, I think in the circumstances of this case, the Defendant should have made an endeavour to supply the documents the Plaintiff had asked for in their letter of 10th April 2017 aforesaid. I say so because the Defendant does not deny that at all material times, they were dealing with the founder and primary contact of the Plaintiff, the said Ahmed Tahir Sheik Said when the facilities were advanced.

22. As at the time the Notification of Sale was issued on 16th February 2017, the said Ahmed had passed on a month earlier and it would have been prudent in the circumstances to supply the Surviving directors with all documentation in the Bank’s possession to avoid a situation where the Plaintiffs felt they were being ambushed in the absence of documentation.

23. As it were, the Bank only filed the documents when it filed its defence herein. That however would probably not have been sufficient reason to halt the planned exercise by the Defendant of its statutory power of sale given the concomitant requirement of the Plaintiff to keep proper records of its affairs. From the material placed before me, however, it is evident that neither the Plaintiff nor the Defendant is in a position to independently and authoritatively verify whether the said banking facilities were obtained and if so, under what authority.

24. From a perusal of the material before me and more so filed herein on 2nd October 2017, there are legitimate questions being raised by the Plaintiff over the Charge allegedly registered over the suit property. While the said Charge forms the basis of the exercise of the statutory power by the Defendant which is challenged in these proceedings, there appears to be no proof of the existence of the same.

25. Alluding to the existence of the Charge, the Defendant states as follows at Paragraphs 7, 8 and 9 of the Replying Affidavit of Fatuma Mohamed filed on 8th June 2017.

“7. That the Plaintiff admits that on diverse dates the suit property was charged to the Bank as security for the Plaintiff’s borrowing. I confirm that the suit property is still charged to the Bank as demonstrated by a Certificate of Official Search dated 25th May 2017. Annexed hereto and marked NBK-3 is a copy of the Official Search document dated 25th May 2017 issued in respect of the suit property.”

8. That clearly, Lamu Ginners Limited created charges over the suit property in favour of National Bank of Kenya Ltd to secure various financial facilities for a total aggregate principal amount of USD 9,302,000/-“

9. That the Plaintiff was supplied with all the Counterparts of all the security documents that were created....”

26. As matters stand, the Plaintiffs have raised a pertinent issue as to whether the Charge was executed and whether the directors who did so had the Plaintiff's authority so to do. The Plaintiff's surviving directors have indicated that they had no knowledge of the execution of the Charge and I think it was incumbent upon the Defendants to demonstrate the existence of the same as well as the fact that it was properly executed by authorized signatories.

27. The Statutory right of sale can only be founded on a valid Charge instrument. The basis of the relationship of the parties herein as the Chargee and the Chargor arises from the Charge executed in relation to the suit property.

28. Section 3(3) (a) of the Law of Contract Act provides that:-

“a) No suit shall be brought upon a contract for the disposition of an interest in land unless the contract upon which the suit is founded

i) Is in writing

ii) Is signed by all the parties thereto; and

iii) The signature of each party signing has been attested by a witness who is present when the contract was signed by such party.”

29. For an agreement to arise giving rights and obligations that are legally binding, there must be some evidence of an intention to create legal relations. In the absence of the Charge documents in the matter before me, that speaks to the intention of the parties herein, to be bound by an instrument securing the payment of money or money's worth or future or a contingent debt, there ought to have been placed before this Court a clear demonstration of the existence of the instrument creating such a relationship.

30. Expounding on the ingredient of a prima facie case in *Nguruman Limited –vs- Jan Bonde Nielsen & 2 Others (2014)eKLR*, the Court of Appeal stated that:-

“The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion.”

31. In the matter before me, the Defendant seeks to exercise its Statutory Power of Sale pursuant to a Charge allegedly registered over LR. No. Lamu/Block IV/2. The existence of the Charge and its authenticity remain in doubt. I think pending its production, authentication and verification of the amounts due under it, the suit property ought to be preserved.

32. In the circumstances, I find merit in the Plaintiff's application dated 19th April 2017. The same is allowed with costs.

Dated, signed and delivered at Malindi this 31st day of January, 2019.

J.O. OLOLA

JUDGE