



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 4 OF 2018

MICHAEL ANGAYA ARUNGA.....1ST PLAINTIFF

PAMELA KAWIRA ARUNGA.....2ND PLAINTIFF

VERSUS

COMMERCIAL BANK OF AFRICA LIMITED.....DEFENDANT

RULING

What is before me for determination is the plaintiffs' Notice of Motion application dated 8th January, 2018 in which the plaintiffs sought a temporary injunction restraining the defendant whether by itself or through its agents, Garam Auctioneers, or any other auctioneers, servants or anybody acting on its behalf from selling by public auction or any other mode, the plaintiffs' property known as L.R No. Kiambaa/Kihara/2861(hereinafter referred to as "the suit property") pending the hearing and determination of the suit. The application was supported by an affidavit sworn by the plaintiffs jointly on 8th January, 2018 and a further affidavit sworn by the 2nd plaintiff on 21st March, 2018. The application was opposed by the defendant through a replying affidavit sworn on 23rd January, 2018 by Dr. Jacob O. Ogola.

The plaintiffs' case:

The plaintiffs who are husband and wife averred that they purchased the suit property jointly at Kshs. 25,000,000/-. They paid a deposit of Kshs 2,500,000/- and obtained a mortgage finance from the defendant in the sum of Kshs. 22,500,000/- for the balance of the purchase price. The suit property was transferred to them and charged to the defendant to secure the mortgage loan aforesaid. After the loan was drawn down, they made substantial payments in settlement of the loan in accordance with the terms under which the said loan was advanced to them. The plaintiffs averred that despite several requests made to the defendant, the defendant had never furnished them with the mortgage loan statement. The plaintiffs averred that on 30th September, 2016 the 1st plaintiff was retrenched and they informed the defendant of the same. They averred that the defendant failed to invoke the mortgage protection policy that was to take care of the mortgage repayment for a period of 6 months with effect from 1st October, 2016 following the said retrenchment of the 1st plaintiff. The plaintiffs averred that the failure by the defendant to invoke the mortgage protection policy led to the default in the loan repayment with the consequence of increased interest on the principal amount and penalties.

The plaintiffs averred that as at May, 2017, the loan was in arrears to the tune of Kshs. 1,933,007/-. The plaintiffs averred that since the suit property was under threat of being sold, they were forced to pay off the loan that was in arrears even before the issues they had raised regarding the defendant's failure to invoke the mortgage protection policy was resolved. The plaintiffs averred that on or about 28th July, 2017 they were notified by the defendant that the defendant had received only a sum of Kshs. 1,265,250.04/- under the mortgage protection policy. The plaintiffs averred that this payment was less in that it was only for 4 months instead of 9 months which was covered under the revised policy.

The plaintiffs averred that after receipt of this payment, the defendant promised to reconcile their loan account. The plaintiffs averred that the defendant neither reconciled their account nor furnished them with a statement showing what was outstanding. The plaintiffs averred that the defendant issued them with a document showing that they had a mortgage loan balance Kshs. 22,227,183.53 as at 29th September, 2017 in spite of all the payments they had made since 2014. The plaintiffs averred further that after they paid Kshs. 2,300,000/- in May, 2017 to forestall the sale of the suit property, the defendant proceeded to debit their account with Kshs. 487,200/-, Kshs. 379,000/- and Kshs. 276,700/- on account of auctioneers, legal and valuation fees respectively without any notice to them.

The plaintiffs averred that despite the foregoing and the fact that they had not been furnished with a statement of their loan account, Garam Auctioneers acting on the instructions of the defendant served them on 20th December, 2017 with a notice of intention to sell the suit property on 16th January, 2018 unless the loan amount was paid in full. The plaintiffs averred that on 21st December, 2017, the suit property was advertised for sale on 16th January, 2018 in the Daily Nation newspaper. The plaintiffs averred that the suit property was advertised for sale in spite of the meeting they held with the defendant in which various issues of conflict were highlighted for the defendant to resolve. The plaintiffs averred further that when the loan was disbursed in July, 2014, the defendant used a dollar to shilling exchange rate which was not

applicable with the result that they lost Kshs. 400,000/-.

The plaintiffs averred further that even though the 2nd plaintiff was a co-applicant for the loan facility and a co-mortgagor, the 2nd plaintiff does not appear anywhere in the defendant's records and has never received any communication apart from the demands for payment. The plaintiffs averred that the defendant had received a total of Kshs. 13,644,975.72 from them on account of the loan repayment between 2014 and 2017 and that the defendant was unable to show how the said monies had been applied on the mortgage account. The plaintiffs averred further that the auctioneer's notice that was served upon them was illegal as it did not specify the reserve price for the suit property. The plaintiffs averred that since all the previous arrears had been cleared by May 7, 2017 and further payments received thereafter, if the defendant's right of sale was to accrue, it was to be on a new cause of action which required fresh notices. The plaintiffs contended that the recovery measures undertaken by the defendant were illegal.

The plaintiffs contended that the suit property was their matrimonial home and that they had paid Kshs. 16,144,975.72 for it inclusive of the deposit. They contended that it was ridiculous that the defendant had no statement to reflect what was outstanding. The plaintiffs averred that the defendant's last valuation put the value of the suit property at Kshs. 85,000,000/- and that they would suffer irreparable damage if the property was sold.

The defendant's case:

The defendant through an affidavit sworn by Dr. Jacob O. Ogola who was the head of its remedial management unit contended that the plaintiffs' application had no merit and was aimed at frustrating the defendant's legitimate exercise of its statutory power of sale over the suit property. The defendant averred that the plaintiffs applied for a mortgage loan facility from the defendant in 2014 which was granted on among other conditions that the plaintiffs would repay the loan in 216 consecutive monthly instalments of Kshs. 301,880.42. The defendant averred that in 2016, the plaintiffs repeatedly defaulted in paying the monthly installments as a result of which 30 days and 90 days statutory notices were served upon them on 17th May, 2016 and on 7th June, 2016 respectively. The defendant averred that the defendant thereafter served the plaintiffs' with 40 days redemption notice on 22nd September, 2016. The defendant averred that no payment was received from the plaintiffs following these notices as a consequence of which an auctioneer was instructed to put up the suit property for sale.

The defendant averred that on 7th May, 2017, the plaintiffs upon receipt of the notification of sale of the suit property sought indulgence from the defendant. The defendant averred that the plaintiffs requested for the suspension of the advertisement of the sale of the suit property and undertook to pay the loan arrears, the auctioneer's charges and the advocate's fees. The defendant averred that the plaintiffs thereafter remitted Kshs. 2,300,000/- which reduced the loan balance to Kshs. 21,178,878.31. The defendant averred that the auctioneer's and advocate's fees were not settled and as such the plaintiffs' loan account was debited with the said amounts. The defendant averred that the plaintiffs were duly notified of this expenditure.

With regard to the plaintiffs' contention that it failed to invoke the mortgage protection policy when the 1st plaintiff was retrenched, the defendant averred that the 1st plaintiff informally advised the defendant of his intended retrenchment in November, 2016 but only presented the requisite documents in June, 2017. The defendant contended that it was the duty of the 1st plaintiff to notify the defendant of his intended retrenchment and to avail the requisite the documents to enable the defendant to pursue his benefit from the insurance company. The defendant averred that when the 1st plaintiff availed the necessary documents, it promptly presented the same to the insurance company which ultimately after initially rejecting the claim remitted to the defendant a sum of Kshs. 1,265,250.04 on 26th July, 2017 for the mortgage loan covering a period of 4 months from October, 2016 to January, 2017. The defendant denied that it delayed in pursuing the 1st plaintiff's retrenchment benefits. The defendant averred that even after the payment of the retrenchment benefits aforesaid, the loan facility continued to be in arrears.

The defendant averred that in all the correspondence exchanged with the defendant prior to the suspension of the first auction, the plaintiffs admitted their indebtedness to the defendant and sought indulgence to settle the same. The defendant averred that when the plaintiffs' continued to be in default in their loan repayment a courtesy notice dated 13th November, 2017 was served upon them to settle the outstanding loan amount. The defendant averred that the plaintiffs had been served with all the statutory notices.

The defendant averred that it was upon being served with this courtesy notice dated 13th November, 2017 that the plaintiffs embarked on creating perceived issues concerning the loan facility from the date of disbursement. The defendant averred that all the issues that were raised by the plaintiffs were addressed. The defendant averred that it thereafter instructed the firm of Garam Investments Auctioneers to advertise the suit property for sale. The defendant averred that it was under no obligation to reissue statutory notices to the plaintiffs. The defendant averred that the notice that was issued to the plaintiffs by the said auctioneers was valid. The defendant contended that the plaintiffs were guilty of material non-disclosure and were undeserving of the equitable relief sought. The defendant added that the plaintiffs had not demonstrated a prima facie case with a probability of success. The court was urged to dismiss the application.

The submissions:

The application was argued by way of written submissions. The plaintiffs filed their submissions on 24th April, 2018 while the defendant filed its submissions on 18th April, 2018. The plaintiffs submitted that as at the date of the advertisement of the suit property for sale by the defendant, the defendant's statutory power of sale had not crystallised. The plaintiffs argued that after the defendant issued them the statutory notices and redemption notice, they cleared the loan that was in arrears and their loan account reverted to its normal status. The plaintiffs argued that the said notices were spent after payment of the amount that was in arrears and as such the defendant could not rely on the same as a basis for the intended sale of the suit property. The plaintiffs submitted further that in the absence of a mortgage account known to both mortgagors, the defendant could not claim unpaid mortgage monies. The plaintiffs submitted that although the mortgage loan was taken by them jointly, there was no mortgage account in their joint names. The plaintiffs averred further that in the absence of a mortgage loan statement, it was not possible to ascertain the defendant's claim that the plaintiffs were in arrears in the payment of their mortgage loan. The plaintiffs submitted that the defendant had engaged in illegalities in the management of their loan account and as such was not justified in the

enforcement of its right of sale. The plaintiffs submitted that they had raised several weighty issues which should be interrogated at the trial. The plaintiffs reiterated that they would suffer irreparable damage if the orders sought were not granted as they had used up all their resources to acquire the suit property which was their matrimonial home. The plaintiffs submitted that even if the application was considered on a balance of convenience, the same would tilt in their favour as they had struggled to clear the loan arrears even as they were prosecuting this suit. The plaintiffs urged the court to preserve the suit property as justice of the case called for the preservation of the matrimonial house as against it being sold off at this point. In support of their submissions, the plaintiffs relied on the case of Giella v Cassman Brown & Co. Ltd. [1973]E.A 358.

In its submissions dated 17th April 2018, the defendant submitted that the issue for determination by the court was whether the plaintiffs had satisfied the test for grant of a temporary injunction set out in the case of Giella v Cassman Brown & Co. Ltd. (supra). The defendant referred to the definition of a prima facie case in the case of Mrao Ltd. v First American Bank of Kenya Ltd & 2 Others [2003]eKLR and submitted that the plaintiffs had not established a prima facie case because the allegations that they were not served with valid statutory notices was false. The defendant submitted further that the allegations that the defendant had failed to open a mortgage account in respect of the loan disbursed to the plaintiffs were baseless. The defendant submitted that all the issues that had been raised by the plaintiffs were addressed by the defendant and were not the reason for the plaintiffs' default in repaying the loan. On the circumstances under which the court can restrain a mortgagee from exercising its statutory power of sale, the defendant cited the case of Mohamed Khaled Khashoggi v Equity Bank Limited [2013] eKLR in which the court stated that the issue of disputed accounts and interest cannot be a ground for the issuance of injunctive orders.

With regard to the allegation that it had failed to issue the plaintiffs with statutory notices before advertising the suit property for sale, the defendant submitted that it had no obligation to issue the plaintiffs with fresh statutory notices every time they defaulted in their loan repayment obligations. The defendant submitted that section 90(1) of Land Act, 2012 does not impose an obligation upon a chargee to issue a statutory notice each time a chargor defaults in his loan repayment obligations. In support of this submission, the defendant cited the case of Peter Ngure Kihuto v Co-operative Bank of Kenya Ltd & Another [2015]eKLR. The defendant submitted further that in any event, the plaintiffs did not clear the loan that was in arrears when the statutory notices whose validity have been contested by the plaintiffs were issued.

On whether the plaintiffs will suffer irreparable harm, the defendant relied on the case of M'mbwani M'njau v K-Rep Bank Ltd & 2 Others [2013]eKLR and submitted that where land has been offered as a security to a financial institution, the sentimental value thereof only exists as long as the borrowing party does not default. The defendant submitted that it acted in accordance with the law when exercising its statutory power of sale and had given the plaintiffs ample time to remedy the default to no avail.

Determination:

I have considered the plaintiffs' application together with the two affidavits filed in support thereof. I have also considered the defendant's affidavit in opposition to the application. Finally, I have considered the parties' respective submissions and the authorities cited in support thereof. What is before me is an application for an order of a temporary injunction. What I need to determine is whether the plaintiffs have made out a case for such order. The principles upon which this court exercises its discretion in applications for a temporary injunction were set out in the case of Giella v Cassman Brown & Co. Ltd. (supra). An applicant for a temporary injunction must show that he has a prima facie case with a probability of success and that he stands to suffer irreparable harm unless the order is granted. In case the court is in doubt as to the above, the application would be determined on a balance of convenience. The plaintiffs brought this suit to challenge the exercise of the defendant's statutory power of sale. The plaintiffs challenged the manner in which the defendant had set out to exercise its statutory power of sale on various grounds.

In summary, the plaintiffs contended that the defendant intended to exercise its statutory power of sale on the basis of the statutory notices that it had issued earlier and which were spent after they made payment of the loan amount that was in arrears. The plaintiffs also contended that although they applied for the mortgage loan jointly, the defendant only opened a mortgage account in the name of the 1st plaintiff. The plaintiffs contended that in the absence of a valid mortgage account in their joint names, the issue of loan arrears or unpaid mortgage monies did not arise since the same could not be established without a mortgage account statement. The plaintiffs also contended that the management of their mortgage account had been marred with several illegalities and irregularities right from the time of the loan draw down. The plaintiffs contended that the defendant used false exchange rate in converting the purchase price that was in US Dollars into Kenya Shillings. The plaintiffs contended further that the defendant failed to activate the insurance cover when the 1st plaintiff lost employment leading to none payment of the loan for 9 months.

I have considered all the issues raised by the plaintiffs. I am not convinced that the plaintiffs have established a prima facie case of wrongful exercise of statutory power of sale against the defendant. There is no dispute that the defendant advanced to the plaintiffs a mortgage loan of Kshs. 22,500,000/-. There is also no dispute that the plaintiffs had difficulties in servicing the loan and did not repay the loan in accordance with the terms of the letter of offer dated 12th February, 2014. It is also not disputed that following the plaintiffs' persistent default in the payment of the loan, the defendant served upon them all the requisite statutory notices demanding payment of the outstanding loan amount. The last of such notices was the 40 days redemption notice dated 22nd September, 2016 by the defendant's advocates on record through which the defendant demanded from the plaintiffs the payment of a sum of Kshs. 27, 941, 175.69 being the total loan amount that was outstanding as at 9th September, 2016. This was followed by the auctioneers 45 days redemption notice dated 16th March, 2017 and notification of sale of the same date. From the material on record, the plaintiffs prevailed upon the defendant to suspend the sale of the suit property that was scheduled to take place on 30th May, 2017 on the promise that they would clear the loan amount that was in arrears, the auctioneers charges and advocates fees. Following the suspension of the advertisement and sale of the suit property by the defendant, the plaintiffs paid Kshs. 2,300,000/- which cleared substantial portion of the amount of the loan that was in arrears.

From the material before the court, the plaintiffs did not clear the loan arrears in full and did not continue to pay the monthly instalments as and when the same fell due with the effect that their loan account continued to be in arrears. This is what prompted the intended sale of the suit property which is challenged in these proceedings. By the plaintiffs' own admission, out of a total loan of Kshs. 22,500,000/-, they have only paid Kshs. 13,644,975.72/-. Assuming that all the payments went to service the principal amount, the plaintiffs would still be indebted

to the defendant to the tune of Kshs. 8,855,024.28/- exclusive of interest that has accrued for over 4 years.

I am not persuaded that the defendant was under any obligation to serve the plaintiffs with fresh statutory notices when they defaulted again in the payment of the loan instalments after the suspension of the earlier planned sale of the suit property. I have noted from the material before the court that the plaintiffs were furnished with the particulars of the outstanding amount from time to time. I have noted from a copy of the e-mail message dated 15th November, 2016 from Cecilia K. Ogoti to the 1st plaintiff attached to the 2nd plaintiff's affidavit sworn on 21st March, 2018 that the defendant forwarded to the plaintiffs a mortgage loan statement and monthly loan instalments for the mortgage. It is not true therefore that the plaintiffs were not being furnished with the statements of their mortgage account. From the material before the court, it is also clear that the plaintiffs were aware that although the mortgage loan was advanced to them jointly, the defendant opened a mortgage account in the name of the 1st plaintiff only. I am not convinced that this fact absolved the plaintiffs from paying the loan that was advanced to them. On the issues of false exchange rate and alleged failure by the defendant to activate the mortgage protection policy, there is no evidence that the exchange rate that was used by the defendant was false as alleged and that the defendant was to blame for the delay in the remittance of the 1st plaintiff's mortgage protection benefits. Due to the foregoing, it is my finding that plaintiffs have failed to establish a prima facie case against the defendant with a probability of success. I am also not satisfied that the plaintiffs would suffer irreparable harm which cannot be compensated in damages.

In conclusion, it is my finding that the plaintiffs' Notice of Motion application dated 8th January, 2018 has no merit. The application is dismissed with costs to the defendant.

Delivered and Dated at Nairobi this 24th day of January 2019

S. OKONG'O

JUDGE

Ruling read in open court in the presence of:

Mr. Mulako h/b for Mr. Namada for the Plaintiffs

Ms. Maina h/b for Mr. Kabaiko for the Defendant

Catherine-Court Assistant