



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 84 OF 2018

RICHARD KITSAO WILLIAM.....1ST PLAINTIFF/APPLICANT

JULIANA CHANGA JACOB.....2ND PLAINTIFF/APPLICANT

UNIVERSAL PLASTIC LIMITED.....3RD PLAINTIFF/APPLICANT

VERSUS

STANDARD CHARTERED BANK (K) LTD.....RESPONDENT/DEFENDANT

RULING

1. By a Notice of Motion application dated 11th April 2018, the Plaintiffs pray for orders:-

C. That this Honourable Court be pleased to issue orders restraining the defendant from selling, disposing and/or alienating the 3rd Defendant's land parcels Kilifi/Mtwapa/1248 and Kilifi/Mtwapa/353 pending the hearing and determination of this suit.

D. That this Honourable Court be pleased to enlarge time for the 3rd Plaintiff to liquidate outstanding loan balance for the next (6) months starting from April 2018.

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2. The application which is supported by an affidavit sworn by the 1st Plaintiff Richard Kitsao William is premised on the grounds:-

i. That the Defendant has not issued any statutory notice as per Section 90(1), 90(2) (b) of the Land Act 2012;

ii. That the Defendant's agents messrs Legacy Auctioneers have on 10th April 2018 advertised the two properties for sale;

iii. That the Plaintiffs have been having challenges from their source in South Sudan where they have several ongoing contracts due to the volatile and unstable political situation. They have since paid Kshs 13.2 Million for the two facilities and are ready and willing to pay the outstanding if given a period of six months;

iv. That the Plaintiff will be greatly prejudiced if the defendant is allowed to arbitrarily proceed with the auction.

3. In a Replying Affidavit filed herein on 19th April 2018 sworn by its Manager, Collections and Recoveries Division Juliana Oyando, the Defendant Bank avers that it did not grant any facilities to East Africa Aquatech Drilling Ltd under the Agreement annexed to the Plaintiff's Supporting Affidavit as the 1st and 2nd Plaintiffs opted instead to take the facilities for the 3rd Plaintiff.

4. The Defendant further avers that the registered owners of the two suit properties are the 1st and 2nd Plaintiff and not the 3rd Plaintiff as stated in the Plaintiffs' Supporting Affidavit. It is their case that the 1st and 2nd Plaintiffs as directors of the 3rd Plaintiff did execute charges in favour of the Defendant to secure banking facilities totaling Kshs 12 million granted to the 3rd Plaintiff by the Defendant. The loan was repayable in monthly instalments of Kshs 270,534/- and was at any rate to be repaid in full within sixty months.

5. The Defendant avers that the Plaintiffs did not comply with the terms of the lending agreements and defaulted in repayment thereof. Consequently, the Defendant commenced the process of realizing the security and all requisite notices were issued to the Plaintiffs. The

Plaintiffs however continued in default despite indulgence extended to them and the Defendant was compelled to instruct auctioneers to proceed with the sale of the secured properties.

6. Further, the Defendant avers that the public auction scheduled for 13th April 2018 went on as scheduled and that the secured properties were sold to the highest bidder at Kshs 4.5 Million. Accordingly, it is the Defendant's case that this present application has been overtaken by events. The Court order issued on 13th April 2018 was served upon the Defendant on the same day at 3.04 p.m. when the auction took place earlier at 11.00 a.m.

7. I have considered both the application and the response thereto. I have also considered the written submissions and authorities as filed by the Learned Advocates for the parties.

8. The Plaintiffs herein have called upon this Court to issue orders of injunction restraining the Defendant Bank from selling, disposing and/or alienating the 3rd Plaintiff's parcels of land known as Kilifi/Mtwapa/1248 and Kilifi/Mtwapa/353 pending the hearing and determination of this suit. In addition, the Plaintiffs have asked this Court to enlarge time within which the 3rd Plaintiff can liquidate the outstanding balance of the loan advanced to it by the Defendant.

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 Plaintiffs have established a prima facie case with a probability of success. As to what constitutes a prima facie case, the Court of Appeal offered guidance in *Mrao Ltd –vs- First American Bank Ltd & 2 Others(2003) KLR 125* where Bosire J.A., 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 endeavored 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. The same Court of Appeal expounded on the ingredients of a prima facie case in *Nguruman Limited –vs- Jan Bonde Nielsen & 2 Others(2014)eKLR* where they stated thus:-

“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 rights has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion....”

12. In the matter before me, it is not disputed that the 1st and 2nd Plaintiff executed security documents with the Defendant to secure the repayment of loan facilities that were extended to the 3rd Plaintiff. From the Supporting Affidavit of the 1st Plaintiff who is a director of the 3rd Plaintiff, their sister company Africa Aquatech Building Ltd provides services of borehole drilling, maintenance, dam building, water purification, cattle dips and other services in Kenya, Tanzania and now mostly in South Sudan.

13. It was the 1st Plaintiff's case that following their success with the said sister company, he and his family decided to enlarge and diversify their business activities by venturing into plastic pipes manufacturing. To enable them venture into the new business, they prepared a project proposal which they presented to the Defendant Bank for financing. The Bank approved the project and a facility of Kshs 10 million was approved and granted in 2013 following the execution of a Charge in favour of the 3rd Plaintiff in June 2013.

14. As it turned out, the Plaintiffs were unable to service the loan facility as agreed. The Plaintiffs blame this on the fact that the machines and equipment they had imported for manufacturing the plastic pipes turned out to be more expensive than they had estimated. At the same time, and following the break out of civil war in South Sudan in 2014, the Plaintiffs sister company aforesaid has faced numerous challenges as a result of which the Plaintiffs have been unable to make ends meet.

15. According to the Plaintiffs the fact that they are engaged in business ventures and undertakings in South Sudan was fully in the knowledge of the Defendant and that was the reason the Defendant gladly and promptly agreed to approve and finance the 3rd Plaintiff's project. Subsequently, the Plaintiffs have informed the Defendant of the challenges they face in the said country and have written pledging and pleading for indulgence but the Defendant has instead chosen to go ahead with the realization of its securities.

16. As it were, the Plaintiffs do not deny that they have defaulted in their loan repayment to the Bank. Section 90 of the Land Act provides as follows:-

“90. Remedies of a Chargee

(1) If a Chargor is in default of an obligation, fails to pay interest or any other periodic payment or any part thereof due under any Charge or in the performance or observation of any covenant, express or implied, in any Charge, and continues to be in default for one month, the Chargee may serve the Chargor a notice in writing to pay the money owing or to perform and observe the agreement as the case may be.”

17. It is apparent from the material placed before me that this is the path the Defendant Bank chose to follow once it was apparent that the Plaintiffs were in default. As a result by various letters dated 11th June 2015, 25th June 2015 and 6th August 2015 the Bank gave due notice to the Plaintiffs and urged them to regularize their account within three months of the date of demand failure to which the securities would be sold. At paragraph 24 of the Supporting Affidavit, as well as paragraph 10 of the Further Affidavit, the Plaintiffs acknowledged the fact that the Defendant served them with several notifications despite their plea for indulgence.

18. In my mind, I did not think that having admitted their indebtedness and the fact that the Defendant Bank had served them with the requisite Statutory notices, the Plaintiffs had any basis for filing this application for injunction. As Kwach J.A stated quoting from *Hulsburry’s Laws of England in Mrao Ltd –vs- First American Bank Ltd & 2 Others(supra):-*

“The Mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute or because the Mortgagor has began a redemption action, or because the mortgagor objects to the manner in which the sale is being arranged. He will be restrained, however, if the mortgagor pays the amount claimed into Court, that is, the amount which the Mortgagee claims be due to him, unless, on the terms of the mortgage, the claim is excessive.”

19. At any rate, it is apparent that the sale by auction took off as scheduled on 13th April 2018. According to the Defendant, the suit properties were sold to the highest bidder on the said date at 11.00 a.m. I note that while the Plaintiff asserts that they served temporary orders barring the auction upon the Bank on the same day, there is conflicting information as to when the orders were served.

20. As it were, the Bank has attached to its Replying Affidavit a Memorandum of Sale indicating the property was sold to one Yusuf Ashur Ahmed.

21. If indeed by the time the orders were served the Bank had exercised its statutory power of sale, the Plaintiff’s equity of redemption in regard to the suit properties were extinguished and an order of injunction cannot be granted herein as the same would most likely affect the third party.

22. At any rate and I as have indicated above, I did not find that the Plaintiffs had established a prima facie case to warrant the grant of orders of injunction. I did not also find any basis for this Court to vary the terms of the contract executed by the parties to enlarge the time for payment of the loan.

23. The result is that the application dated 11th April 2018 has no merit and must fail. The Defendant/Respondent will have the cost of this application.

Dated, signed and delivered at Malindi this 29th day of May, 2019.

J.O. OLOLA

JUDGE