



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 759 OF 2017

MATAI KABWINYI NYATABORU.....1ST PLAINTIFF

MELLECH ENGINEERING & CONSTRUCTION CO. LTD.....2ND PLAINTIFF

VERSUS

UWEZO MICROFINANCE BANK.....DEFENDANT

RULING

The application for determination is the Plaintiffs' Notice of Motion dated the 8th June, 2017 brought pursuant to Order 42 rule 1 and 2 of the Civil Procedure Rules, Section 1A, 1B, 3A of the Civil Procedure Act, Section 82 (3), 97 and 104 (2) of the Land Act 2012 and all enabling provisions of the law.

The application is based on the following grounds, which in summary is that no statutory notice in accordance with the law was served by the Defendant upon the Plaintiffs. The notices served are ex facie defective, illegal, null and void in so far they purport to have been served upon a person who is not the chargor of the suit premises. Without service of a valid statutory notice, the Defendant cannot legally purport to exercise its statutory power of sale. The power of sale has not crystallized and or accrued, yet the sale by public auction is fixed on 2nd June, 2017. The 2nd Defendant is in a position to liquidate any true debt given a little time.

The application is supported by the affidavit of MATAI KABWINYI NYATABORU the 1st Plaintiff herein where he deposes that he is the proprietor of land parcel number KAJIADO/LOODARIAK/8407 (hereinafter referred to as the 'suit land') which was charged to the Defendant to secure a loan of Kshs. 7 million to the 2nd Plaintiff. Further that neither the 1st Plaintiff nor the 2nd Plaintiff has a copy of the charge document. He states that the Defendant has advertised to sell the suit land by public auction on 2nd June, 2017 and yet they have not been served with any statutory notice of intention to sell the suit land as envisaged by law. He claims the intended auction of the suit property is unlawful and the Defendant should not be allowed to proceed with it at this stage and it would be more equitable to allow the 2nd Plaintiff to liquidate the outstanding debt as it is able to do so. He explains that the 2nd Plaintiff had entered into an agreement with the Defendant to restructure the loan and given the timeframe for doing so, the 2nd Plaintiff can pay it comfortably. He made a plea for the Court to consider the provisions of the Land Act 2012 and allow him a little time to resolve the instant matter rather than sell a third parties' property.

The application is supported by the affidavit of GERALD WAMALWA who is a director to the 2nd Plaintiff where he reiterated the claim contained in the 1st Plaintiff's affidavit.

The application is opposed by the Defendant whose Debt Collection Officer Mercy Makena swore an affidavit where she deposed that the Plaintiffs' affidavit and Complaint are riddled with falsehoods and deliberate misleading statements. She denies that the Plaintiffs do not have copies of the Charge document as alleged and states that the Plaintiffs were duly served with valid statutory notices of the Defendant's intention to sell the suit land in accordance with the provisions of section 90 of the Land Act. Further that the Plaintiffs indeed executed the Charge documents. She confirms that upon receipt of the Statutory Notice, one GERALD WAMALWA who is a Director to the 2nd Plaintiff communicated with the Defendant and sought to settle the outstanding arrears which culminated into the execution of a Loan Reschedule Agreement dated 30th September, 2016. She avers that the Plaintiffs failed to honor their commitment under the said Loan Reschedule Agreement and the Defendant in exercising its statutory power of sale appointed messrs Regent Auctioneers to issue the Plaintiffs' with the mandatory Notification of Sale of the suit property and they were given a notice of forty five (45) days after which suit property would be sold by public auction to recover the debt. Further, that the 2nd Plaintiff only paid Kshs 50, 000 on 31st March, 2017 towards repayment of the loan despite giving numerous promises. She confirms receiving several correspondence from the Plaintiffs admitting their indebtedness and being in breach of the Loan Agreement and Loan Reschedule Agreement. She claims the 2nd Plaintiff owes the Defendant Kshs. 7, 897, 305 as at 25th May, 2017 giving the microfinance institution every right to exercise its statutory power of sale. She reiterates that the 2nd Plaintiff borrowed Kshs. 7 million to build a petrol station at Ririoni on behalf of their client GALANA Oil Kenya Ltd which project has since been completed and is now up and running. Further, the 1st Plaintiff despite being paid its dues has failed/refused to repay the loan. She reaffirms that the process for recovery of the loan including the accrued interest rate is based on a legally binding contract consciously entered between the parties with the Plaintiffs fully aware of the consequences of defaulting in repayment of the loan herein, and the Court has no power to review, vary as well as interfere with the terms or conditions set out in the said instruments. She contends that the suit is fatally defective as there is no authority from the 2nd Plaintiff to the said GERALD WAMALWA to plead and swear the verifying affidavit. She insists the Plaintiffs have not established a prima facie case with a probability of success.

The 1st Plaintiff filed a supplementary affidavit reiterating his claim and denied entering into any loan rescheduling communication with the Defendant as he had not borrowed any money from it. He insists he did not receive any notices or letters from the Defendant as prescribed by the law. GERALD WAMALWA who is a Director to the 2nd Plaintiff filed a supplementary affidavit where he denied having copies of the Charge Instruments as they were retained by the Defendant. He admits receiving the statutory notices but denies the same were properly served upon him. He confirms that the loan he obtained from the Defendant was secured by a Charge over the 1st Plaintiff's land but he is not the Chargor of the land for statutory notices of intention to sell to be served upon him. He admits defaulting in loan repayment but states that they had a meeting on 23rd March, 2017 to reschedule the repayment and one day after this, the Defendant issued a forty five (45) days notification of sale before the date agreed to submit a proposal for repayment. He avers that given time the 2nd Plaintiff would be able to repay the loan and that the Defendant adopted a wrong procedure under the law by serving only the borrower with a statutory notice and not the chargor of the land. He insists he has authority from the 2nd Plaintiff to swear and plead an affidavit on its behalf.

Both parties filed their written submissions that I have considered.

Analysis and Determination

The court has considered the materials presented and arguments canvassed by the respective parties in respect to the Notice of Motion dated 8th June, 2017 and analyzed that the following are the issues for determination:

- whether statutory notices were issued to the Plaintiffs before Defendant exercised its statutory power of sale
- Whether the Plaintiffs are entitled to the injunctive orders sought.

The principles of granting interlocutory injunction are established in the case of **Giella vs. Cassman Brown & Co. Ltd (1973) E.A 358** where the court held inter alia that for an injunctive order to be granted the Applicant has to demonstrate it has prima facie case with a probability of success, and it stands to suffer irreparable loss or injury which cannot adequately be compensated in damages. If the court is in doubt, it should decide the application on a balance of convenience.

As to whether the Plaintiffs have established a prima facie case with a probability of success, from their affidavits and submissions, it is not in dispute that the 1st Plaintiff charged his property KAJIADO/LOODARIAK/8407 to guarantee the 2nd Plaintiff to secure a loan of Kshs. 7 million with the Defendant. The Plaintiffs/Applicants are not denying in principle that they owe a debt to the Defendant/Respondent. They are seeking for a temporary injunction claiming that the Defendant did not serve them with the requisite notices as stipulated under section 90 of the Land Act; that the 1st Plaintiff did not receive any notices as the Chargor. The Plaintiffs are admitting their indebtedness and seek for more time for the 2nd Plaintiff to repay the loan.

On the Plaintiffs allegation that no statutory notices were issued to them in accordance with the provisions of sections 90 (1) and 90 (1) (3) and 96 of the Land Act, the Defendant submitted various notices it issued to the Plaintiffs.

Section 90 (1) stipulates that '**If a chargor is in default of any obligations, 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 on the chargor a notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be.**'

Section 90 (3) stipulates that '**if the chargor does not comply within two months after the date of the service of the notice under, subsection (1), the chargee may -**

- (a) sue the chargor for any money due and owing under the charge;**
- (b) appoint a receiver of the income of the charge land;**
- (c) lease the charged land, or if the charge is of a lease, sublease the land;**
- (d) enter into possession of the charged land; or**
- (e) sell the charged land.**

According to the annexures 'MM 2(a) and (b), within the replying affidavit, I note there are statutory notices dated the 16th September, 2016 issued to the Plaintiffs as well as the Certificate of posting. I further note annexures 'MM' 4(a) and 'MM' 4(b) are Notification of Sale dated the 23rd March, 2017 as well as the Certificates of Posting issued to the Plaintiffs. I note from the Correspondence marked as annexure 'MM 6' the 2nd Plaintiff acknowledged default of loan repayment and sought for more time to repay the same. A cursory look at the Certificate of posting indicates that it contains the same address the 1st Plaintiff has used in the supporting affidavit herein. The 2nd Plaintiff's CEO Gerald Wamalwa admits receiving the notices while the 1st Plaintiff does not deny that the address in the Certificate of posting is not his last known address. From the above the Court finds that the Plaintiffs were indeed served with the requisite statutory notices in accordance with section 90 (1) of the Land Act.

Except for the Kshs. 50,000, I note the 2nd Plaintiff has not provided to court any amounts it has paid towards loan repayment. I note in the 2nd Plaintiff's letter dated the 31st March, 2017 which is part of annexure 'MM 6' they stated in paragraph 2 as follows:

'We are waiting some funds to enable us settle in full our instalment of Kshs. 250,000 which was

due today; regrettably the funds have been unexpectedly delayed.'

I note the 2nd Plaintiff wrote this letter after it had already gotten into a loan rescheduling agreement with the Defendant has stated in their letter dated the 24th March, 2017. Clearly this is an indication of lack of seriousness on the part of the 2nd Plaintiff, after having defaulted in the loan repayment, despite entering into a fresh agreement.

Section 96(1) stipulates that a chargee shall proceed to exercise its statutory power of sale 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 instant case, the Court notes that after the various notices issued to the Plaintiffs, the 2nd Plaintiff admits it is yet to repay the loan and requests for time to pay up the loan. I note the 2nd Plaintiff was even granted time by the Defendant to reschedule the repayment of the loan but to date has not done so. The Plaintiffs are further requesting Court to allow them more time to repay the loan. It is the Court's finding that it cannot be made a party to the contractual obligation between the Plaintiffs and the Defendant.

The Court notes that the Plaintiffs have admitted its indebtedness to the Defendant and requests for time to repay the loan. Further that the Defendant has granted the 2nd Plaintiff time to rectify the default but the 2nd Plaintiff is yet to repay the outstanding loan. The Plaintiffs are seeking for Court's intervention for more time to repay the outstanding loan, but do not indicate how much they intend to pay nor the period of repayment. In the case of **LABELLE INTERNATIONAL LTD. AND ANOTHER – VS – FIDELITY COMMERCIAL BANK & ANOTHER, CIVIL CASE NO. 786 OF 2002** it established that *“. . . when part of amount claimed is admitted or proved to be due, a Chargee cannot be restrained by an injunction.”* I am persuaded by this case and find that the Defendant cannot be restrained from realizing the security since the Plaintiffs already admitted its indebtedness to it. In the circumstances I find that the Plaintiffs have not established a prima facie case with the probability of success.

On the issue of irreparable harm which cannot be compensated by way of damages, I find that the Defendant as a microfinance institution is capable of compensating the Plaintiffs by way of damages if the suit land is sold unprocedurally.

I however note that the Defendant has not provided a valuation report in accordance with section 97 (2) of the Land Act which is mandatory and stipulates that **' A charge shall, before exercising the right of sale, ensure that a forced sale valuation is undertaken by a valuer.'**

From the above, it is clear that Plaintiff has not established a prima facie case to meet the threshold for the grant of orders of injunction.

It is only in these circumstances that I will allow the Plaintiffs' application dated the 8th June, 2017 in the following terms:

- a) The intended Sale by public auction on 2nd June, 2017 by the Defendant of land parcel number KAJIADO/LOODARIAK/8407 be and is hereby set aside pending the valuation of the suit land.
- b) An interim injunction will remain in force until the Defendant undertakes valuation of the suit property in accordance with the provisions of section 97(2) of the Land Act and in case the Plaintiffs' persist in default in repaying the loan, then the Defendant is at liberty to exercise its statutory power of sale and sell the charged property.

Costs will be in the cause.

Dated signed and delivered in open court at Kajiado this 22nd day of January, 2017.

CHRISTINE OCHIENG

JUDGE

Present:

Cc Mpoye

Otieno for 1st and 2nd Plaintiff

Ms Mwenda holding brief for Njogu for Respondent