



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMABSA

ELC CASE NO. 315 OF 2017

GOLDEN SERVICES ORGANIZATION.....1ST PLAINTIFF

KANG'ALIKYA MALUKI.....2ND PLAINTIFF

IBRAHIM MURITHI MAGIRI.....3RD PLAINTIFF

PAUL JESSE MUNGATIA.....4TH PLAINTIFF

-VERSUS-

SIDIAN BANK LIMITED.....DEFENDANT

RULING

1. For my determination are two applications. The first one is by the plaintiff dated 28th August 2017. The 2nd application is brought by the defendant dated 30th October 2017 in which the prayer sought is for an order to set aside and or vary the ex parte order issued by this Court on 29.8.2017 in favour of the plaintiff. The plaintiff's' application is seeking several reliefs inter alia:

1. Spent

2. Spent

3. That pending the hearing and determination of this application interpartes an order of injunction suspending any interests from further being charged on the first plaintiffs loan account(s).

4. That pending the hearing and determination of this suit an order of injunction does issue restraining the defendant, their servants,, auctioneers, licencees, agents or any other persons acting on their behalf from howsoever advertising for sale, selling, auctioning, alienating, transferring, disposing, dispossessing or in any way interfering with right of ownership and proprietorships to LR NO. MOMBASA/SHANZU SQUATTER/1464, TITLE NUMBER GATURI/GITHIMU/5556, TITLE NUMBER KILIFI/KIJIPWA/369 and CR 21195 a sub division of MN/111/1512.

5. That pending the hearing and determination of this suit an order of injunction suspending any interests from further being charged on the first plaintiffs loan account(s).

6. That this honourable Court be pleased to issue such other equitable order(s) as it may deem fit.

7. That the costs of this application be borne by the defendant.

2. The parties agreed that both applications be heard together. I will first consider the application of the plaintiff whether it is merited or not. If it is merited, I will then consider what orders are appropriate to grant in view of the application for variation made by the defendant. The plaintiffs' application is supported by the grounds listed on the face of it, the affidavits sworn by Trifosa Ncororo Jesse on 28.8.2017 and 21st November 2017 together with the documents annexed in support thereof. The grounds relied upon includes but not limited to:

a) The plaintiff/applicants have filed an urgent application seeking to stop the imminent advertisement and sale of their properties by the defendant.

b) The defendant intends to illegally and unlawfully auction the plaintiffs' security properties being LR NO. MOMBASA/SHANZU SQUATTER/1464, TITLE NUMBER GATURI/GITHIMU/5556, TITLE NUMBER KILIFI/KIJIPWA/369 and CR 21195/1 a sub division of MN/111/1512 without following the legal process.

c) Any advertisement for sale of the said properties will gravely prejudice the plaintiffs.

d) It is in the interests of justice that the instant application be allowed so that the Court can hear the application filed herewith.

3. In the supporting affidavit, Ms Trifosa deposed that the 1st plaintiff organization would borrow monies for working capital from the defendant and has been faithfully and smoothly repaying. Because of their good repayments, more sums were borrowed and the securities given for the same. This good relationship seemed to have changed in November 2015 when the plaintiffs according to advice given by the defendant applied for a loan of Kshs 50.0 Million from the defendant bank but which application was declined albeit after 7 months which in the applicant's opinion was unreasonable delay and constitutes material breach. In paragraph 17 – 23 the applicant deposed on the consequences they have suffered as a result of the refusal to grant the loan of the Kshs 50 Million on their business. Further that the defendant has failed to give full disclosures of account to the 1st plaintiff. In paragraph 30 of the supporting affidavit, the plaintiffs depose that the defendant has not served them with any of the statutory notices contemplated by the law. In paragraph 31, the applicant pleaded that the defendant has not conducted any recent valuation of the charged properties. As a result of the non-compliance stated, the applicants aver that the purported exercise of statutory power of sale is illegal and unlawful and thus urged the Court to grant the orders sought.

4. In opposing the application, the defendant filed an application which I already mentioned in the opening paragraphs and a replying affidavit dated 30th October 2017 sworn by Agnes Wanja Mwara the Branch Manager of the Bank's Moi Avenue branch in Mombasa. She deposed that the 1st plaintiff's relationship with the Bank commenced in the years 2004/2005. She gave the details of the facilities the defendant offered to the 1st plaintiff in paragraphs 5, 8 – 13 of her replying affidavit. Ms Mwara deposed further that the facilities were to be secured by the existing securities and additional securities as outlined in paragraph 16. That the additional facilities were disbursed by the Bank on 5.3.2015 following the perfection of the securities. Later the applicant requested for substitution of the securities which request the bank approved. Ms Mwara admitted the applicant applied for additional facilities for the sum of Kshs 50.0 Million which she said the Bank declined after analyzing the customer loan book and the applicant was duly notified.

5. The defendant continued that the applicants declined to execute the supplemental letter of offer dated 21.07.16 and also breached the covenant to repay contained in the terms of her facilities and thus fell in arrears to the tune of Kshs 648,410.00. That the bank notified the applicant of the default vide the letter dated 8.7.2016 prompting the applicants to engage the Bank in an effort to remedy the default. The letter is produced as "E-20". Ms Mwara deposed that there were subsequent engagements which bore no fruit forcing the bank to serve the applicant with a statutory notice as provided in section 90 of the Land Act. That inspite of service of this demand, the applicant did not remedy the default. Consequently the Bank's Statutory Power of sale arose.

6. The defendant continued through its replying affidavit that as at 5.9.2017, the applicant had not made a single repayment for 462 days and due to default the arrears amounts to Kshs 13,267,457 as at the date of this application. That it is illogical and imprudent for the applicant to expect the Bank to part with her securities without any pre-conditions as this would potentially expose them to a total or partial impairment of the facilities extended to the applicant. That the Bank has always made full disclosure to the applicant in relation to its loan account whenever requested to do so. Lastly the Bank deposes that the Bank (Amendment) Act 2016 has no retrospective application on capping of interests to loans or deposits made before the law came into effect. The sum of the Bank's position is to urge the Court to dismiss the plaintiff's application for lacking in merit.

7. The applicant responded to the issues raised in the Replying Affidavit vide the supplementary affidavit dated 21st November 2017 which also acted as a response to the defendant's application. The applicant deposed that most of the documents annexed to the replying affidavit are pure fabrications. The plaintiffs denied applying for what they called "**disastrous overdrafts.**" They again referred to the issue of the loan of Kshs 50.0 Million that the defendant declined to disburse. At paragraph 23 of this supplementary affidavit, the applicants deposed that the statutory notices if at all posted was posted to **Box 82706 – 80100** Mombasa which address they no longer used. The applicants urged the Court to confirm the ex parte orders and allow the application as presented.

8. The parties' advocates filed written submissions in respect of the two applications which submissions I have read and considered. Some of the issues raised in the plaintiffs' application and the submissions can only be determined during the full trial. For instance whether this Court can order the defendant to suspend the interest charged on the debt/loan outstanding. The second issue that can be determined at the trial of the main suit is whether as a result of the action of the defendant in not disbursing to the applicant the sum of Kshs 50.0 Million resulted in a misrepresentation whose consequence the applicants have suffered loss and damage hence they are entitled to be compensated. In light of the above observations I will not deal with prayers (3) & (5) of that application. I will only consider whether the applicant has met any of the three principles laid down for granting of orders of temporary injunctions as per their prayer (4) of the application.

9. The first principle is whether a prima facie case has been established. It is not in dispute that the 1st plaintiff is indebted to the defendant although the amount of the debt outstanding may not be agreed between the parties. The question for this Court to consider at this stage is whether the defendant's claim that having served the notice under section 90 of the Land Act was in order to instruct the auctioneers in exercise of its statutory power of sale to advertise the property for sale by public auction. Section 90 (2) of the Land Act states thus "**before exercising the power to sell the charged land, the charge shall serve on the charger a notice to sell in the prescribed form and shall not proceed to complete any contract for the sale of the charged land until at least forty days have elapsed from the date of the service of that notice to sell.**"

10. The defendant annexed copies of the statutory notices served upon the plaintiffs as **E-23, E-24 & E-26**. They are dated 23rd December 2016, 25.4.17 & 26.7.17 all sent to the address given as **P.O. Box 82706 – 80100 Mombasa**. The applicants agree this was at one time their postal address. However, they changed it to **P.O. Box 16505 – 80100 Mombasa**. The applicants went ahead to annex a letter dated 18th May 2010 in which they notified the defendant of this change of address. The defendant has also sent correspondences to the plaintiff using this new address as is evidence in some of their letters for instance the letter dated 8th July 2017 annexed as **E – 20**. In contesting the denial of service of the statutory notices by the applicants, the defendant in paragraph 12 of their submission stated that the 1st plaintiff acknowledged receipt of the soft copy of the statutory notice sent to them by email as they awaited receipt of the hard copy.

11. The Bank has thus not denied being aware of the change of address by the plaintiffs. Section 96 (2) requires the charge to serve the notice in the prescribed form. The prescribed form given under section paragraph 7 (L) of the charge documents to be by post mail. The defendant was under obligation to show that the questioned letters were indeed dispatched to the correct address and annex proof of such registration. Secondly even if the statutory notice was sent by email there is no evidence that the subsequent notices (the 40 days and the Redemption Notice) was also served both by soft and hard copy. Although the prescribed form as provided in law & contract must be followed. If the defendant was unsure of which address to use, it is not costly to have had the statutory notices posted to both addresses of the plaintiffs in their records.

12. For the reason that the address used to serve the notices was no longer in use by the plaintiffs and the defendant having been notified, I am convinced that the plaintiffs have established a prima facie case to warrant the issuance of the restraining orders. The defendant Bank cannot sell the suit properties by public auction until they comply with the law to wit terms of their contract and section 96 (3) the Land Act while serving the statutory notices. I will not delve on the remainder of the principles of irreparable loss or balance of convenience because a party is not required to prove all the three. Consequently, I do grant the plaintiffs an order of temporary injunction which shall be in force until the statutory notices are properly served. Secondly the plaintiffs are not to use these orders to exempt them in their obligations of making the monthly repayments due and owing to the defendant as per the existing contract. The said sums remain due and payable.

13. The costs of each of the applications are ordered in the cause pending the determination or outcome of the main suit.

Dated, signed & delivered at Mombasa this 7th February 2018.

A. OMOLLO

JUDGE