



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 181 OF 2017

HANNAH WAMBUI.....1ST PLAINTIFF

EAST AFRICA CARGO LOGISTICS LTD.....2ND PLAINTIFF

-VERSUS-

EQUITY BANK LIMITED.....DEFENDANT

RULING

1. The Application for determination is the Notice of Motion dated 24th May 2017 brought under Order 40 Rules 1, 2, 3 and 4 of the Civil Procedure Rules, Sections 1A, 1B and 3A of the Civil Procedure Act. The Application seeks an order that pending hearing and determination of this suit, the Defendant by itself, its servants and/or agents be restrained by a Temporary Injunction from alienating, selling or in any other way dealing with the Plaintiff's properties known as **PLOT NOS.MN/I/6032** and **KILIFI/KAWALA 'A'/KADZONZO/36**.
2. The Application is based on the grounds on the face of the motion and the Supporting Affidavit of Hannah Wambui, sworn on 24th May 2017.
3. The Application is opposed by the Defendant through a Replying Affidavit sworn by Roseline Kivuva sworn on 13th June 2017.
4. The Applicants filed Written Submissions on 30th January 2018 while the Respondent filed its Written Submissions on 14th March 2018 all which I have read and need not reproduce their contents herein.
5. When the Application came up for hearing before me on 15th March 2018, Mr. Gikandi, Counsel for the Applicants submitted that under Section 97 of the Land Act, 2012, a chargee who exercises a power to sell the charged land shall, before exercising the right of sale ensure that valuation is undertaken by a valuer. He submitted that there was no current valuation report in respect of the property known as **LR MN/I/6032**. He therefore submitted that that property cannot be sold in the absence of a current valuation report as required by Section 97 of the Land Act. He further submitted that the Respondent was at liberty to go ahead with the sale of the property known as **LR. NO. KILIFI/KAWALA 'A' /KADZONZO/36** as there was a valuation carried out in respect of that property.
6. Mr. Obinju who appeared for the Respondent relied on the Replying Affidavit filed and the submissions on record. He conceded that there was no valuation report annexed to the Replying Affidavit in respect of the property known as **LR.MN/I/6032**, and that the valuation report annexed to the Replying Affidavit and marked "RK 7" was only in respect of **LR. NO. KILIFI/KAWALA 'A'/KADZONZO/36**. Mr. Obinju submitted that the court could allow the Respondent to go ahead with the sale of the property which is not disputed and in which all legal requirements have been met by the Respondent before advertisement.
7. I have carefully considered the application, the affidavits for and against, the submissions by the respective parties and the law. It is not disputed that the Applicants were advanced monies by the Respondent and they offered the Suit Properties as securities. The Applicants do not deny that they have defaulted in repayment of the loan. Similarly, it is not in dispute that the Applicant's properties are being sold upon the terms of the loan and the charge created thereof. The Applicants however, contend that although the Respondent is entitled to exercise its statutory power of sale of the Suit Property, it must do so in accordance with the law. The Applicants contention is that the Respondent did not comply with the law as Section 97(2) of the Land Act was not complied with in respect of the property known as **LR NO. MN/I/6032**. The Respondent did not discharge the duty of care under Section 97(2) of the Land Act to undertake valuation of that property in order to obtain the best market value of the property. The evidence on record shows that the Respondent carried out a valuation report in respect of the property known as **LR. NO KILIFI/KAWALA 'A'/KADZONZO/36** and the same is annexed to the Replying Affidavit and marked "RK 7". Although the Application seeks to restrain the Respondent from selling the two parcels, the Applicants' in their submissions have conceded that the sale in respect of title no **KILIFI/KAWALA 'A'/KADZONZO/36** can proceed as scheduled as the relevant provisions of the law were complied with prior to its advertisement.

8. Have the Plaintiffs established a *prima facie* case with the probability of success and are damages adequate ready, and if in doubt, where does the convenience lie? There is no evidence that the Respondent carried out any valuation in respect of the property known as **LR MN/I/6032** as required under section 97 of the Land Act. The respondent is required by law to undertake a valuation.

9. On the basis of the foregoing, the Applicants are entitled to some relief. Violation of Section 97 of the Land Act is evident, thus a violation of the Applicants rights. In such a situation, an award of damages will never be an alternative or adequate relief. Irreparable damage not compensable in an award of damages will certainly result if the particular Suit Property is sold without following the clear provisions of the law. In my view, this is a perfect ground on which the court should issue an injunction on account that *prima facie* case has been established in terms of **Giella – V- Cassman Brown & Co Ltd (1973) EA 358**. In the case **Of Mrao Limited –V- First American Bank & 2 Others (2003) KLR 125**, the Court of Appeal held that:

“a prima facie case.....in civil cases, is a case in 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 from the latter....”

I am also of the view that the balance of convenience would be in favour of the applicants in order to maintain the *status quo* pending compliance of the law or pending hearing of the Suit.

10. Accordingly, I find merit in the Application and grant an order for temporary injunction to restrain the sale of the property known as **LR MN/I/6032**. Such an injunction will however subsist for as long as the Respondent has not carried out a forced valuation as required under Section 97 of the Land Act 2012 and the Auctioneers Rules. The Respondent is however at liberty to proceed with the auction sale of the property known as **PLOT NO.KILIFI/LKAWALA ‘A’/KADZONZO/36**. Each party to bear own costs.

Delivered, signed and dated at Mombasa this 21st March, 2018.

C. YANO

JUDGE