



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 846 OF 2017

SIMON PASUA OLE KAANTO

NICHOLAS OTUMA KAANTO.....PLAINTIFFS

VERSUS

FAMILY BANK LIMITED.....DEFENDANT

RULING

What is before Court for determination is the Plaintiff's Notice of Motion dated the 30th August, 2017 brought pursuant to Order 40 rules 1 & 2 of the Civil Procedure Rules and Sections 90 (1) , 90 (2) (b), 96 (2), 96 (3) (c), 97 (2), 103 & 104 of the Land Act 2012. It is premised on the following grounds which in summary is that the 1st Plaintiff is the registered owner of land parcel number KAJIADO/ LORNGUSUA / 85 hereinafter referred to as the 'suit land'. The 2nd Plaintiff obtained a loan of Kshs. 3 million from the Defendant on the guarantee of the 1st Plaintiff, which loan was secured by a Charge registered over the suit land. The 2nd Plaintiff defaulted in the loan repayment and the Defendant has opted to exercise its statutory power of sale over the suit land. The Defendant did not serve the Plaintiffs with the mandatory notices required in law and through its agents has advertised the suit land for sale by public auction scheduled on 5th September, 2017.

The application is supported by the affidavit of SIMON PASUA OLE KAANTO the 1st Plaintiff herein where he admits that on 13th November, 2015 he guaranteed the 2nd Plaintiff to obtain a loan of Kshs. 3 million from the Defendant on the security of the suit land and his wife consented to the registration of the Charge. He confirms being aware that the 2nd Plaintiff defaulted in the loan repayment and on 8th December, 2016 the 2nd Plaintiff wrote to the Defendant requesting for four (4) months to pay the loan. He is aware the Defendant rejected the 2nd Plaintiff's request and on 13th December, 2016 the Defendant wrote to the 2nd Defendant demanding for payment of the outstanding loan balance of Kshs. 3, 662, 000 within seven (7) days. He avers that between February, 2017 and May 2017 the 2nd Plaintiff engaged the Defendant in unsuccessful negotiations towards payment of the outstanding loan balance. Further, that on 25th August, 2017, the 2nd Plaintiff brought to him a notification that had been circulated at IL BISSIL Market for the sale of the suit land, by public auction on 5th September, 2017. He states that the Defendant through its agent TOPLINK Auctioneers advertised the sale of the suit land vide Standard Newspaper dated the 21st August, 2017. He denies being served with the three (3) months' notice for payment of the loan balance and the forty (40) days notice for sell of the suit land. He claims the wife who provided spousal consent, was not served with the notice to sell of the suit land. He insists no forced sale valuation was undertaken by the Defendant before exercising its statutory power of sale. He contends that the Defendant has denied him the opportunity to pay the outstanding loan balance so as to

save his land. He reiterates that his family home is established on the suit land whose current open market value is Kshs. 98 million and stands to suffer irreparable damage not compensable in an award of damages unless he is given an opportunity to redeem his land.

The application is also supported by the affidavit of NICHOLAS OTUMA KAANTO the 2nd Plaintiff herein where he confirmed obtaining a loan of Kshs. 3 million from the Defendant on guarantee by the 1st Plaintiff wherein a legal charge was registered over the suit land. He admits defaulting in the payment of the loan and on 8th December, 2016 he wrote to the Defendant requesting for four (4) months to repay the said loan but it rejected his request and on 13th December, 2016, it wrote to him demanding for payment of the outstanding loan balance of Kshs. 3, 662,000 within seven (7) days. He avers that on 25th August, 2017 he found leaflets at IL BISSIL market giving notice for the sale of the suit land by way of public auction on 5th September, 2017. He denies being served with any notice for repayment and for the sale of the security. He reiterates that the Defendant has denied him an opportunity of repaying the outstanding loan balance as required in law.

The application is opposed by the Defendant that filed a replying affidavit sworn by ANTHONY OUMA, its Legal Officer who deposes that the instant application is incurably defective, incompetent, misconceived, has no merit whatsoever, is an abuse of the court process and does not disclose any reasonable ground to warrant the prayers sought as it is based on falsehood as well as misrepresentation of facts. He confirms that the Defendant advanced a loan facility to the 2nd Plaintiff for Kshs. 3 million vide a Letter of Offer dated the 16th October, 2015. He contends that it was a term in the said Letter of Offer that the loan facility was to be secured by a Legal Charge over the suit land that was in the name of the 1st Plaintiff and subsequently the Charge was registered in favour of the Defendant. Further, that the 1st Plaintiff was executed a Deed of Guarantee and Indemnity dated the 13th November, 2015. He contends that for more than one year, the 2nd Plaintiff's loan account was not performing compelling the Defendant to issue a series of formal demand letters that failed to elicit a response. He confirms that the Defendant issued notices informing the Chargor and the Borrower of its intention to exercise its remedies over the charged property as provided by Section 90 of the Land Act. He explains that after the expiry of the time given in the Statutory Demand Notice dated the 4th February, 2017, the Plaintiffs' never cleared the loan, prompting the Defendant on the 10th May, 2017 to issue a notice of intention to sell the suit land within forty (40) days of the notice as a result of an outstanding sum of Kshs. 3,744, 283.12 with arrears of Kshs. 3,577,995.89 owed by the Plaintiffs'. He confirms that the Defendant engaged the services of TOPLINK AUCTIONEERS to repossess and sell the security, with the said auctioneer issuing the Notification of Sale informing the Plaintiffs' of the date and venue of the auction as well as serving them with the Auctioneer's 45 days notice of intended sale. Further, through its letter dated the 10th May, 2017, the Defendant instructed Hallmark Valuers Limited to undertake a professional valuation over the suit land, which conducted a valuation and submitted a report dated the 19th May, 2017 to the Defendant. He reiterates that after the statutory process was completed and notices served as per the law, the Auctioneer on the 21st August, 2017 proceeded to advertise the scheduled auction in a newspaper with a nationwide circulation. He reaffirms that the Plaintiffs' are in arrears and it only leaves it with the option to exercise its statutory power of sale as they have admitted in their respective affidavits that the loan amount was disbursed to their benefit and the 1st Plaintiff was aware of the newspaper advertisement. He insists the spouse to the 1st Plaintiff was not a party to the agreement and there is no legal requirement that a wife/husband to a Chargor needs to be served with the various notices, but they still served her. Further, that the application does not satisfy the condition laid in the case of CASSMAN BROWN for granting of a temporary injunction.

The 1st Plaintiff filed a supplementary affidavit where he reiterated their claim and denied service of the notices upon him.

Both parties filed their 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 30th August, 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 Spouse to the 1st Plaintiff who granted spousal consent to change the suit land was served with a Notice to Sell before the intended auction.
- Whether the Plaintiffs are entitled to temporary injunction pending the outcome of the suit.

From the Plaintiffs' opening and closing arguments, it is not in dispute that the 1st Plaintiff offered the suit land as a guarantee to the 2nd Plaintiff to secure a loan of Kshs. 3 million. The Plaintiffs have admitted in defaulting on loan repayment and seek for a temporary injunction pending the outcome of the suit claiming that the Defendant did not serve them with the requisite statutory notices in accordance with section 90 of the Land Act. The 1st Plaintiff further claims his wife who provided spousal consent was not served with the statutory notice before the Defendant could exercise the statutory power of sale and the suit land was not properly valued before the intended sale.

The Plaintiffs relied on the following cases to support their claim: **Julius Kipleny Kolil and Another Vs Kenya Commercial Bank and 2 others (2013) eKLR; Zadarack Oyaro Achoki Vs Consolidated Bank of Kenya Limited (2013) eKLR and Peter Atandi Nyabuti Vs Mellen Kemunto Phillip (2016) eKLR.** While the Defendant relied on the following cases of : **Njoroge wa Kairo Vs Housing Finance Co. of Kenya Limited (2006) eKLR; Giella Vs Cassman Brown Co. Ltd (1973)EA 358; Mrao Limited Vs First America Bank Limited (2003) eKLR; Showind Industries Vs Guardian Bank Limited & Another (2002) 1EA. 284; Julius Mainye Anyega Vs Eco Bank Limited (2014) eKLR; HCCC Number 82 of 2006 Maltex Commercial Supplies Limited & Another Vs EcoBank Limited (in Liquidation); Jimmy Wafula Simiyu Vs Fidelity Bank Ltd (2014) eKLR; Bii Vs Commercial Bank Limited (2001) KLR (458); and Joseph Otura Allaii Vs China Overseas Engineering Group (2013) eKLR;** to refute the Plaintiffs' claim.

The principles for granting of temporary injunctions were settled in the case of **Giella Vs. Cassman Brown & Co. Ltd (1973) EA 358** as follows:

"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."

Bearing this principle in mind, it behoves this honourable court to interrogate whether the applicant has made out a prima facie case with a probability of success at the trial.

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 marked as annexures 'FBK 4' , "FBK 5' and 'FBK 6" respectively, which were the requisite notices posted to the address indicated in the Charge Document. I however note that the 1st Plaintiff's wife who provided spousal consent has her address indicated as P. O. Box 84 Kajiado instead of P. O. Box 80 Kajiado. I note the Defendant has annexed Certificates of Posting confirming where the notices were sent.

In the case of ZADARACK OYARO ACHOKI Vs. CONSOLIDATED BANK OF KENYA

' a notice addressed to a wrong address, is no notice at all, it is as if no such notice was issued.'

Section 90 (1) of the Land Act 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) of the Land Act 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**

Section 96 (3) (c) of the Land Act stipulates as follows:

- “(3) A copy of the notice to sell served in accordance with Subsection (2) shall be served on-**
- (c) a spouse of the chargor who had given the consent;’**

These provisions are couched in mandatory terms and there is no way the Defendant can skirt around it. I note that Toplink Auctioneers issued a notice to the Plaintiffs' dated the 28th June, 2017 and also served the Notification of Sale on 25th June, 2017 to one Mrs. ANNE NAISERIAN OTUMA KAANTO who is indicated as the owner of the suit land. As per the Charge document, I note the 1st Plaintiff's Spouse who granted the spousal consent is NANTEI ENE PASUA KAANTO and there is no evidence furnished by the Defendant that she was indeed served with a copy of the Notice to Sell as envisaged by section 96(3) (c) of the Land Act. It is against the foregoing that I find that the Plaintiffs were indeed served with the Statutory Notices but the Spouse to the 1st Plaintiff was not served as required by section 96(3) (c) of the Land Act. Further, I find that the 1st Plaintiff as Chargor was not properly served with the Notification of Sale by the Auctioneer as required by the law.

The Plaintiffs' claim the Defendant has not undertaken proper valuation of the suit land before the same was advertised for sale. They contend that the suit land has appreciated to approximately Kshs. 98 million.

Section 97 (1) and (2) of the Land Act provides that:

- ‘(1) A chargee who exercises a power to sell the charged land, including the exercise of the power to sell in pursuance of an order of a court, owes a duty of care to the chargor, any guarantor of the whole or any part of the sums advanced to the chargor, any chargee under a subsequent charge or under a lien to obtain the best price reasonably obtainable at the time of sale.**
- (2) A chargee shall, before exercising the right of sale, ensure that a forced sale valuation is undertaken by a valuer.**

The Defendant conducted a valuation of the said property and there is a report from Messrs. Hallmark Valuers Co. Ltd Limited dated the 19th May, 2017, indicating that the Market Value is Kshs. 48 million while the forced Sale Value is Kshs. 36 million.

From a cursory look at the Valuation Report dated the 27th October, 2015 by Afriland Valuers Ltd, I note they indicated the open market value of the suit land is Kshs. 60 million; Mortgage Value is Kshs. 48 million and the Forced Sale Value is Kshs. 45 million. As for the Valuation report by Hallmark Valuers Co. Limited, dated the 19th May, 2017, which was conducted almost two years later, it indicated that the Market Value is Kshs. 48 million while the forced Sale Value is Kshs. 36 million. I note the two valuation reports were commissioned by the Defendant and the discrepancies are glaring. I find that the discrepancies in the Valuation reports demonstrate that the Defendant did not get the best price and act in good faith to cater for the best interests of the Chargor as envisaged by the provisions of the law. The pricing in the two valuations are two wide and this is an issue that should be deciphered. The Court takes judicial notice of the fact that the property market in Kenya appreciates steadily no matter the location and Kajiado where the suit land is situate is no exception.

In the case of **Mrao Limited Vs. First American Bank of Kenya Limited & 2 others (2003) KLR 125** the court held that: *' In civil cases, a prima facie 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 or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but 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.'*

In relying on the judicial authorities cited above including the facts as presented, inasmuch as the Plaintiffs have admitted their indebtedness to the Defendant which has duly served the requisite statutory notice, I however find that the discrepancy in the two valuation reports are two wide and these raise triable issues which can only be determined after a full hearing. I find that the Defendant as the Chargee has not obtained the best reasonable price for the suit land and the forced Sale Valuation is too low. The Defendant has not controverted the Plaintiff's allegation regarding the Valuation of the suit land. The 1st Plaintiff's spouse was not served with the Notice of Sell as envisaged by the Law. It is against the foregoing that I find that the Plaintiffs' have indeed established a prima facie case with a probability of success.

On the issue as to whether the Plaintiffs will suffer irreparable harm that cannot be compensated by way of damages. I have already noted the discrepancies in the valuation of the suit land and the fact that the 1st Defendant's spouse was not properly served. In the case of **Case of Nguruman Ltd. Vs. Jan Bonde Nielsen CA No. 77 of 2012**, it was held that *' ...the applicant must establish that he 'might otherwise' suffer irreparable injury which cannot be adequately compensated remedied by damages in the absence of an injunction, this is a threshold requirement and the burden is on the applicant to demonstrate, prima facie, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot 'adequately' be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy. '*

In relying on the case above and based on the circumstances at hand, I find that the Plaintiffs alleged injuries are not speculative as they have demonstrated the harm they will suffer if the injunctive orders are denied.

On the question of balance of convenience, from the evidence presented by the parties, I am not in doubt that the balance tilts in favour of the Plaintiffs as the Defendant has infringed on their rights by failing to properly value the charged suit land before advertising it for auction; failing to serve the Spouse of the 1st Plaintiff who had given her consent when the suit land was charged; and not properly serving the Chargor with the Notice to Sell.

From the above, it is clear that the Plaintiffs' have established a prima facie case to meet the threshold for

the grant of orders of injunction.

I find the Plaintiffs' Notice of Motion dated the 30th August, 2017 is merited and allow it.

Costs will be in the cause.

Dated signed and delivered in open court at Ngong this 25th day of April, 2018.

CHRISTINE OCHIENG

JUDGE