



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC (HC) NO. 144 OF 2017

TSS SALT MANUFACTURES LIMITED.....PLAINTIFF

VERSUS

NIC BANK LIMITED.....DEFENDANT

RULING

INTRODUCTION

1. Before me for determination is a Notice of Motion Application dated 29th June 2017. The Plaintiff TSS Salt Manufacturers Ltd prays for Orders:-

1. Spent

2. Spent

3. That a temporary injunction do issue to restrain and prevent the Defendant/Respondent by itself and/or its agents, servants, employees, assigns or otherwise howsoever from interfering with the Plaintiff/Applicant's quiet possession of or marketing and/or advertising for sale or selling, leasing, sub-dividing, receiving or taking possession of the charged suit property being LR No. 24207 (CR 31954) or in any manner exercising or continuing to auction and or exercise a Statutory Power of Sale over the said property or any thereof pending the hearing and final determination of the suit herein.

4. Spent

5. That a temporary injunction do issue to restrain and prevent the Defendant/Respondent by itself and/or its agents, servants, employees, assigns or otherwise howsoever from interfering with the Plaintiff/Respondent's quiet possession of or marketing and/or advertising for sale or selling, subdividing, receiving or taking possession of any charged suit property or interests in its knowledge and possession and registered to the Plaintiff/Applicant pending a hearing inter-partes and final determination of suit herein.

6. That the costs of this Application be provided for.

THE APPLICANT'S CASE

2. The said application is premised on a number of grounds stated on the body thereof and which are inter alia, that:-

i. The Plaintiff is the registered owner of the property known as LR No. 24207(CR 31954) which was charged to the Defendant as collateral to secure a principal loan for the borrower KAAB Investments Ltd.

ii. A Director with a major stake in the Plaintiff Company Twahir Sheikh Said Ahmed died on 10/01/2017 and the surviving Director(s) have embarked on a process of putting the affairs of the Plaintiff in order albeit with a lot of difficulty particularly pertaining to tracing documents.

iii. On 27/06/2017 unknown to the Plaintiff, the Defendant advertised through the Daily Nation the sale by auction of the said LR No. 24207(CR 31954) on 03/07/2017.

iv. That the Bank did not issue a statutory Notice over the non-payment of any monies due under the charge to give the Plaintiffs an opportunity to redeem and/or rectify the same within three months as required under Section 90(1) (2) (b) (of the) Land Act, 2012 Laws of Kenya.

v. That the Bank did not issue a Statutory Notice of at least 40 days as required under Section 96(2) (3) (of the) Land Act 2012, Laws of Kenya.

vi. Unknown to the Plaintiffs, the Bank engaged Garam Investments Auctioneers to auction the above mentioned property on 03/07/2017 which act is wrongful, unlawful, in bad faith and in breach of the Land Act, 2012.

vii. The Bank's attempts to mischievously exercise a Statutory Power of sale would unfairly fetter and/or curtail the business operations of the Plaintiff.

viii. The Defendant has been and continues to be aware of criminal investigations of conspiracy to defraud and forgery being conducted by the Directorate of Criminal Investigations (DCI) pertaining to all properties of TSS and the Plaintiff in its possession including the charged property but deliberately failed to bring it to the attention of the Plaintiff before, during and after negotiations.

ix. The Defendant has been and continues to be aware that the borrower of its facility is KAAB Investments Ltd and that it cannot proceed to realise its debt without issuing relevant Statutory Notices to all effected parties.

x. Unless otherwise restrained by this Court, the Bank will unfairly reap from its own illegal/unprocedural acts/ omissions and proceed to prematurely and unlawfully auction the charged property to the detriment of the Plaintiff ; and

xi. It is only fair, just and in the interest of justice that the orders herein be granted in order to preserve the suit property pending the determination of the suit herein.

3. The Application is further supported by an affidavit sworn by Osman Tahir Sheikh Said on 29th June 2017 to which is annexed a copy of the advertisement carried in the Daily Nation Newspaper of Tuesday June 27, 2017.

4. In a lengthy and detailed Replying Affidavit sworn on 15th September 2017 by the Deputy Group Company Secretary and Head of Legal Waweru Mathenge, NIC Bank Ltd(the Defendant) responds that the Plaintiff's application is based on an incorrect and misleading narrative as well as a deliberate misrepresentation of the true facts.

5. According to the Bank, the Plaintiff was at all material times a guarantor of KAAB Investments Ltd (the Borrower) in respect of various loans advanced. The Plaintiff offered some of its properties including the suit property herein to guarantee the obligations of the said KAAB Investments under the lending agreement.

6. The Defendant further avers that on 27th March 2014 and 21st May 2014, the Bank advanced to the Borrower the following facilities:-

a) Overdraft facility for Kshs 150,000,000/=

b) Letters of Credit and/or Bill Avalization and/or Guarantees and/or Short Term Loans for Kshs 400,000,000/=;

c) Term Loan facility for Kshs 1,600,000,000/=;

d) Invoice Discounting facility for Kshs 300,000,000/=;

e) Stock Loan facility of Kshs 200,000,000/= and

f) SFET facility for Kshs 200,000,000/=

7. In respect to the said lending, the Plaintiff as a Guarantor provided the Respondent with the following securities as collateral for the performance of the Borrowers obligations:-

a) A legal Charge over LR No. 24207(CR 31954) in the name of the Plaintiff to secure the sum of Kshs 350,000,000/=

b) A legal Charge over LR Nos 25986(CR 35612) in the name of the Plaintiff to secure lending in the sum of Kshs 850,000,000,000/= and

c) Corporate Guarantee for the sum of Kshs 1.2 Billion approved by the Plaintiff's Board on 5th June 2014.

8. It is further the Defendant's case that in March 2015 it advanced additional facilities to the Borrower subject to the terms and conditions set out in the Credit Facility Letter dated 6th March 2015. The said lending was secured by several securities including the existing Charge over the suit property and LR No. 25986 as well as a Corporate Guarantee for the sum of Kshs 1,200,000,000/=.

9. The Defendant avers that by providing its security together with a Corporate Guarantee, the Plaintiff bound itself to ensure that the Borrower met its obligations under the Credit Facilities and in default it undertook to indemnify the Defendant by settling any outstanding payments due from and payable to the Defendant to the maximum limits set out in the Guarantee and Charge instruments.

10. According to the Defendant, it was a term of the lending agreements that in the event of default, the Defendant would by notice to the Borrower and copied to the Guarantors declare that the Defendant's securities had become enforceable whereupon all amounts payable by the Borrower in respect of the Banking Facilities and under the security would become immediately due and payable on demand and if it defaulted in making payment then the amount would immediately become payable by the Guarantor including the Plaintiff herein.

11. The Defendants aver that in breach of its obligations, the Borrower failed to service the facilities advanced to it and by 21st December 2015, the Borrower was in arrears in the sum of Kshs 418,464,533.21/= The Defendant duly informed the Borrower of the said breach and requested the Borrower to regularize the account. The Borrower however failed and or neglected to repay the outstanding amount, and as a consequence the Defendant's Advocates issued a Statutory Notice to the Borrower, the Plaintiff and other guarantors pursuant to Section 90(1) of Land Act, demanding the payment of the sum due as at 21st December 2015.

12. It is the Defendant's further case that notwithstanding the said Notice neither the Borrower nor the Plaintiff responded. As a result of the continued default, on 12th May 2016, the Defendant in compliance with Section 96(2) and (3) of the Land Act issued to the Borrower, the Plaintiff and the other Guarantors a 40 days Notice of Intention to sell.

13. The Defendant states that in tacit acknowledgement of the Borrower's inability to service or repay the facilities advanced, it did request the Defendant sometime in May 2016 to restructure the facilities. Following discussions between the Borrower and the Defendant, the Defendant restructured the debt in the following terms:-

a) The Borrower would pay monthly instalments of Kshs 17 Million towards repayment of the facilities effective July 2016 until 31st December 2016 and thereafter increase the instalments to Kshs 15 Million from 1st January 2017 to 31st December 2017;

b) That there would be joint sales as between the Borrower and the Defendant of various properties with a view to realising a projected figure of at least Kshs 1.5 Billion by 31st December 2017. The proceeds of the sales would be used to reduce the outstanding debt;

c) The Borrower would channel minimum business sales turnover through its account held at the Bank in the total sum of Kshs 600 Million from June 2016;

d) All terms and conditions detailed in the original offer letter dated 6th March 2015 remain effective and unchanged;

e) An acknowledgment by the Borrower that the facilities under the original Offer Letter were in default and that the Defendant retained its right to realise its securities.

f) That the then ongoing legal recovery process through the sale of various properties held as security would continue until such a time that the Borrower would accept the terms discussed and agreed upon by the parties.

14. The Defendant states that despite the indulgence extended to the borrower and its Guarantors including the Plaintiff, they failed to meet their obligations in consequence whereof the Defendant was left with no option but to proceed with the realisation of its securities.

ANALYSIS OF THE ISSUES

15. I have considered the Application before me and the Defendant's response thereto. I have equally considered the written submissions filed herein by the Learned Advocates for the parties. I have also taken into account the authorities the Learned Counsels referred me to both for and against the application.

16. 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.”

17. 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 Limited –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 a 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."

18. The same Court of Appeal in *Nguruman Limited –vs- Jan Bonde Nielsen & 2 Others (2014)eKLR* expounded on the ingredients of a prima facie case when they stated as follows:-

“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 right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a prima facie case has been established, the Court does not hold a mini trial and must not examine the merits of the case closely. All that the Court is to see is that the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title. It is enough if he can show that he has a fair and bonafide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as it is otherwise put, on a preponderance of probabilities.”

19. In the matter before me it is not disputed that the Plaintiff/Applicant guaranteed KAAB Investments Ltd(the Borrower) by offering some of its properties-including LR Nos. 24207(CR 31954) and No. 25986 (CR 35612)(the suit property) as security for various credit facilities extended by the Defendant to the said KAAB Investments Ltd. It was further not contested that the loan facilities extended to the Borrower were, inter alia, secured by a Legal Charge registered over the suit property to secure the sum of Kshs 350,000,000/=. The Charge on LR 25986 on the other hand was for Kshs 850,000,000/=.

20. What I understood the Plaintiffs to be protesting was the fact that no Statutory Notice was served upon them as required by the law and more so, after the Defendant and the Borrower entered into further arrangements to restructure the debt repayments which arrangements the Plaintiffs contend they were unaware of and deviated from their previous agreed position.

21. 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 interests 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.

(2) The Notice required by sub-section(1) shall adequately inform the recipient of the following matters:-

a) The nature and extent of default by the Chargor;

b) If the default consists of the non-payment of any money due under the Charge, the amount that must be paid to rectify the default and the time, being not less than three months, by the end of which the payments in default must have been completed;

c) If the default consists of the failure to perform or observe any covenant, express or implied, in the Chargee, the thing the Chargor must do or desist from doing so as to rectify the default and the time, being not less than two months, by the end of which the default must have been rectified;

d) The consequences that if the default is not rectified within the time specified in the notice, the Chargee will proceed to exercise any of the remedies referred to in this section in accordance with the procedures provided for in this sub-part; and

e) The right of the Chargor in respect of certain remedies to apply to the Court for relief against those remedies.

22. In its Replying Affidavit, the Defendant has attached as Annexures “WM 5B” a copy of the Statutory Notice dated 11th January 2016 addressed to the Plaintiffs. The same gives notice to the plaintiff that as a result of default in payment of the financial facilities availed to KAAB Investments Ltd, the arrears stood at Kshs 418,464,533.21/= as of 21st December 2015. It further goes ahead to give notice to the Plaintiff that upon expiry of three months from the date of service of the notice, the Bank shall proceed to exercise its remedies, among them its Statutory Power of Sale and sell the charged property to recover the outstanding amount.

23. While the Plaintiffs contend that they did not receive this Notice, I note that the same is addressed to P.O. Box Number 85039-80100, Mombasa. This is the same Postal address used in the Charge document. A Certificate of postage attached to the affidavit (annexture “WM 5C”) shows that the Notice was sent by registered post to the Plaintiff.

24. In my considered view, the said Statutory Notice meets the requirements of Section 90 of the Land Act, 2012. The said notice clearly specifies the amount in arrears as at the specified date and the fact that the Chargee would be entitled to exercise its Statutory Power of Sale over the charged property if the default was not remedied within a period of three months.

25. The other bone of contention by the Plaintiff is that the Notification of Sale of the suit property as given is manifestly unlawful and contrary to the provisions of Section 96 of the Land Act. The said Section provides as follows:-

“96. (1) Where the Chargor is in default of the obligation under a Charge and remains in default at the expiry of the time provided for the rectification of the default in the notice served on the Chargor under Section 90(1); a Chargee may exercise the power to sell the charged land.

(2) Before exercising the power to sell the charged land, the Chargee shall serve on the Chargor 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.

(3) A copy of the notice to sell served in accordance with sub-section (2) shall be served on

a).....

b).....

c)....

d)....

e) Any Lessee and sub-lessee of the charged land or of any building on the charged land;

f) Any person who is a co-owner with the Chargor;

g).....

h).....

i) Any other person known to have a right to enter on or use the land or natural resources in, on, or under the charged land by affixing a notice at the property; and

j).....

26. In response to this contention the Defendant states at paragraph 14 of the Replying Affidavit that on 12th May 2016 in compliance with Section 96(2) and (3) of the Land Act, it did issue to the Borrower, the Plaintiff and the other Guarantors the Forty Days Notices of intention to sell as exhibited at annexure WM-6 A, B and C of the Affidavit. I have perused the annexures which fall within pages 99 to 126 of the bundle of annexures to the Defendant’s Replying Affidavit.

27. The said Notices are said to have been served by one Samuel Ngunjiri Wambugu, a Process Server of the Court who is near similar affidavits all sworn on 24th May 2016 claims to have served the Borrower, the Plaintiff and other Guarantors to the lending agreement. The said affidavits do not however show that the Plaintiff and/or its representative was served as required under Section 96(2) of the Act aforesaid. Under that section the Notice to sell ought to have been first served upon the Chargor giving it 40 days within which it could still exercise its equity of redemption.

28. Perhaps even more telling is the fact that the same Process Server purports that on 19th May 2016 at around 8.45 a.m. he served all the properties belonging to the Borrower, the Plaintiff, and two other guarantors by affixing notices thereon. That was certainly not possible given that the properties in question were in Lamu, Malindi, Mariakani and Nairobi some of which are more than 500 km apart. The only possible conclusion arising from the foregoing is that the Notices due under Section 96(2) were not served as appropriate. In my view, this failure to comply with Section 96(2) of the Act is of itself alone sufficient to support the grant of an injunction for the failure to comply with statutory provisions in my view ipso facto gives rise to a prima facie case with a serious chance of success.

29. I must however add that under Rule 15 of the Auctioneers Rules a Notification of Sale must be served prior to the sale of immovable property. The Notification of Sale should give the Chargor forty five (45) days upon which to redeem the property. The Notification ought to be served on the registered owner or an adult member of his family residing or working with him, and where the person refuses to sign the Notification, the Auctioneer needs to sign a Certificate to that effect.

30. The Notification of Sale issued by Garam Investments Auctioneers annexed hereto marked “WM 10” at pages 163 to 174 of the bundle of the Defendant’s documents show that the Notices were forwarded to the Plaintiff by Registered post. Unlike in the case of the Statutory Notice, no Certificate of Postage is annexed to show that indeed the Auctioneer served the notices as alleged.

31. The absence of proof of service of the Notification of Sale upon the Plaintiff means that the Defendant has not discharged the burden of proof as required under Section 107 of the Evidence Act. Invariably as it were, if the sale of the suit property is carried through in the absence of a proper notice to sell it, it will amount to a clog on the Chargor’s equity of redemption.

32. Accordingly and while it is obvious to me that the Defendant has indulged the Plaintiff and the Borrower enough times, I am prepared to grant an injunction to restrain the sale of the suit property as long as a proper notice to sell the property and a Notification of Sale under Section 96(2) of the Land Act and Rule 15 of the Auctioneers Rules have not been issued.

33. The upshot is that I find merit in the application dated 29th, June 2017.

34. By a similar application dated the same 29th June 2017 filed in ELC No. 145 of 2017, the Plaintiff sought similar orders against the Defendant in regard to LR No. 25986(CR 35612).

35. In light of the agreement of the parties herein that the arguments herein apply to Malindi ELC 145 of 2012; TSS Salt Manufactures Ltd – vs NIC Bank Ltd, the injunction granted herein shall apply mutatis mutandis to the said ELC No. 145 of 2017 in regard to the said LR No. 25986(CR 35612).

36. In light of the circumstances of this case, I think it is in order that each party should bear their own costs.

37. Orders accordingly.

Dated, signed and delivered at Malindi this 19th day of April, 2018.

J.O. OLOLA

JUDGE