



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CASE NO. 248 OF 2017

KWALE CEMENT FACTORY LIMITED.....1ST PLAINTIFF

RISING STAR COMMODITIES LTD.....2ND PLAINTIFF

-VERSUS-

KENYA DEPOSIT INSURANCE CORPORATION (KDIC) as

a receiver for CHASE BANK (K) LTD.....DEFENDANT

RULING

1. The application for determination is dated 3rd July 2017 brought under the provisions of Order 40 of the Civil Procedure Rules and Sections 1A, 1B & 3A of the Civil Procedure Act. The plaintiffs/applicants seek orders:

1. Spent

2. Spent

3. That pending hearing and determination of this suit, the defendant by itself, servants or agents be restrained by a temporary injunction from alienating, selling or in any other manner dealing with the plaintiffs' properties known as Title No. Kwale/Shimoni Adjudication/47, 616, 730, 762 & 766.

4. Costs of the application be provided for.

2. The application is premised on the grounds listed on the face of it inter alia that the defendant extended credit facilities to the 2nd plaintiff for purposes of financing purchase of aforesaid chattels. The 1st plaintiff offered the listed titles as securities for the loans. The 2nd plaintiff has been making payments but due to financial constraints it has delayed. On 26.5.2016 the defendant instructed Mitchell Cotts Ltd to sell the chattels of 2nd plaintiff but has so far not accounted for the proceeds. Further that by a notification dated 2nd May 2017, the defendant instructed Keysian Auctioneers to sell the suit properties by public auction on 20.7.2017. That the intended sale is tainted with illegalities for non-compliance with section 90 (1) and 96 (2) of the Land Act as well as Rule 15 (b) & (c) of the Auctioneers Rules.

3. The application is supported further by the affidavit of Nazum Amina Mohamed Nathoo. She reiterated the facts set out in the grounds and annexed documents to support the averments. She deposed that section 104 (2) of the Land Act empowers this Court to cancel, vary or suspend a scheduled sale if the same does not comply with the law. Ms Nazum deposed that if the intended sale proceeds, the properties will be sold at a price that is below the best available price due to non-compliance with the law which will result in the plaintiffs' suffering irreparable loss and damage.

4. The motion is opposed by the defendant vide the replying affidavit dated 21st August 2017 and sworn by Richard Kamunya. In paragraphs 3 – 11, Mr Kamunya set out the summary of the credit facilities advanced to the 2nd plaintiff and secured with the suit titles/properties of the 1st plaintiff. Mr Kamunya deposed that the 1st plaintiff was served with the 90 day statutory Notice on 22nd November 2016 while the 2nd plaintiff was first notified of its default by a letter dated 9th December 2015. It is the defendant's averment that the 2nd plaintiff denied, refused and or failed to repay the outstanding balance despite the notice. Following this default, the defendant (now plaintiff in the counter-claim) served the 2nd defendant in the counter-claim of its intention to exercise its right of lien over the commodities held under the tripartite agreement. The defendant did sell the goods as set forth in paragraphs 16 – 21 of the replying affidavit to Thai Group Limited for Kshs 89,199,150.00.

5. The defendant continued that after the lapse of the 90 days, they issued the 1st plaintiff with a 40 day notice demanding payment for the sum of USD 11,200,204.42. Later on 18.4.2017, the defendant deposes that it instructed Ardhiworth Ltd to carry out valuation of the suit properties and a report was prepared which they annexed as **RK – 21**. Subsequently on 2nd May 2017, the defendant instructed Keysian Auctioneers to sell the charged properties setting the reserve price at the prevailing market rate as per the valuation report. Mr Kamunya deposed further that the Auctioneers issued the 1st plaintiff with a 45 days notice on 8th May 2017 and later advertised the properties for sale by public auction on 20th July 2017. In essence, the defendant contends that they have fully complied with the provisions of the Land Act in realizing the securities. The defendant thus urged the Court to dismiss the present application as it stands to suffer irreparable loss since the plaintiffs remain indebted to them.

6. The advocates for the plaintiffs filed their written submissions on 14th November 2017 while the defendant's submission was filed on 22nd January 2018. I have read both submissions together with the case law in support thereof enclosed. Both counsels addressed the three principles to be considered on whether or not to grant temporary orders of injunction in an application such as this case i.e. whether the plaintiffs have established a prima facie case; whether the plaintiffs will suffer irreparable loss unless the orders are granted and on whose favour the balance of convenience tilts.

7. From the plaintiffs' pleadings, it is admitted that the 2nd defendant defaulted in prepaying the loan albeit on account of financial difficulties. It is also not in dispute that as a result of the default, the defendant put up for sale by public auction the charged properties. The only question in dispute is whether before putting up the properties for sale, the defendant issued the mandatory statutory notices as required in section 90 (1) & 96 (2) of the Land Act and Rule 15 of the Auctioneers Rules.

8. The plaintiffs in their submissions took issue with the dates indicated when the letters of notice were sent out. At page 253 of the replying affidavit is a list of letters sent out via registered mail by the defendant. Item No 251 & 251 in that list is addressed to the directors of the 1st and 2nd plaintiffs through the stated postal addresses. The date of posted is typed as 18th November 2018 and 18th November 2019. Needless to say that we are yet to reach November 2018 or November 2019. The letter stated to have been dispatched is dated 22nd November 2016 (annex **RK – 12** at page 251). The receiving stamp of the post office is not legible so I am unable to make out the date when it was presented for postage.

9. The notice under the Auctioneers Rules was however received as a copy of the same is annexed to the affidavit in support of the application as and marked **NAN – 2** at page 71 – 73. The defendant annexed the copies of the 90 days & 40 days notices issued to the 1st plaintiff as required under section 90 (1) of the Land Act. However there is no receipt issued by the post office to show that indeed the letters were dispatched to the plaintiffs via registered mail. The list appearing on pages 253 & 256 of their replying affidavit is a document prepared by themselves. Besides the one in page 253 contained wrong dates of dispatch consequently the same cannot be taken as sufficient proof of service as provided in clause 22.2 of the charge document. Clause 22.2 states thus,

“Any notice or demand given or made by one party hereto to the other shall be deemed made and served

(a) When left (in the case of lender) at its above address and in the case of guarantor at the registered or principal office of the Borrower or

(b) Five days after posting provided that proof is given that the notice or demand was properly addressed and adequately stamped and put into the post.

10. In light of the uncertainty of the dispatch date & lack of proof of postage I am satisfied that the applicants have shown that the provisions of section 90 of the Land Act was not properly complied with. This non-compliance means the applicants have demonstrated that they have a prima facie case with a probability of success. The case of **Albert Mario Corderio & Another vs Vishram Shamji (2015) eKLR** cited by the Respondent has raised pertinent issues relevant to the present case. For instance, it raises the question whether statute requires the chargee to issue a notice of not less than 3 months or 90 days. Gikonyo J in the Albert Mario case quoted the Court of Appeal decision of **Trust Bank Ltd vs Eros Chemists Ltd (2000) 2 E A 550 (CAK)** where the Appeal Judges said thus, ***“In our judgment, the heart of this appeal lies in the central question as to what constitutes valid notice under section 69 (A) (1) of the Transfer of Property Act ...*** No form of notice is prescribed. It is sufficient that the notice gives the mortgagor the prescribed period of warning.

11. The Judge took note of the fact that the applicant in that case had defaulted. He decided to take a path which he deemed as fair and just to all and which carries the lower risk of injustice. Given the similarity of facts of the Alberto case to this one, I shall also adopt the path taken by Gikonyo J. Accordingly the application is allowed on terms that:

(i) A temporary order of injunction to restrain the sale of the suit properties until the Mandatory Statutory notice is issued & served in accordance with section 96 (2) of the land Act and clause 22.1 of the Charge Document.

(ii) The Applicants to settle any and/or all outstanding instalments/arrears within 30 days of today, the Respondent is at liberty of issuing the notices set out in (i) above.

(iii) Each party to bear the respective costs of the application.

Dated, signed & delivered at Mombasa this 25th May 2018

A. OMOLLO

JUDGE