



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAKURU**

**CASE No. 219 OF 2016**

**SUPA DUKA NAKURU LTD.....PLAINTIFF**

**VERSUS**

**AGRICULTURAL FINANCE CORPORATION.....DEFENDANT**

**RULING**

1. This ruling is in respect of plaintiff's Notice of Motion dated 15<sup>th</sup> June 2016 pursuant to which the following orders are sought:

**1. Spent.**

**2. Spent.**

**3. The court do issue an order for temporary injunction restraining the defendants/their servants, agents and/or employees from, selling, disposing, alienating or in any other manner, whatsoever interfering with the plaintiff's land parcel No. 4730/54 (original number 4730/6/14) Township until this suit is heard and determined.**

**4. The court do make such further or better orders as may meet the ends of justice in this matter.**

**5. This order be served upon Legacy Auctioneers for compliance.**

**6. Costs of this application be provided for.**

2. The application is supported by an affidavit sworn by Joseph Boro Ngera, a director of the plaintiff company. It is deposed in the affidavit that the plaintiff obtained a loan of KShs 11,600,000 from the defendant in the year 2000 and charged the land known as parcel No. 4730/54 (Original Number 4730/6/14) in favour of the defendant as security. Owing to various problems experienced in its farming business, the plaintiff was unable to honour its repayment obligations.

3. The deponent further stated that the defendant instructed an auctioneer to sell the suit property by public auction without issuing any statutory notice. The auctioneer served upon the plaintiff 45 days Redemption Notice and Notification of Sale on 28<sup>th</sup> April 2016. Copies of these notices were annexed to the affidavit. It was also deposed that the defendant has given the plaintiff varying figures as the amount owing, that the defendant has not given the plaintiff any statement of account and that the plaintiff does not know how much interest it is supposed to pay. Further, it was deposed that the plaintiff filed another suit against the defendant being Nakuru CMCC No. 10 of 2009. The suit has not been prosecuted and is still pending.

4. The defendant opposed the application through a replying affidavit sworn by John M. Kithinji, its Legal Officer. He stated that the plaintiff defaulted in its loan repayment obligations and as a result, the defendant served the plaintiff with various statutory notices. Copies of notices dated 12<sup>th</sup> October 2015, 21<sup>st</sup> August 2014, and 12<sup>th</sup> February 2008 were annexed. The defendant subsequently instructed M/s Legacy Auctioneers to sell the suit property by public auction. In response to that action, the plaintiff filed HCCC No. 2006 which was later dismissed for want of prosecution. After the dismissal, the plaintiff filed Nakuru CMCC No. 10 of 2009 which has not been prosecuted and is still pending.

5. It was further deposed that the plaintiff has admitted being indebted to the defendant. The plaintiff made promises to pay but which promises were not honoured. As an example of such admission and promises, the deponent annexed a copy of a letter from the plaintiff dated 9<sup>th</sup> February 2015. Owing to the plaintiff's failure to repay the loan, a 45 days Redemption Notice and Notification of sale were served upon the plaintiff on 28<sup>th</sup> April 2016.

6. Though the plaintiff sought and obtained leave to file a further affidavit in response to the defendant's replying affidavit, none was filed. Ultimately, the application was argued by way of written submissions. The applicant filed submissions on 26<sup>th</sup> May 2017 while the defendant filed submissions on 18<sup>th</sup> July 2017. Additionally, there was oral highlighting of submissions. I have carefully considered the application, the affidavits and the submissions.

7. In an application for an interlocutory injunction, the applicant must satisfy the test laid down in **Giella –vs- Cassman Brown & Co. Ltd [1973] E.A 358**. It must establish a *prima facie* case with a probability of success. Even if a *prima facie* case is established, an injunction will not issue if damages can adequately compensate the applicant. Finally, if the court is in doubt as to the answers of the above two tests then the court will determine the matter on a balance of convenience. As was held by the Court of Appeal in **Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR**, all the three **Giella** conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially and that if *prima facie* case is not established, then irreparable injury and balance of convenience need no consideration.

8. There is no dispute that the plaintiff defaulted in its repayment obligations. The plaintiff itself admits as much. It follows therefore that an occasion had arisen for the defendant to issue to the plaintiff the notice provided for under Section 33 (1) of the Agricultural Finance Corporation Act. The plaintiff contends that the statutory notice was not issued. The defendant on the other hand maintains that several statutory notices were issued and in that regard the defendant exhibited notices dated 12<sup>th</sup> February 2008, 21<sup>st</sup> August 2014 and 12<sup>th</sup> October 2015. I have perused the notices and I have no doubt that they constitute valid statutory notices. Though the plaintiff was granted an opportunity to file a further affidavit, none was filed. The defendant's position that the statutory notices were issued therefore remains unchallenged. I am thus not persuaded by the plaintiff's argument that no statutory notices were issued.

9. The plaintiff also argued that the defendant was demanding varying amounts and that it was not aware of the interest rate that is applicable. All these arguments go to the issue of the amount payable. As I understand it, the law has always been that a dispute on the amount owing cannot be a basis to stop a chargee from exercising statutory power of sale. On this point, I need not go further than quote **Halsbury's Laws of England**, volume 32 (4<sup>th</sup> edition) paragraph 725:

**725. When mortgagee may be restrained from exercising power of sale.**

*The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has begun a redemption action, or because the mortgagor objects to the manner in which the sale is being arranged. He will be restrained, however, if the mortgagor pays the amount claimed into court, that is, the amount which the mortgagee claims to be due to him, unless, on the terms of the mortgage, the claim is excessive.*

10. In view of all the foregoing, I am not persuaded that the plaintiff has established a prima facie case with a probability of success. That being the case, Notice of Motion dated 15<sup>th</sup> June 2016 is dismissed with costs to the defendant.

**Dated, signed and delivered in open court at Nakuru this 11<sup>th</sup> day of May 2018.**

**D. O. OHUNGO**

**JUDGE**

In the presence of:

Mrs. Mwangi for the plaintiff/applicant.

No appearance for the defendant/respondent.

Court Assistant: Gichaba