



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE No. 13 OF 2018

PP FLORA LIMITED.....1ST PLAINTIFF

PRAKASH CHANDER RAM.....2ND PLAINTIFF

VERSUS

DEVELOPMENT BANK OF KENYA LIMITED.....DEFENDANT

RULING

1. This ruling is in respect of plaintiff's Notice of Motion dated 22nd January 2018, an application pursuant to which the plaintiff sought the following orders:

1. Spent.

2. Spent.

3. Spent.

4. An interim temporary injunction be issued restraining the defendant either by itself or its agents and/or employees or otherwise howsoever from transferring, offering for sale, leasing, subletting, charging and/or interfering and/or otherwise dealing in any other manner howsoever with the properties known as Nakuru/Scheme/Rongai/67 and Naivasha/Maraigushu Block 4/1350 (Kihunyuro) pending hearing and determination of the suit herein.

5. Costs of this application be borne by the defendant.

2. The application is supported by an affidavit sworn by Prakash Chander Ram who is the 2nd plaintiff and a director of the 1st plaintiff. He deposed that he is the registered owner of the parcels of land known as Nakuru Scheme/Rongai/67 and Naivasha/Maraigushu Block 4/1350 (Kihunyuro) (the suit properties). He added that through letter of offer dated 5th February 2007 the defendant advanced to the 1st plaintiff a loan of KShs 55,000,000, an overtrade facility of KShs 5,000,000 and further term loan of KShs 50,486,945.24 which comprised an existing overdraft facility of KShs 43,478,542.84, loan arrears of Euros 18,726.45 and a further term loan of KShs 5,000,000 through letter of offer dated 9th March 2009. These facilities were secured by a charge dated 16th May 2007 over Nakuru/Scheme/ Rongai/67 and a further charge dated 15th August 2008 over the same property. However on 9th March 2009, the defendant cancelled the second facility without any reasonable explanation. As a result, the 1st plaintiff experienced financial strain and was unable to finance its operations. Further, in the year 2015 and 2016, the plaintiff suffered further setback when its green houses and irrigation system were damaged by whirlwinds and rains.

3. On 8th January 2018, the 2nd plaintiff saw an advertisement in the Daily Nation of that date regarding a scheduled auction sale of the suit properties. The deponent stated that he was not served with proper statutory notices. When he went to enquire from the defendant, he was given copies of notices addressed by registered post to P. O Box 15846-00100 Nairobi, an address which he surrendered in the year 2011 and formally notified the defendant. He added that the defendant has greatly undervalued the suit properties and that the amount that the defendant is seeking to recover is not correct.

4. The defendant opposed the application through a replying affidavit sworn by Olga Sechero an officer of the defendant Bank in charge of Credit. She deposed that 1st plaintiff defaulted on its repayment obligations despite being indulged by the bank. As an example, she annexed a copy of an email written by the 2nd plaintiff to the defendant on 26th October 2016 in which he sought to be given up to the end of December 2016 to sell the properties failure to which the defendant could go ahead and sell. The plaintiffs did not honour the indulgence given pursuant to the said request. She further stated that the plaintiffs were served with fresh statutory notices dated 31st January 2018 both by delivery to their advocates on record on 1st February 2018 and by registered post to P. O. Box 87 Nakuru on 1st February 2018. She added that the bank would issue the remaining notices prior to the next auction. In a supplementary affidavit filed on 3rd July 2018, she annexed a

fresh 40 days' notice dated 2nd May 2018 which she stated was served upon the plaintiffs on 3rd May 2018.

5. The application was heard by way of written submissions. The applicants filed submissions on 3rd May 2018 while the defendant/respondent's submissions were filed on 3rd July 2018. I have carefully considered the application, the affidavits filed and the submissions.

6. In an application for an interlocutory injunction, the applicant must satisfy the test in **Giella –vs- Cassman Brown & Co. Ltd [1973] E.A 358**. He must establish a *prima facie* case with a probability of success. Even if a *prima facie* case is established, an injunction would not issue if damages can adequately compensate him. Finally, if the court is in doubt as to the answers of the above two tests then the court would determine the matter on a balance of convenience. As was recently 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.

7. The applicants herein deposed that they were not served with any statutory notices in respect of the auction that the defendant had scheduled for 25th January 2018. Pursuant to **Section 90(1) and (2) of the Land Act No. 6 of 2012**, a statutory notice is a mandatory prerequisite of any valid exercise of a chargee's remedies. The Section provides:

90. Remedies of a chargee

(1) If a chargor is in default of any obligation, 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.

(2) The notice required by subsection (1) shall adequately inform the recipient of the following matters—

(a) the nature and extent of the 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 payment 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 charge, 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 consequence 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.

8. I have perused the replying affidavit and supplementary filed by the defendant. I have not seen any notice that satisfies the requirements of section 90 of the Act. Although the defendant referred to two notices dated 3rd March 2016 and 9th August 2016, I note that the one dated 3rd March 2016 demanded payment within 2 months failure to which statutory power of sale would be exercised while the one dated 9th August 2016 gave notice of 40 days only. Either way, the requirement of the law as regards statutory notices was not satisfied. Perhaps in acknowledgment that it had not complied with the law, the defendant issue a new statutory notice on 31st January 2018, during the pendency of this matter in court.

9. I am therefore satisfied that the applicants have established a *prima facie* case with a probability of success as regards their complaints in relation to the sale that was scheduled for 25th January 2018. I do not think that damages would be an adequate remedy to the plaintiffs in the circumstances.

10. I must however emphasise that the defendant would be at liberty stage a new sale if the same is organised in accordance with the law. The court cannot grant a blanket injunction that would amount to restraining any lawful exercise of chargee's remedies that may be arranged in the future.

11. In the end, I make the following orders:

a) I grant an injunction restraining the defendant either by itself or its agents and/or employees or otherwise howsoever from selling, transferring or offering for sale the properties known as Nakuru/Scheme/Rongai/67 and Naivasha/Maraigushu Block 4/1350 (Kihunyuro) pursuant to the defendant's notices dated 3rd March 2016 and 9th August 2016 pending hearing and determination of the suit herein.

b) The defendant is at liberty to stage a new sale or exercise chargee's remedies if the same is done in accordance with the law.

c) Costs of the application are awarded to the plaintiffs.

Dated, signed and delivered in open court at Nakuru this 27th day of November 2018.

D. O. OHUNGO

JUDGE

In the presence of:

Mr Ondieki holding brief for Mr Kashindi for the plaintiffs/applicants

Mr Ojo holding brief for Mr Makambo for the defendant/respondent

Court Assistants: Gichaba & Lotkomoi