



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE No. 455 OF 2017

MURINGA HOLDINGS LIMITED.....PLAINTIFF

VERSUS

KCB BANK LIMITED.....1ST DEFENDANT

GARAM INVESTMENTS AUCTIONEERS2ND DEFENDANT

RULING

1. By Notice of Motion dated 5th December 2017, the plaintiff sought the following orders:

1. Spent.

2. Spent.

3. That an interlocutory injunction be granted restraining the 1st and 2nd respondents whether by themselves, their servants, workers, agents and/or employees from interfering, trespassing, auctioning, wasting, damaging, alienation, sale, removal or disposition of the properties known as LR. No. Naivasha/Mwichiringiri Block 4/623, 637, 638, 639, 640, 649, 656 & 657 or any part thereof pending the determination of the main suit.

4. That the chargee statutory notice issued pursuant to Section 90 (1) (2) (3) (e) and the statutory notice to sell issued pursuant to Section 96 (2) (3) of the Land Act, 2012 by the 1st respondent be revoked/rescinded/voided.

5. That the notification of sale issued by the 2nd respondent be revoked/rescinded/voided and or be postponed and the 2nd respondent be restrained from undertaking the public auction of properties known as LR. No. Naivasha/Mwichiringiri Block 4/623, 637, 638, 639, 640, 649, 656 & 657 which is to be held on 21st December 2017.

6. Spent.

7. That the court do make a declaration that the 1st respondent breached its duty of care to the applicant because it failed to ensure that a forced sale valuation is undertaken by the valuer before exercising the right of sale.

8. That the applicant be granted a further six months within which time to undertake the sale of the adjacent land by way of private treaty of the same land namely: LR. No. Naivasha/Mwichiringiri Block 4/91, 92, 93, 94, 641, 642, 643, 644, 645, 646, 647, 648, 651, 652, 661, 2971 & 2989 to settle its outstanding debt with the 1st respondent because the intended sale by the 2nd respondent is unlikely to offset the full debt owed to the 1st respondent because of the undervaluation of the same by the respondents.

9. That the applicant be granted the costs of this application.

10. That this honourable court do issue any such other and/or further orders as justice of the case herein may demand.

2. The application was supported by a supporting affidavit and further affidavit all sworn by Joseph Njuguna Kibe, a director of the plaintiff company. He deposed that the plaintiff obtained a term loan of Kshs.8, 965, 693/= from the 1st defendant. As security, the plaintiff charged LR. No. Naivasha/Mwichiringiri Block 4/623, 637, 638, 639, 640, 649, 656 & 657 (the suit properties) in favour of the 1st defendant. Owing to difficulties experienced in the business, the plaintiff defaulted in its repayment obligations. The defendants issued an irregular statutory three months' notice dated 6th March 2017, an irregular notice to sell dated 22nd August 2017, notification of sale on 12th October 2017 and

ultimately advertised in the Daily Nation Newspaper of 4th December 2017 that the suit properties would be sold by Public auction on 21st December 2017. The defendants did all these despite pleas by the plaintiff that the notices were irregular and that there had been no valid valuation.

3. The defendants opposed the application through a replying affidavit sworn by Jane Orumoi, a recovery manager with the 1st defendant. She deposed that the plaintiff had failed to properly service its account and as a result a valid statutory three months' notice dated 6th March 2017 served upon the plaintiff. The plaintiff acknowledged receipt and responded through a letter dated 6th April 2017. The 1st defendant thereafter issued a Notice to sell on 22nd August 2017 and obtained a forced sale valuation from Landmark Realtor Limited. The plaintiff once again wrote to the 1st defendant on 3rd October 2017 seeking suspension of the statutory notice. Ultimately, the 1st defendant instructed the 2nd defendant who issued a 45 days' notice on 12th October 2017 and also advertised the suit properties for sale by public auction.

4. The application was heard by way of written submissions. The applicant filed submissions on 26th February 2018 while the respondents filed submissions on 18th August 2018. I have considered the application, the affidavits filed and the submissions.

5. 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 to issue if damages can adequately compensate him. Finally, if the court is in doubt as to the answers to 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.

6. A perusal of the applicant's supporting affidavit shows that the applicant admits defaulting on its repayment obligations and receiving statutory notices from the 1st defendant and even the 2nd defendant. I note that the applicant itself annexed a copy of a three months statutory notice under Section 90 (1) (2) (3) (e) of the Land Act issued by the 1st defendant and dated 6th March 2017. The copy clearly shows that it has the applicant's receiving stamp dated 22nd March 2017. The defendants' annexure KCB – 2 is a copy of the applicant's letter dated 6th April 2017 which shows that upon receiving the three months statutory notice, the applicant's officers held a meeting with the 1st respondent and made proposals on how to clear the outstanding arrears. Similarly, the Notice of sell under Section 96 (2) (3) of the Act bears the applicant's receiving stamp showing that it was received on 6th September 2017. Even the notification of sale issued by the 1st defendant was received and signed for on behalf of the applicant by Joseph N. Kibe on 13th October 2017. Additionally, notices issued by the 2nd defendant bear the applicant's receiving stamp of 13th October 2017. I have carefully read all these notices and see nothing in them that supports the applicant's allegation of irregularity.

7. The applicant has also argued that there was no valid forced sale valuation and that the suit properties were undervalued. The requirement of a forced sale valuation is found at Section 97 (1) and (2) of the Land Act 2012 which provides:

97. Duty of chargee exercising power of sale

(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.

8. The respondents exhibited a copy of a valuation by Landmark Realtors Limited dated 16th June 2017 which put the forced sale value of the suit properties at KShs 32,450,000. Considering that all the suit properties were provided by the applicant to collectively secure a loan of KShs 8,965,693 hardly a year before the valuation by Landmark Realtors Limited, I do not see how a forced sale valuation of KShs 32,450,000 can be said to be an undervaluation. All in all, I find no merit in the applicant's arguments as regards the issue of valuation.

9. The applicant has failed to establish a *prima facie* case. That being so, an injunction is not available to the applicant. I note that prayers 4, 7 and 8 of the Notice of Motion are repetitions of prayers (b), (d) and (e) respectively of the plaint. These prayers seek final relief which must await the main hearing of the suit.

10. In view of the foregoing, Notice of Motion dated 5th December 2017 is dismissed with costs to the defendants.

Dated, signed and delivered in open court at Nakuru this 4th day of December 2018.

D. O. OHUNGO

JUDGE

In the presence of:

Mr Mutai holding brief for Mr Wakaba for the plaintiff/applicant

Ms Wachira holding brief for Ms Matu for the 1st defendant/respondent

No appearance for the 2nd defendant/respondent

Court Assistants: Gichaba & Lotkomoi