



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT KERICHO

CIVIL CASE NO 56 OF 2016

STEPHEN KIPKATAM KENDUIYWA T/A KAPCHEBET FARM.....PLAINTIFF

VERSUS

SIDIAN BANK LIMITED1ST DEFENDANT

JOSEPH M GIKONYO T/A GARAM INVESTMENTS AUCTIONEER...2ND DEFENDANT

RULING

(Application for injunction; principles to be applied; chargor arguing that chargee is not properly exercising its power of sale; no contest that statutory notices were issued; no requirement for fresh notices to be issued before subsequent advertisements of the charged property; valuation; chargee's obligation to value the property; argument that the valuations are below market value; chargee's obligation is to engage a professional valuer and cannot dictate the values; obligation discharged once the valuer is appointed and a valuation is done; sale cannot be stopped because chargee's and chargor's valuers raise different values for the property; proper value will be revealed at the auction sale; application dismissed)

1. The application before me is one for injunction, seeking to stop the 1st defendant bank from exercising its statutory right of sale, pending the hearing and determination of this suit. This being an application for injunction, I stand guided by the principles laid down in the case of ***Giella vs Cassman Brown (1973) EA 358***, wherein the East African Court of Appeal stated that to succeed in such an application, the applicant needs to demonstrate a prima facie case with a probability of success and further show that he stands to suffer irreparable loss unless the injunction is granted; if the court is in doubt, the application will be decided on a balance of convenience.

2. In order to determine whether or not an applicant has laid down a prima facie case, it is inevitable that a preliminary assessment of his case be made by the court determining the application. This will of course be made with the utility of the plaintiff's pleadings and affidavit evidence furnished at that stage of the proceedings. If the defendant has replied to the application, the examination must include the reply made in light of the material tabled by the respondent. Upon assessment, the court will then determine whether or not the applicant has laid down a prima facie case, which to me, means nothing more than if all factors are held constant, the plaintiff has a large likelihood of succeeding in his suit. It needs to be understood however that this assessment is only preliminary, made for purposes solely of determining the application for injunction, and the court may very well arrive at a different finding upon hearing of the suit on merits.

3. I will therefore straight away proceed to lay down the plaintiff's case and the response by the bank and

determine whether or not I am of the view that a prima facie case has been disclosed.

4. This suit was commenced by way of a plaint filed on 15 August 2016. The plaintiff is the registered proprietor of the **land parcels Kericho/Kipchimchim/1179 and 1181 and Kericho/Kabianga/2430 and 3707** which properties were used as security for a loan facility of Kshs. 91,809,173/= advanced to the plaintiff to expand his tea farming and hotel business. The money was loaned out in March 2014. It does seem that his account quickly fell into arrears, and it is pleaded in the plaint, that on 17 April 2015, the 1st defendant (or the bank) served upon the plaintiff a statutory notice for the sale of all properties offered as security. Another statutory notice was issued on 19 June 2015. The bank thereafter advertised the properties for sale with the public auction due on 29 October 2015. There followed negotiations pursuant to which the plaintiff was allowed to dispose the properties **Kericho/Kabianga/2430 and 3707** which fetched the sums of Kshs. 14 Million and Kshs. 43,700,000/= respectively. These monies were used to reduce the loan account but still left a significant sum outstanding. The plaintiff has averred that there was then a restructuring of his loan. He has pleaded that he requested the bank to allow him to sell through private treaty the remaining properties **Kericho/Kipchimchim/1179 and 1181** where the plaintiff has developed a hotel straddling both parcels of land. He has pleaded that the value of these two properties is Kshs. 123,000,000/=; that he has a buyer for Kshs. 120,000,000/= ; and that the purchaser was due to pay the money on or before 31 August 2016. He has pleaded that despite this, the bank through a "courtesy letter" sent on 29 July 2016 signaled intention to sell the hotel through a public auction due on 22 August 2016 to be undertaken by the 2nd defendant who is an auctioneer. It is the plaintiff's pleading that this is a show of bad faith and an act of attempted illegal deprivation of the plaintiff's property.

5. It is this intended sale which prompted the plaintiff to file this suit and with it this application for injunction. I did give interim orders subject to some conditions, stopping the sale, pending hearing and determination of the application.

6. It is the case of the plaintiff that the 1st defendant ought to have undertaken a valuation before the intended sale; was duty bound to issue fresh notices including a notification of sale; and that the courtesy letter of 14 days has the effect of clogging his equity of redemption given that he has executed a sale agreement for the property. He has pleaded that all he needs is time to have the sale agreement he has negotiated materialize.

7. In the suit, the plaintiff has asked for the following orders (which I have slightly paraphrased) :-

(a) An order that accounts be taken between himself and the bank on the interest applicable, the amount paid and the legally due balance.

(b) An order of declaration that the courtesy letter served upon the plaintiff dated 29 July 2016 is null and void and that the same cannot base any legal sale in exercise of the statutory power of sale.

(c) An order of declaration that the 1st defendant is stopped by conduct from selling the property by public auction, hence the exercise of the chargee's statutory power of sale is premature, unsupported and illegal.

(d) An order of permanent injunction restraining the defendants from selling the suit properties following the courtesy letter dated 29 July 2016.

(e) Mandatory injunction directed at the 1st defendant to follow the law on the issuance of the requisite notices in the exercise of its statutory power of sale.

(f) Costs of this suit with interest at court rates.

(g) Any other relief that this honourable court may deem fit to grant.

8. The 1st respondent filed a replying affidavit sworn by Judith Kipngok, the Manager of its Kericho

Branch. She has deposed inter alia that the plaintiff did not comply with the terms of the loan even after the same was restructured. She has averred that the requisite statutory notices were sent. She has agreed that the plaintiff was allowed to sell two of his properties in an attempt to regularize his loan and has stated that any offer to the plaintiff to sell the properties in issue cannot be open ended. She has taken note of the fact that the date of 31 August 2016, which is the date that the plaintiff has averred that his private sale was to materialize, is now long gone and there has been no sale by the plaintiff. On the letter of 29 July 2016, she has stated that the same was sent purely out of courtesy with intention to notify the plaintiff that the bank would re-advertise the suit properties for sale. She has contended that there was no obligation to serve a fresh statutory notice. She has pointed out that indeed the plaintiff does not contest that a statutory notice was issued. She has deposed that the plaintiff was also served with notices by the auctioneer and she annexed the same to her affidavit. She has further deposed that the bank has done a current valuation of the property and she annexed valuation reports made in September 2015.

9. The plaintiff did file a supplementary affidavit vide which he essentially attacked the valuation reports tabled by the bank. He observed that the valuation reports made in the year 2015 show values of Kshs. 85,000,000/= and Kshs. 82,500,000/= yet the same property was valued at Kshs. 123,000,000/= in the year 2013. He has annexed a valuation report of his own, prepared by Primeland Limited, showing that the property is valued at Kshs. 120,000,000/=. He has asked that this court subjects the property to another valuation process. On his proposed sale of the property, he has deposed that the intending purchaser failed to procure financing in time.

10. In his submissions, Mr. J.K Mutai for the applicant, appeared to narrow his client's case on the question of valuation of the suit properties. He criticized the valuation reports of the bank prepared in September 2015 by Crystal Valuers (reflecting Kshs. 85,000,000/= as market value and Kshs. 65,000,000/= as forced sale value) and Advent Valuers (reflecting Kshs. 82,500,000/= as market value and Kshs. 61,875,000/= as forced sale value). He submitted that on 27 October 2013, the properties had been valued by Add Property Consultants at Kshs. 123,000,000/= and a forced sale value of Kshs. 92,250,000/=. He pointed at his client's valuation of the property which shows the sum of Kshs. 120,000,000/= as the current market value. He submitted that the valuation confirms that no current valuation was done at the time of the advertisement of the property. He contended that the valuations done by the bank are an undervaluation and that they do not amount to valuation for purposes of Sections 97(1) and (2) of the Land Act, 2012. He submitted that his client deserves to have his property sold at the current market value and that a proper valuation ought to be done. He argued that it is not safe to have the sale proceed under the unclear valuation of the property. He averred that if the sale proceeds without proper valuation, the plaintiff stands to suffer irreparable loss incapable of compensation by an award of damages.

11. In response, Mr. Muthama for the bank, submitted inter alia that the bank complied with all required statutory notices. He pointed out that receipt of these notices is not disputed. He submitted that once the notices expired, the statutory right of sale arose. He submitted that postponement of the earlier sales did not vacate the statutory notices. He relied on the case of *Nora Stella Sandhu vs National Bank of Kenya Ltd & Another (2006) eKLR*. He stated that the bank has conducted a valuation and has thus complied with its obligations under Section 97 of the Land Act. He raised issue that the valuation of Kshs. 123,000,000/= was for all the properties tendered as security. He submitted that the plaintiff has come to court with unclean hands for failing inter alia to comply with the terms of the letter of offer and failing to comply with the conditions given for the interim order of injunction and does not deserve the injunction sought. He further averred that the plaintiff was being dishonest in displaying sale agreements which do not materialize.

12. I have considered the matter before me. As I had earlier stated, the application is one for injunction. The plaintiff in his pleadings did raise various issues against the intended sale by the bank of the properties **Kericho/Kipchimchim/1179** and **1181** which constitute the suit properties herein. It will be noted that he argued that no statutory notices had been sent and that the bank was wrong in only sending him a "courtesy letter" informing him that his properties are due for sale. He also argued that the bank ought to afford him time to sell his properties privately and that the bank was wrong to proceed to sell his properties without undertaking a proper valuation. He is of the view that a proper valuation of his

properties need to be done.

13. Having gone through the material before me, it appears that there is no contention on the statutory notices. The plaintiff does indeed concede that the requisite statutory notices were sent to him. I therefore need not make any decision on the matter of the statutory notices which are not in contest. I have also seen the various auctioneers' notices issued and which are annexed in the replying affidavit. Again, these do not seem to be in contention. The only argument raised is whether there needed to be fresh notices before the advertisement of the properties for the sale that was intended to take place on 22 August 2016.

14. I have not been pointed at any law which requires new notices to be issued before a charged property may be advertised for sale. So long as the chargee has served the statutory notices and the auctioneers' redemption notice has been served, I am not aware of any law which requires an additional notice before an advertisement of the property or for fresh notices to be issued before subsequent advertisements of the property. None has been shown to me by the plaintiff and indeed Mr. Mutai did not pursue this argument in his submissions. The bank had no obligation to serve any further notice and I wonder why the plaintiff would complain for being informed, politely, that his property would be advertised for sale. I see nothing untoward in the letter of 29 July 2016 sent out of courtesy and advising the plaintiff that his property would soon be advertised for sale. I therefore find nothing wrong with the advertisement placed in the Daily Nation of 1 August 2016 informing the public that the suit properties were up for sale on 22 August 2016.

15. The plaintiff raised issue that the bank ought not to have advertised the suit properties for sale because he already had a buyer for Kshs. 120,000,000/=. I really do not see the need of saying more on this because the plaintiff himself has admitted that the sale agreement he displayed is not going to materialize since the potential buyer did not follow through on the agreement. In short, the plaintiff has no buyer for the property. But even if the plaintiff had a buyer, this alone would not stop the bank from advertising the property for sale. The chargee has discretion to either allow the chargor to privately dispose of the property or to itself proceed to sell the property through the chargee's statutory power of sale. No prejudice is caused to the chargor if the bank opts to take the latter route. The same buyer that the chargor has can indeed go to the public auction sale and purchase the property. Alternatively, the chargor can negotiate with the bank for the bank to sell the property to the same buyer through private treaty at a mutually agreed purchase price instead of going through a public auction.

16. There is a prayer for accounts but in my view, this alone is not ground enough to stop the auction, unless it is the argument of the plaintiff that he has paid everything and not a single cent is outstanding. That of course is not his case. He does admit owing the bank and indeed that is the very reason he has been scouting for a buyer for his properties, so that money can be raised to offset his loans.

17. The main argument raised by the plaintiff is on the issue of valuation. The **Land Act, 2012** does at **Section 97** lay out the obligation of the chargee on the question of valuation. It is drawn as follows :-

Duty of chargee exercising power of sale.

97.(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.

(3) If the price at which the charged land is sold is twenty-five per centum or below the market value at which comparable interests in land of the same character and quality are being sold in the open market—

(a) there shall be a rebuttable presumption that the chargee is in breach of the duty imposed by subsection (1); and

(b) the chargor whose charged land is being sold for that price may apply to a court for an order that the sale be declared void, but the fact that a plot of charged land is sold by the chargee at an undervalue being less than twenty-five per centum below the market value shall not be taken to mean that the chargee has complied with the duty imposed by subsection (1).

(4) It shall not be a defence to proceedings against a chargee for breach of the duty imposed by subsection (1) that the chargee was acting as agent of or under a power of attorney from the chargor or any former chargor.

(5) A chargee shall not be entitled to any compensation or indemnity from the chargor, any former chargor or any guarantor in respect of any liability arising from a breach of the duty imposed by subsection (1).

(6) The sale by a prescribed chargee of any community land occupied by a person shall conform to the law relating to community land save that such a sale shall not require any approval from a Community Land Committee.

(7) Any attempt by a chargee to exclude all or any of the provisions of this section in any charge instrument or any agreement collateral to a charge or in any other way shall be void.

18. It will be noted from **Section 97 (2)** that the chargee is enjoined to ensure that a forced sale valuation is undertaken by a valuer. The chargee is of course not the valuer, and so long as it has appointed a professional valuer and a report is obtained, that obligation is discharged. The bank is not in control of and cannot direct what value the professional valuer ought to give. That is left to the independent assessment of the valuer. The purpose of the valuation is of course to guide the chargee on the "forced sale value", which essentially is the value of a property urgently put into the market and which must be sold promptly. It will of course be expected to be a price below the market value, the latter being the price that is expected to be obtained if the property is properly marketed and time given for negotiations to obtain the maximum price. Once the chargee conducts the valuation, the rest is left to the market forces to determine the price that will result at the actual auction sale. The obligation of the chargee under **Section 97 (1)** of the **Land Act**, is to obtain the best price reasonably available at the time of sale. If the chargee properly advertises the property and an auction sale is properly conducted, the best price will reveal itself in the highest bidder. That price may or may not be the market price, or indeed the forced sale value. But it will be the best price available all factors held constant. It does appear that the chargee is at liberty to accept the best price, whatever it may be, although a price below 25% will invite the presumption that the chargee is in breach of his duties to obtain the best price.

19. Turning on the valuations tendered in this case, I have seen the valuation dated 2 September 2015 by Crystal Valuers, which gave a market value of Kshs. 85,000,000/= and forced sale value of Kshs. 65,000,000/=. Advent Valuers gave on 30 September 2015, the market value of Kshs. 82,500,000/= and forced sale value of kshs. 61,875,000/=. It will be observed that the bank actually engaged two independent valuers, and to me, the bank did discharge its obligation under Section 97 (2) of the Land Act. The two valuers gave values that are not too far apart. The valuation of the plaintiff is by Primeland Limited which gives a market value of Ksh. 120,200,000/=. It is a valuation that is rather apart from the other two valuers, but again that is the opinion of the valuer engaged. I see no reason why an auction should be stopped merely because the valuer engaged by the chargee has given a different opinion or value from that given by the valuer of the chargor. The proper value will emerge when the property will be offered at the auction sale. That is when it will be discovered how exactly the market views the property. There is therefore no prejudice that is going to be suffered by the plaintiff if the property is offered at an auction. This is not a private sale but an auction where the public is invited. The best price will be revealed at this auction.

20. Given the above, I am not persuaded that the bank needs to be stopped from auctioning the property because there is a difference in the valuations tendered.

21. Having the foregoing in mind, I am not persuaded that the plaintiff has demonstrated to me a case with a probability of success. In any event, if there is any loss to be suffered, the same can be made good by an award of damages. I am not in doubt and therefore need not consider the balance of convenience.

22. I see no merit in the application before me and the same is hereby dismissed with costs.

23. For the avoidance of doubt, the bank is at liberty to advertise the suit properties for sale if it is so minded to do so.

24. Orders accordingly.

Dated, signed and delivered in open court at Kericho this 3rd day of February 2017

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

KERICHO

PRESENT:

Ms Kitur holding brief for Mr. J.K. Mutai for the plaintiff/applicant

No appearance on part of M/s Munyao, Muthama & Kashindi Advocates for the 1st Defendant

No appearance entered for 2nd Defendant

Court Assistant; Wambany