REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 342 OF 2016

BARNABAS ARAP KIPRONO…….....…1ST PLAINTIFF/APPLICANT

KIRTIKUMAR HARSHADBHAI PUROHIT.....2ND PLAINTIFF/APPLICANT

VERSUS

ECO BANK KENYA LIMITED…….....….DEFENDANT/RESPONDENT

RULING

Barnabas Arap Kiprono and ***Kirtikumar Harshadbhai Purohit***, hereinafter referred to as the applicants have come to court against Eco Bank Kenya Limited hereinafter referred to as the respondent for a temporary injunction restraining the defendant from alienating, advertising for sale, offering for sale, selling, taking possession of, leasing, transferring and or otherwise disposing off the whole of those parcels of land known as Eldoret Municipality Block 2/86/1 pending the hearing and determination of the suit. That in the alternative to prayer (b) above, the time for compliance and/or rectifying any default to redeem those parcels of land known as Eldoret Municipality Block 2/84/1 Eldoret Municipality block 2/85/1 AND Eldoret Municipality Block 2/86/1 be extended for a period of 24 months or for such other period as the court may determine pursuant to powers conferred on the court under section 104 (2) as read with section 90 of the Land Act, 2012. That in the alternative to prayer (b) and (c) above, the defendant/respondent's statutory power of sale be suspended and/or postponed for period of 24 months or for such other period as the court may determine to enable the plaintiffs/applicants redeem those parcels of land known as Eldoret Municipality Block 2/84/1, Eldoret Municipality Block 2/85/1 and Eldoret Municipality Block 2/2/86/1. The application is based on grounds that the plaintiffs are joint registered owners of those parcels of land known as Eldoret Municipality Block 2/84/1, Eldoret Municipality Block 2/85/1 and Eldoret Municipality Block 2/86/1. That the plaintiffs have a prima facie case with a probability of success and that damages shall not be an adequate remedy. Lastly, the balance of convenience tilts in favour of the plaintiffs. The gist of the affidavit is that the defendant advanced a loan to Prayosha Ventures Limited and that the plaintiffs guaranteed the said Prayosha Ventures Limited the loan and as collaterals they charged land parcels known as Eldoret Municipality Block 2/84/1, Eldoret Municipality Block 2/85/1 and Eldoret Municipality Block 2/86/1.

That all along, the plaintiffs have been assuming that all is well between the defendant and the principal borrower. It is claimed that on the 15th November 2016, the plaintiffs received a letter dated 20th September 2016 forwarding a notification of sale from Valley Auctioneers indicating that their parcels of land would be sold by public auction on 29th November, 2016 due to the default of the principal borrower and that to their utter shock, the defendant had commenced the process of carrying out the chargees statutory power of sale without compliance with the law. That the sale of the parcels of land is improper for the reasons that the alleged realization process commenced by the defendant/respondent is a nullity in law as the defendant/respondent has not served them with statutory notice at all and that the

defendant/respondent has not issued them with a statutory notice that complies with section 90(1) and 90(2)(b) of the Land Act, 2012. Moreover, the defendant/respondent has not issued them at all with the 40 days' statutory notice under section 96(2) of the Land Act, 2012.

Furthermore, that the instructed Auctioneers have not served them with notification of sale as required under the Auctioneers Act. The plaintiffs further complain that no advertisement of the property has been done by the instructed Auctioneers and that the amount required to remedy the default has not been stated. According to the plaintiffs no valuation of the properties has been carried out and that the equity of redemption is being closed. Lastly that the defendant has not exhausted alternative remedies available before resorting to sale of the collaterals. That based on the above reasons, they have a prima facie case with a probability of success and that damages shall not be an adequate remedy as their properties shall be sold on an irregular sale. That the balance of convenience tilts in their favor or maintaining the status quo. That the chargee ought to have exercised any other remedies prior to resorting to the power of sale. That he has contacted the directors of the principal borrower who have informed him that they are waiting for money from transactions they have carried out to enable them regularize payment of the loan.

In the replying affidavit, Sammy Miring'u, a Remedial Officer for the respondent herein states that the respondent complied with all the contractual and statutory provisions seeking to realize the security in exercise of its statutory powers of sale. In a nutshell, the respondent states that the respondent herein advanced a banking facility of Kenya Shillings One Hundred and Forty Five Million (Kshs.145,000,000) to Prayosha Ventures Limited in the year 2015. The plaintiffs/applicants herein guaranteed the above-mentioned banking facility through a charge over the subject properties being land parcels numbers Eldoret Municipality/Block 2/84/1, Eldoret Municipality/Block 2/85/1 and Eldoret Municipality/Block 2/86/1. That it is a term of the contract between the parties herein and the borrower that the above-mentioned banking facility was to be repaid together with interest in monthly installments.

The borrower and the plaintiffs/applicants defaulted in repayment of the loan facility and the outstanding loan amount owed to the respondent stood at Kenya Shillings One Hundred and Six Million Nine Hundred and Eighty Thousand Eight Hundred and Thirty Ninety Eight Cents (Kshs.106,980,830.98) as at 5th November, 2016 and the said amount continue to accrue interest. The borrower and plaintiffs/applicants breached their contractual obligation on repayment and remained in default even after a formal demand was made to them hence inviting the respondent to commence the process of exercising its statutory power of sale. That the respondent issued the first statutory notice as envisaged under section 90(1) and 2(b) of the Land Act, 2012 giving the borrower and the plaintiffs/applicants notice to rectify the default within a period being not less than three months.

That the borrower and the plaintiffs/applicants failed to rectify the default within the three months prompting the respondent to issue a notice of intention to exercise its statutory power of sale as envisaged under section 96(2) of the Land Act, 2012 giving the borrower and the plaintiffs/applicants a forty days' grace period to redeem the securities. The borrower and the plaintiffs/applicants were duly served with all the statutory notices vide registered posts to their last know postal addresses as envisaged at clause 30.5 of the Charge Instrument hence denial of service is malicious and actuated by the desire to defeat contractual provisions. The respondent has complied with the provisions of section 97(2) of the Land Act, 2012 by conducting a valuation of the properties before any sale can be conducted hence the interests of the plaintiffs/applicants have been taken care of.

When the borrower and the plaintiffs/applicants failed to rectify the default by repaying the loan, the respondent instructed Valley Auctioneers to recover the loan through a sale by auction of the subject properties. That the above-mentioned Auctioneers proceeded to issue a Notification of Sale by Auction as envisaged under the Auctioneers Act and more particularly Rule 15 of the Auctioneers Rules and advertised the subject properties compliance with the provisions of section 21 of the Auctioneers Act, Chapter 526 of the Laws of Kenya.

The respondent holds money and deals with it in trust for the depositors and shareholders hence this Honourable court should consider the public interest question in the matter vis-à-vis the applicants' private interests. That he is advised by the respondent's advocates on record which advise he believe to be

true that the plaintiffs/applicants having come before this Honourable court for equitable remedies ought to have come with clean hands but they have failed to do so by maliciously misrepresenting and concealing material facts as can be gleaned from the denial of service of the statutory notices hence this Honourable court should not exercise its discretion in their favour.

The 2nd plaintiff/applicant is director of Prayosha Ventures Limited, the borrower herein, hence it is utterly deceptive for the plaintiffs/applicants to allege that they were not aware of the default on the part of the borrower and this amount to material misrepresentation and non-disclosure which deprive them of the right to any assistance by this Honourable court through exercise of discretion in granting temporary injunctions. That the plaintiffs/applicants will not suffer any irreparable damage if the orders sought in the Notice of Motion application are declined because the value of the properties is known or can easily be ascertained to enable computation of adequate compensation and in any case, there is nothing unique about the subject properties that cannot be remedied by acquisition other similar properties.

That in any case the plaintiffs/applicants were fully aware of the consequences of standing in surety for the borrower and more so the fact that a default in repay the loan facility would lead to the forfeiture of the subject properties hence they can be allowed to backtrack from what they voluntarily acceded to the detriment of the defendant/respondent.

That on the other hand the respondent will suffer irreparable harm being that it will not be able to get its money on time hence negatively affecting its liquidity exposing it to potential winding up causes which is an irreversible damage.

That the application has been brought too late in the day the same having been filed on 21st November, 2016 which was just eight days to the date of the sale and this offends the cardinal principle of equity that equity only aids the vigilant and not the indolent hence the plaintiffs/applicants are underserving of the equitable remedies being sought.

Mr. Mathai leaned counsel for the applicant submits that the chargees statutory power of sale was nullity for the following reasons;

> ***1. Pursuant to section 90, a charge has to issue a statutory notice. No notice was issued in respect of the amount claimed in respect of Kshs.102,359,116.29.***
>
> ***2. No notice was issued pursuant to section 96 of the Land Act.***
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> ***3. Applicants were not served with any Bank statements.***
>
> ***4. No valuation was done before the chargees exercises the statutory power of sale.***
>
> ***5. Notification of sale issued by charge is void and it was addressed to a different person.*** **It was issued to Prayosha Ventures, the principal borrowers. The guarantors were never served. Valley Auctioneers were instructed by Eco Bank.**

The plaintiffs argue that the guarantors never guaranteed the principal borrower to be advanced a sum of shillings by Eco Bank Kenya Limited. The statutory notice does not indicate what action the guarantors need to take to rectify or remedy the breach by the principal borrower. The chargee went ahead to issue a notice of 40 days. The statutory notice does not comply with section 76(1) of the Act. It does not show that the borrower failed to pay. In Notice dated 5.8.2016, they are claiming Kshs.98,214,617.82. This is a contradiction to the Act and the statutory notice of sale. Given the difference of Kshs.20,000,000. The spouses of the guarantors also gave their consent and therefore Pursuant to section 96, having given consent, they ought to have been given notices. None of the spouses was ever served. There were other guarantors but they were never served. The balance of convenience tilts towards his client. The applicant will be more inconvenienced if the same is sold at the value given as the property is for more than Kshs.300,000,000. The greater injustice will be selling the property as it will go for a lesser value. It will not even satisfy the amount to be realized.

Mr. Kenei, learned counsel for the respondent submits that the application is opposed. They rely on the replying affidavit signed by Sammy Muring'u. The application before court is in two limbs. One is for the temporary injunction and the other is for the orders to vary the terms of the charge. The charge is a contract between the plaintiff and the defendant and that the terms of payment are well stipulated. The court cannot vary the term of the charge. The principles for injunction are well settled. He who seeks injunction must demonstrate a prima facie case and irreparable harm and that on the balance of convenience, the harm will be greater than the benefit.

The respondent has explained in their replying affidavit the procedures taken. The charge document provided several mechanisms for serving the notice. One of them was by the registered post. Clause 30.5 provides for notices. Notices could be served by registered posts. They have provided for evidence of service. He has the E.T.R. receipts as 6(b). The notices were served. On prima facie case, the plaintiffs have failed to demonstrate that they a prima facie case with a likelihood of success. On irreparable harm, the plaintiff envisaged a situation where the property could be sold. They were aware and consented to the properties being sold in case of default. They were willing to take liability on behalf of the borrower. They should not have accepted to be the guarantors. The plaintiffs are holding his client's money in excess of Kshs.100,000,000. Conversely, his client requires the money for business which business is likely to collapse as client holds money in trust for depositor who requires their money when they need it. If depositors fail to access their funds, they are likely to be sued and the same will damage the reputation of the defendant, no compensation can compensate the damage on The property, the subject of the suit has been valued and already there is a valuation report. There is nothing unique about the property, the plaintiff can acquire similar properties. His client suffers greater harm if the loan is not recovered. The balance of convenience tilts in favour of not granting the orders. The plaintiff came to court on 21.11.2016. The valuation report was made on 17.10.2016. The report was filed more than a month before the plaintiff came to court.

Mr. Kenei further submits that statutory notices clearly stipulated the amount to plaintiff ought to pay. They demanded Kshs.103,000,000/= as at 10.4.2016. Kshs.98,214,617.82 was after some time. The issue of Eco Bank (K) was an error. Prayosha Ventures and Prayosha Ventures Ltd are the same thing but it was just an error to call Prayosha Venture instead of Prayosha Ventures Ltd. For the court to grant such orders, the party must come to court with clean hands. The plaintiff does not say that he owes the bank.

I have carefully considered the application, supporting affidavit, replying and rival submission by counsel and do find that as is the practice in such cases in applications for temporary injunction, the power to grant temporary injunction is in the discretion of the Court. This discretion however should be exercised reasonably, judiciously and on sound legal principles. Before granting a temporary injunction, the court must consider the following principles: --

1) whether the applicant has demonstrated a prima facie case with a probability of success.

2) Whether the applicant is likely to suffer irreparable harm if injunction is not granted.

3) Where the balance of convenience tilts if the court is in doubt.

The existence of a prima facie case in favor of the plaintiff is necessary before a temporary injunction can be granted to him. ***Prima Facie*** case has been explained to mean that a serious question is to be tried in the suit and in the event of success, if the injunction be not granted the plaintiff would suffer irreparable injury. The burden is on the plaintiff to satisfy the court by leading evidence or otherwise that he has a ***Prima Facie*** case in his favor of him. A prima facie case does not mean a case proved to the hilt but a case which can be said to be established if the evidence which is led in support of the same were believed. ***Irreparable injury*** means that the injury must be one that cannot be adequately compensated for in damages the existence of a prima facie case is not itself sufficient. The applicant should further show that ***irreparable injury*** will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury. The court should issue an injunction where the ***balance of convenience*** is in favor of the plaintiff and not where the

balance is in favor of the opposite party. The meaning of ***balance of convenience*** in favor of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favor of the plaintiffs, the inconvenience caused to the plaintiff would be greater than that which would be caused to the defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience, it is really the ***balance of inconvenience*** and it is for the plaintiffs to show that the inconvenience caused to them would be greater than that which may be caused to the defendants. Should the inconvenience be equal, it is the plaintiffs who suffer. In other words, the plaintiffs have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than which is likely to arise from granting it.

The first issue raised by Mr. Mathai is that no notice under section 90 was issued. I have seen the document dated 4.4.2016 being a demand letter by Eco Bank Limited to Prayosha Ventures Limited. According to the respondent, as at the date of the letter, the plaintiff was in arrears of Kshs.2,842,838.68. The respondent demanded a repayment of the full amount of Kshs.100,461,159 together with accrued interest. On the 26th April 2016, the respondent through the firm of Chege Nyingi Wanjiru issued a statutory notice delivered to the plaintiffs by registered mail pursuant to the provisions of section 90 of the land act no 6 of 2012 as read together with section 106 (4) of the Land Registration Act No 5 of 2012 laws of Kenya and have seen the documents in terms of the electronic receipts annexed in the supporting affidavit and do find that the plaintiffs were served. Section 90 provides for the remedies of charge provides as follows: -

> ***(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.***
>
> ***(3) If the chargor does not comply within ninety days after the date of service of the notice under, subsection (1), the chargee may—***
>
> ***(a) sue the chargor for any money due and owing under the charge;***
>
> ***(b) appoint a receiver of the income of the charged land;***
>
> ***(c) lease the charged land, or if the charge is of a lease, sublease the land;***

(d) enter into possession of the charged land; or

(e) sell the charged land;

The Statutory Notice dated 26.4.2016 was served upon the applicants on 26.4.2016. The respondent has demonstrated that the statutory notice was served vide NK6(b). I do find that the said notice was clear on the outstanding balance. The import of the last paragraph of the letter dated 26.4.2016 is that the plaintiffs were to pay all the monies in full together with legal court fees and charges. Moreover, the affidavit of Harrisson Githinji confirms that the plaintiffs were served with the 40 days' notification of sale. From the foregoing, I do find that the defendant complied with the procedure for recovery of the debt and do find that the plaintiffs have not established a prima facie case with the probability of success as there was service of statutory notice and notice for redemption. There is on record a valuation report.

On the ***issue of irreparable harm*** that cannot be compensated with damages, the court finds that the plaintiffs having charged their properties to guarantee the loan, the properties became a commodity liable for sale and therefore, they cannot be heard to complain that they are likely to suffer irreparable harm that cannot be compensated in damages. Moreover, the property was valued and therefore the plaintiffs cannot be heard to say that there is no valuation report. The plaintiffs have not established that the defendant will not be able to compensate them in case they succeed on the suit.

On ***balance of convenience***, I do find that the defendant stands to be inconvenienced at a greater extend as the debt is likely to outstrip the borrowed money and the value of the property.

The plaintiff raised the issues of the discrepancies in the figures in the statutory notice which was admitted as an error by Mr. Kenei and the other issue of the discrepancy in the names of ***Prayosha Ventures and Prayosha Ventures Ltd*** and ***Eco Bank Kenya And Eco Bank*** ltd which the court finds that the same amounts to splitting hairs. Ultimately, the application is dismissed with costs.

DATED AND DELIVERED AT ELDORET THIS 13TH DAY OF APRIL, 2017.

A. OMBWAYO

JUDGE