



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

E&L 43 OF 2017

ASIS HOTEL LTD.....PLAINTIFF

VERSUS

I & M BANK LTD.....DEFENDANT

RULING

INTRODUCTION

This ruling is in respect of the plaintiff's application dated 7th February 2017 brought by way of Notice of Motion under Certificate of Urgency seeking for orders:

- i. That the application herein be certified as urgent and the same be heard ex- parte in the first instance due to its nature.
- ii. That this Honourable court be pleased to grant an order of injunction restraining the Defendant whether by itself, or its authorized agents, auctioneers and or any of them or otherwise from offering for sale, selling by public auction or private treaty of that parcel of land namely Eldoret/Municipality/Block 6/189 pending the hearing of this application inter-partes.
- iii. That this Honourable court be pleased to grant an order of injunction restraining the Defendant whether by itself, or its authorized agents, auctioneers and or any of them or otherwise from offering for sale, selling by public auction or private treaty of that parcel of land namely Eldoret/Municipality/Block 6/189 pending the hearing and determination of the main suit.
- iv. That an interlocutory mandatory order do issue compelling the defendant/Respondent to furnish/supply the statement of accounts.
- v. That costs of this application be provided for.

This matter was placed before me on 8th February 2017 having been filed under certificate of urgency. The Court granted interim orders in terms of prayer (ii) and directed that the application be served on the respondent for inter parte hearing on 15th February 2017. The application was served and a replying affidavit filed by the respondent. When the matter came up for hearing on 15th February 2017, Counsels for both parties agreed to extend the interim orders by consent and allow the plaintiff's Counsel to file a further affidavit.

On 1st March 2017, Counsels for both parties agreed by consent to canvass the application by way of written submissions and a mention date was given for 14th March 2017 to confirm that submissions had

been filed. The Court further gave a date for highlighting of the submissions on 16th March 2017 but later the Counsels abandoned the highlighting and requested for a ruling date.

Plaintiff's Case.

The plaintiff brought this suit against the defendants on 8th February, 2017 seeking for an order for injunction restraining the defendant whether by itself or agents, customers and or any of their firm offering for sale, selling by public auction or private treaty of that parcel of land known as LR.No.. Eldoret/Municipality/Block 6/189. The plaintiff also sought for an injunction restraining the defendant from clogging or letting the plaintiff's right of redemption to redeem his property, suit property or exercising its equity of redemption. He further prayed for an order that accounts be taken between the plaintiff and the defendant.

Contemporaneously the plaintiff filed an application by way of Notice of Motion dated 7th February 2017 seeking for a temporary injunction and a mandatory injunction as enumerated above.

The plaintiff relied on the grounds filed and a supporting affidavit by one Hassan K. Koskei who is a Director of the Plaintiff/Applicant herein.

The Plaintiff averred that it is the registered proprietor of all that parcel of land known as Eldoret/Municipality Block 6/189. That in the year 2011 the defendant/respondent offered the plaintiff a financial facility to the tune of Kshs 100,000,000/-. The Plaintiff further stated that it has made various payments to the defendant but the defendant still demands colossal sums of Kshs 62,092,926/- and Kshs 43,512,491.75/- which are not particularized or detailed.

The Plaintiff averred that the defendant issued a notification of sale which was scheduled to take place on 8th February, 2017 by way of public auction.

The plaintiff stated that the defendant has neither issued to the plaintiff a valid Statutory Notice nor have the auctioneers issued a valid notification of sale as required by law. The plaintiff averred that the purported notification of sale was served through registered mail and that the plaintiff's agents had misplaced the post office keys.

In a further affidavit dated 27th February 2017, the plaintiff reiterated that the defendant did not serve a valid statutory notice as required by the law and that the notification of sale did not indicate where and when it was served.

The plaintiff further stated that they are willing to clear the outstanding balance once the accounts are reconciled. The plaintiff claimed that the defendant had breached the contractual terms of the agreement and applicable law. The plaintiff urged the court to grant the orders sought in the application.

The Defendant's case

In a replying affidavit sworn on 14th February, 2017 by Bradley Kevogo a Relationship Manager of the Defendant and filed in court the same day, the defendant opposed the application and stated that the plaintiff has not come to Court with clean hands as it has misrepresented the issues to the court.

The defendant averred that the plaintiff withheld material facts from the court which would enable the court reach a just decision. The defendant stated that the orders sought are equitable in nature and should not be granted to the plaintiff as the plaintiff's pleadings are marred by untruths and deliberate concealment of important facts.

The defendant further gave the background of the facts in a 39 paragraph replying affidavit to shed light to the transaction. In the affidavit, the defendant confirmed that it had given the plaintiff a loan facility of Kshs 100,000,000/- which was accepted by the plaintiff on 6th July, 2011. That the said loan facility was

secured by a legal charge over the property Title No. Eldoret/Municipality/Block 6/189 and a fixed and floating debenture over certain assets of the plaintiff. The said charge was duly executed by the plaintiff and a charge registered over the above mentioned property and a debenture over the plaintiff's assets in favour of the defendant bank which has been admitted in paragraph 3 of the supporting affidavit by Hassan K. Koskei.

Default.

The defendant averred that as per clause 2(a) and (b) of the credit facility letter between the Plaintiff and the defendant, the plaintiff was to make payments in satisfaction of the facility and on the understanding that the defendant would *inter alia*, exercise its statutory power of sale in the event that the Plaintiff defaulted in payment of any instalments.

The defendant further stated that the plaintiff through its Directors understood the terms and conditions of both the Banking facility letter of offer and the charge therefore executed both documents in acceptance of the same. Further that under clause 9 (c) it provided for the defendant's remedies in case of occurrence of any event of default which remedies included the defendant's power to sell the charged properties.

The defendant stated that the Plaintiff in breach of the agreed terms failed to make the requisite payments of instalments in satisfaction of the loan facility and that as at 16th May 2016, the plaintiff had fallen into arrears of the following.

1. Kshs 644,753.60 in respect of the overdraft account,
2. Kshs 57,324,636.60 in respect of the term loan account,
3. Kshs 40,410,752.75 in respect of the term loan account NO. 0170057763401203,

which necessitated the defendant to issue the Demand Notice dated 11th May, 2016 to the Plaintiff.

It is further averred by the defendant that the Plaintiff failed to regularize the default and ignored the Notice issued thereby making the outstanding debt accrue further. That the outstanding debt as at 31st August, 2016 stood at:

- 1) Kshs 61,668,640.67 in respect of the Term Loan Account No. 0170057763401202 and
- 2) Kshs 43,104,707.75 in respect of the Term Loan Account No. 0170057763401203.

The defendant stated that the default necessitated it to issue another Demand Notice dated 30th August, 2016.

The defendant further stated that the plaintiff wrote a letter dated 17th January, 2017 acknowledging receipt of the Demand Notice and the debt. It was the defendant's contention that the plaintiff's assertion that it was neither issued with a valid statutory notice nor an auctioneer's notification of sale as required by law is untrue and misleading.

Notices

The defendant stated that it served the plaintiff with Statutory Notices as required by law, the first one being on 16th March, 2016 under Section 90 of the Land Act 2012, requiring the plaintiff to pay the amount in arrears within a period of three months. This Statutory Notice was issued pursuant to the stipulations outlined in the charge document and in fulfilment of the provisions of the Land Act 2012, and the defendant states that the Notice was served upon Ms. Jane Koskei, a Director of the plaintiff who endorsed on the said copy by signing on the Bank's copy.

The defendant further stated that the plaintiff disregarded the notice and failed to regularize its account necessitating the defendant to issue a Statutory Notice to sell pursuant to Section 96 of the Land Act 2012 and the 40 days' notice was hand delivered and duly served upon the plaintiff's Director Mr. Hassan K. Koseki who acknowledged receipt by signing the notice on 3rd September, 2016. Further the said notice was sent by registered post to the Plaintiff's Post Office Box No. 6184-30100 Eldoret. The defendant averred that the plaintiff contradicted himself in paragraph 9 of the supporting affidavit where the plaintiff admitted to being served with the notification of sale through registered mail.

The defendant argued that the plaintiff's allegation through its Director that it had misplaced the keys to the post office box does not invalidate the notices issued by the defendant. Through that medium, the defendant states that it served the Plaintiff with a 45 days' notification for sale dated 25th November, 2016 through Dalali Traders Auctioneers and that there has never been any dispute on the amount owing and raising it at this time is meant to curtail the defendant's rights.

The defendant stated that the plaintiff has never been denied statement of accounts and that the plaintiff is aware that if it requires the account statements it can simply apply for the same from the Bank. The defendant further averred that the plaintiff was given ample time to regularize its accounts but failed and cannot be heard to be complaining about the defendant exercising its statutory rights.

The defendant urged the court to dismiss the application as it lacks merit and does not meet the threshold for granting injunctive reliefs which are equitable remedies. It further stated that a dispute on the amounts owing does not entitle the plaintiff to the relief sought.

Plaintiff's Counsel's submissions.

The plaintiff's Counsel Mr. Omboto filed his written submissions on 9th March, 2017 and a list of Authorities on 28th February, 2017.

The submissions reiterated the contents of the supporting and further affidavit of Hassan K. Koskei a Director of the plaintiff but added the issues for determination.

Counsel listed 7 issues for determination namely;

1. Whether the defendant/Respondent has complied with all the relevant Statutory Notices?
2. Whether the Defendant/Respondent complied with the requisite procedures as envisaged under the various Sections of the Land Act 2012, Section 90 of the Land Act.
3. Whether the Plaintiff/Applicant was duly served in accordance with Section 96 (2) of the Land Act.
4. Whether the Notification of sale is in compliance with Rule 15 of the Auctioneers Rules and whether it was properly served upon the plaintiff/Applicant (Directors)
5. Whether a force valuation report was conducted by the Defendant/Respondent pursuant to Section 97 (2) of the Land Act and Rule 11 of the Auctioneers Rules.
6. Whether the Statutory Notices makes the intended sale a nullity, illegal and unlawful?
7. Whether the Plaintiff/Applicant has established a *prima facie* case with a probability of success?

Counsel submitted in answer to issue No. 1 on whether the defendant complied with the relevant Statutory Notices in the negative. He stated that Section 84 to 101 of the Land Act 2012 provides for mandatory and not discretionary provisions and therefore the purported Statutory Notices were null and void including the notification for sale by Dalali Traders Auctioneers as they did not follow the

mandatory Provisions of the Act.

He submitted that the purported notices dated 30th August 2016 and 5th September, 2016 respectively were not valid.

On issue No. 2 on whether the defendant/Respondent complied with Section 90 of the Land Act, Counsel submitted that the defendant did not comply with that section as it did not;

- (a) Give the Plaintiff/Applicant opportunity to rectify and/or restore the default to normal as intended by section 90 of the Land Act.
- (b) Inform the Plaintiff/Applicant that it had the option of approaching the court for relief.
- (c) That it brazenly took away the rights bestowed under Section 90(2) of the Land Act.

Counsel relied on the case of Alfred Osanya -vs- Giro Commercial Bank Ltd & Another (2014) eKLR where it was held that the Statutory Notices were defective as it was in breach of Section 90 (2) (b) of the Land Act for it did not detail the amount the Plaintiff ought to have paid to rectify the default.

In answer to issue No. 3 Counsel submitted that the defendant did not serve the notices as provided for under Section 96(1) & (3) of the Land Act that the redemption clause did not indicate the interest due hence the Statutory Notice was null and void. He further submitted that the defendant did not comply with Rule 15 of the Auctioneers Rules which provides that:

..... upon receipt of a court warrant of instruction, the auctioneer SHALL in the case of immovable property;

- (a) Record the court warrant or letter of instruction in the register.
- (b) Prepare a notification of sale in the Form 4 set out in the second schedule indicating the value of each property to be sold;
- (c) Indicate the property and serve the notification of sale of the property on the registered owner or an adult member of his family residing or working with him or where a person refuses to sign such notification, the auctioneer SHALL sign a certificate to that effect;
- (d) Give in writing to the owner of the property a notice of not less than forty-five (45) days within which the owner may redeem the property by payment of the amount set forth in the court warrant or letter of instruction;
- (e) On expiry of the period of notice without payment arrange sale of the property not earlier than fourteen days after the first newspaper advertisement.

Plaintiff's Counsel relied on the authority of Rose Chepkurui Mibei Vs Jared Mokuia & 2 Others (2015)eKLR and the case of Albert Mario Cordeiro & another Vs Vishram Chamji (2015) eKLR .

In answer to issue whether a forced sale valuation was done as stipulated under section 97 (2) Counsel submitted that the same was not done therefore the notice and the intended sale were a nullity. He relied on the case of Koileken ole kipolonka orumoi v Mellech Engineering & Construction Limited & 2 others [2015] eKLR where an injunction was issued for failure to comply with section 90 of the Land Act. He further quoted the case of David Gitome Kuhiguka v Equity Bank Ltd [2013] eKLR

Counsel finally submitted that the plaintiff had established a prima facie case with a probability of success and urged the court to grant the orders sought.

Defendant's Counsel's submissions.

The defendant's Counsel filed written submissions on 7th March 2017 and opposed the plaintiff's application. Counsel relied on several authorities to demonstrate that the applicant's application has no merit and should be dismissed. He quoted the case of **Anthony Muthumbi Wachira & another v Housing Finance Company of Kenya [2015] eKLR** which pointed out instances where a chargor may be restrained from exercising its statutory power of sale where it held thus:

[46] *I reiterate that a mortgagee will only be restrained from exercising its statutory power of sale of a mortgaged property where the Mortgagor has paid the sum claimed in court or the amount being claimed is apparently excessive from the face of the charge; here illegal charges and interest should be established, or where the mortgagee has violated the law in the exercise of the statutory power of sale, for instance, where no or no proper notices were issued as required under the law. None of these things are present in this case. In the overall, the conduct of the Applicants does not meet the approval of equity and may be summed up as Rigeri J (as he then was) did in the case of **Thathy vs. Middle East Bank (K) Ltd & Ano. HCCC No. 302/02** that:*

“How about the conduct of the Applicants? ...the history of the parties is characterized by several demands for payment of mortgage debt, and several unfulfilled promises by the Applicants to pay the said debt. The Respondent has extended a lot of indulgence to the Applicants but the Applicants has not made good his promises...And the Applicants is absolutely silent about repayment ... the Applicants' conduct disentitles him to the favour of equity. He cannot get an injunction to restrain the Bank from realizing its security when he is heavily indebted, his promises of repayment have come to nought and he does not evince any intention to repay soon or at all....a sale of the security now appears to me in the best interest of both parties.”

Counsel submitted that the plaintiff is not entitled to the relief sought as it has acknowledged indebtedness to the defendant and has failed to establish a prima facie case. It was also submitted that the plaintiff seems to hinge its application on dispute on accounts which the defendant stated that this has never been raised and it is meant to frustrate the defendant's right of power of sale. Counsel relied on the case of **Turbo Highway Eldoret Ltd v Kenya Commercial Bank Ltd [2016] eKLR** where Obaga J held that:

It is patently clear that the applicant has only come to court not because any of the procedures required have not been complied with but because it wants to have some breathing space. There has never been any dispute as to the amount owed or interest charged. I therefore find that there are absolutely no grounds upon which this court can grant an injunction. The applicant is facing a winding up petition. This is an indication that it is in financial problems. This will seriously affect the respondent from recovering the advanced money. The applicant's argument that the winding up cause has nothing to do with this application is misplaced. An applicant approaching the court for an equitable remedy is obliged to disclose all material facts. I find that the applicant's application lacks merits. The same is hereby dismissed with costs to the respondent.

Counsel submitted that dispute on accounts has never been raised by the plaintiff and if it had any issue it would simply apply to the bank to be given statement of accounts. The defendants maintained that they had complied with the law in terms of service of statutory notices. Counsel stated that the orders sought by the plaintiff applicant are equitable in nature and a party must come to court with clean hands and that a borrower who is in huge arrears is undeserving of the courts discretion. Counsel reiterated his quest for the court to dismiss the plaintiff's application with costs to the defendant.

Issues and determination.

I have considered the submissions from both counsels for the Plaintiff/ applicant and the Defendant/ respondent together with the supporting documentation. I have also looked at the list of various judicial authorities and have come to the conclusion that the issues for determination are follows:

1. Whether the applicant was validly served with a valid statutory notice of sale?

2. Whether disputes in accounts is a basis for granting an injunction?

3. Whether the Defendant has breached the law by failure to undertake a forced sale valuation of the Plaintiff's land in accordance with section 97 (2) of the Land Act.

Apart from those issues, the court is also alive to the fact that it must be guided by the principles of the granting of interlocutory injunctions enunciated in the case of **Giella v Cassman Brown Co. Ltd & Anor (1973) EA 358**. Where a party must establish a prima facie case with a probability of success, that he or she would suffer irreparable loss which may not be compensated by an award of damages and finally if the court is in doubt, where does the balance of convenience lie?

Notices

I have perused the notices issued herein by the defendant. The first Demand Notice dated 16th May 2016 was issued pursuant to section 90 of the Land Act, 2012 requiring the plaintiff to pay within a period of three months the amount in arrears to rectify the default. The particulars of the nature and extent of the default were detailed in that demand notice. Notice states in its body that; **TAKE NOTICE** that you are required to **RECIFY** the aforementioned defaults as follows." The amounts are quoted in the notice and it goes further under clause 5 to state that 'The Chargor is **HEREBY NOTIFIED** in accordance with Section 90(2) (e) and 103 of the Land Act 2012 that they may apply to the court for relief for certain remedies. I disprove Plaintiff's Counsel's submission that the notice did not inform the Plaintiff/Applicant that it had the option of approaching the court for relief as the same is indicated in the annexed Notice.

It is evident that the notice was served upon one of the Directors of the Plaintiff one Jane Koskei who acknowledged receipt. The next statutory notice to sell dated 30th August 2016 issued pursuant to Section 96 of the land Act was served upon one of the Directors of the plaintiff applicant one Hassan K. Koskei who acknowledged receipt by signing on the notice on 3rd September 2016 and a further copy sent by registered post to the plaintiff's post office Box No. 6184-3010 Eldoret. This is not denied by the plaintiff from the evidence on record. The plaintiff's claim that it had misplaced its post office keys does not invalidate the notice as they had received hand delivered copies which they signed for. A 45days notification of sale by the Auctioneers dated 25th November 2016 was also served on the plaintiff and this is also not denied.

I therefore find that the notices have complied with the law as provided for. The mandatory days provided for and the particularization of the amount owing were followed by the defendant in respect of the statutory notices as earlier stated above.

Dispute on accounts

On the issue of dispute on statement of accounts, the plaintiff applicant has admitted it owes the defendant and at no point did it dispute the amount owing. It seems the Plaintiff just wants some time to organize its house so that it can marshal funds to repay the outstanding arrears. This is evident from the plaintiff's letter dated 17th January 2017 that the applicant was seeking for time to clear the outstanding arrears. In that letter the plaintiff did not raise any issue as to the amount owing.

As a general rule, disputes on accounts or amounts owing on a charge will not per se be a basis for granting of an injunction. The chargee may be restrained from exercising its statutory power of sale only if it can be established from the charge or evidence adduced in court that the amounts claimed are excessive or tainted with illegal charges and interest. The plaintiff has prayed for an interlocutory mandatory order compelling the defendant to furnish/supply it with statement of accounts but there is no complaint about the accounts in the grounds in support of the application or the supporting affidavit. In fact, the supporting affidavit in paragraph 11 states that the plaintiff is willing to clear the outstanding balance once the accounts are reconciled. The defendant stated that statements of the accounts herein are readily available upon application to the bank. The plaintiff is at liberty to apply for the statements of

accounts without the assistance of the court as the defendant has not denied them the same.

Forced Sale Valuation

The Applicant alleges that the Respondent did not discharge the duty of care under section 97(2) of the Land Act to undertake valuation of the suit property in order to obtain the best market value of the suit property.

The primary provision on forced sale valuation is Section 97(1) and (2) of the Land Act No. 6 of 2012. It applies where the charged land is to be sold in the exercise of power of sale or pursuant to an order of the court. The Act provides as follows;-

1) 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.

I note that two points are clear from the above section. The Defendant/Respondent is under a statutory duty; 1) to ensure that a forced sale valuation is undertaken by a valuer; and 2) to obtain the best price reasonably obtainable at the time of sale. I have not seen any valuation attached by the defendant respondent apart from the market value and forced sale value as at 12th October 2015 on the notification of sale issued by the Auctioneer. The question is whether this mention of the value on the notification of sale qualifies as a forced sale valuation? The defendant has neither addressed the issue in the replying affidavit nor in the submissions to counter the plaintiffs' assertion that it did not undertake a valuation as required by law before exercising the right of sale. Did the defendant fail to undertake a forced sale valuation? Is that the reason why they have not referred to it?

I wish to state that both parties and their Counsels have not been helpful on the dispute on forced sale valuation. They have not produced any valuation reports to help the Court. The Respondent has referred to two figures in the notification of sale that is Kshs. 200M and 150M being market value and forced sale value respectively as at 12th October 2015. Counsel for the plaintiff Applicant who raised the issue of forced sale valuation has not given a figure that his client expects or its own independent valuation.

In the case of *Palmy Company Limited vs Consolidated Bank of Kenya Limited* the court stated as follows:

“The onus of establishing on prima facie basis, that the Applicant’s right has been infringed by the Respondent by failing to discharge the duty of care under section 97(1) of the Land Act lies on the Applicant.”

Be as it may, the court’s duty at this juncture is not to decide on the value of the property but to ascertain whether the defendant complied with the requirement to undertake a forced sale valuation before exercising its power of sale. I find that there was no compliance with this requirement.

Determination

Having considered the above issues including whether the applicant has established a prima facie case with a probability of success, I find that the applicant did not meet the threshold for granting equitable relief of temporary injunctions. I agree with the respondent that the applicant did not give material facts in support of its application. Most of the material evidence was tendered by the respondent which countered the initial assertions of the applicant when they appeared before the court *ex- parte*. I am of the view that the applicant is only seeking for time to organize itself to repay the outstanding arrears. As late as 17th January 2017, the applicant wrote a letter to the defendant acknowledging receipt of a statutory Demand

notice letter dated 30th August 2016 requesting the defendant not to immediately take any action against them as they were “*waiting for some good payment from the government, the money is already in the government supplementary budget which is due to be released anytime in less than 3(three) months. In the meantime, we want to assure you that we shall continue to be banking our daily collections with you in a bid to have the arrears reduced*” annexure marked BK-5 in the replying affidavit.

This letter shows admission of indebtedness to the defendant and an acknowledgment of receipt of statutory Demand notice. The applicant did not seem to have any problem with the figure they saw in the demand notice, neither did they raise an issue of statement of accounts. They just wanted more time to receive the “*good payment from the government*” to enable them pay the arrears. This letter should have raised the issues that they were not happy with like statement of accounts, variation of interest and the fact that they had not received valid notices as claimed. I find that the Statutory Notices are valid and there would be no need to re-issue them.

The plaintiff having failed to establish a prima facie case with a probability of success, I will give it the benefit of doubt and find that the balance of convenience tilts in its favour from the plaintiff’s later conduct of continuing to repay its debt. This was evident by the Plaintiff’s continued deposits made to the loan account during the pendency of this case.

The upshot is that I issue a conditional temporary injunction restraining the defendant from selling the charged property subject to undertaking a forced sale valuation as required under section 97 of the Land Act within 30 days from the dated of this ruling, thereafter the defendant is at liberty to exercise its statutory power of sale.

The application dated 8th February 2017 succeeds to the extent I have mentioned above. All other prayers are denied.

I order that each party shall bear its own costs. It is so ordered.

Dated and delivered at Eldoret on this 4th day of April, 2017.

M.A ODENY

JUDGE