REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE No. 195 OF 2016

JIINUE HOLDINGS LIMITED ….……..…..PLAINTIFF

VERSUS

HOUSING FINANCE CORPORATION OF KENYA…....1ST DEFENDANT

BENJAMIN KISOI SILA T/A

LEGACY AUCTIONEERING SERVICES ……....…2ND DEFENDANT

RULING

(An application for interlocutory injunction; plaintiff seeking to restrain bank from exercising statutory power of sale; plaintiff alleging that statutory notice and other notices were not served; defendants assert that service was effected; court finds that notices were served; no prima facie case established; application dismissed)

1. The plaintiff filed this suit on 2nd June 2016 seeking an injunction to restrain the defendants from selling the parcel of land known as Nakuru Municipality Block 1/6 (Langalanga) and a declaration that an intended sale of the said property by public auction is illegal.

2. Contemporaneously with the plaint, the plaintiff also filed Notice of Motion dated 3rd June 2016 in which it sought inter alia the following prayers:

> ***"THAT pending the hearing and determination of this suit this honourable court be pleased to grant an injunction restraining the defendants either by themselves, their agents, servants employees from advertising, selling, transferring, disposing and/or in any way interfering with the parcel of land known as Nakuru Municipality Block 1/6 (Langalanga)".***

3. The application is based on grounds listed on its face and is supported by the affidavit of Zachary Waweru Ireri, a director of the plaintiff. This ruling is in respect of the above application.

4. The plaintiff's case is that it obtained a loan of Ksh.15 million from the 1st defendant and that the loan was secured through a charge against the suit property. That despite servicing the loan, the defendants advertised the suit property for auction sale on 8th June 2016. That the proposed sale is illegal since no redemption notice and/or statutory notices have been issued. The plaintiff thus seeks an injunction as prayed.

5. The defendants responded to the plaintiff's case through statement of defence dated 21st July 2016 and

the replying affidavit of Martin Wachira sworn on 5th October 2016. It is deposed on behalf of the defendants that following an application by the plaintiff, the 1st defendant approved a loan of Ksh.15 million on 3rd September 2014. Subsequently, a charge dated 23rd July 2014 was prepared and registered on the same date against the suit property. The plaintiff is the chargor while the 1st defendant is the chargee in the said charge. It is further deposed that the plaintiff defaulted on its repayment obligations and a statutory notice was therefore issued to the plaintiff on 15th May 2015. The said notice was sent to the plaintiff on 19th May 2015 by registered post to the address specified in the charge. There being no response from the plaintiff, the 1st defendant issued a demand notice to the plaintiff on 31st August 2015. The default continued and consequently, the 2nd defendant, acting on the instructions of the 1st defendant, issued a 45 days redemption notice and notification of sale to the plaintiff on 4th April 2016. Mr. Zachary Waweru Ireri received and signed both documents on behalf of the plaintiff, in his capacity as a director of the plaintiff. Subsequently through email dated 26th October 2015, Mr. Zachary Waweru Ireri wrote to the 1st defendant seeking an indulgence. That the plaintiff having failed to honour promises to pay, the defendants advertised the suit property for sale in the Daily Nation of 23rd May 2016. Prior to the said advertisement, the 1st defendant obtained a forced sale valuation report by Gimco Limited dated 24th November 2015. All the documents referred to above were annexed by the defendants. The defendants therefore urge the court to dismiss the application.

6. When the application came up for hearing Mr. Ikua learned counsel for the plaintiff relied entirely on the application and the supporting affidavit and opted not to make any submissions either oral or written. Mr. Kisila, learned counsel for the defendants opted to file written submissions and the defendant's submissions were thus filed on 26th April 2017. Parties opted not to do any oral highlighting.

7. I have considered the application, the affidavits in support and reply as well as the submissions. I note that the plaintiff did not file any further affidavit to controvert the contents of the replying affidavit filed by the defendants.

8. The application before the court is one seeking an interlocutory injunction. The principles applicable when considering such an application were laid down in the case of **Giella –vs- Cassman Brown & Co. Ltd [1973] E.A 358** as follows: -

> **"The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."**

9. More recently in the recent case of **Nguruman Limited –vs- Jan Bonde Nielsen & 2 Others [2014] eKLR** the Court of Appeal clarified the principles thus:

> ***In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;***
>
> ***a. Establish his case only at a prima facie level,***
>
> ***b. Demonstrate irreparable injury if a temporary injunction is not granted; and***
>
> ***c. Ally any doubts as to (b) by showing that the balance of convenience is in his favour.***
>
> ***These are the three pillars on which rests the foundation, of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See Kenya Commercial Finance co. Ltd –vs- Afraha Education Society (2001) Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant***

an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between.

10. I am guided by the above principles and I am aware that I am not supposed to hold a mini trial or examine the merits of the case closely. Based on the material before the court, it is clear that the plaintiff had defaulted on the facility and that a statutory notice was issued. A 45 day redemption notice and notification of sale were issued. The plaintiff even sought indulgence from the 1st defendant after these notices were issued. I am aware that the trial court will have occasion to examine the evidence in totality and make its own findings. For the purposes of the application before me I am not persuaded that a prima facie case with a probability of success has been established. In view of the sequence laid down by the Court of Appeal in **Nguruman Limited –vs- Jan Bonde Nielsen & 2 Others [2014] eKLR** I do not need to make a finding on whether the other principles have been established.

11. In the end the Notice of Motion dated 3rd June 2016 is dismissed with costs.

Dated, signed and delivered in open court at Nakuru this 31st day of May 2017.

D. O. OHUNGO

JUDGE

In the presence of:

Mr. Ikua for the plaintiff/applicant/applicant

No appearance for the defendants/responents

Court Assistant: Gichaba