REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE No. 37 OF 2017

MAHESH KUMAR...……..……..…….....PLAINTIFF

VERSUS

ORIENTAL COMMECIAL BANK LTD ……....…….....……1ST DEFENDANT

BENJAMIN KISOI SILA

T/A LEGACY AUCTIONEERING SERVICES……...….....…2ND DEFENDANT

SHAMMY SHYAM ATMARAM RAMCHANDAMI……....INTERESTED PARTY

RULING

***(An* application for interlocutory injunction to restrain a bank from exercising statutory power of sale; applicant admitting defaulting in repayments; applicant also admitting service of statutory notice, notification of sale and redemption notice; applicant however arguing that the notices are defective and invalid; court finds the notices valid; court holds that no prima facie case established; application dismissed)**

1. The plaintiff filed this suit on 8th February 2016 pursuant to plaint dated 4th February 2016, against the 1st defendant bank and the second defendant, an auctioneer. Alongside the plaint, the plaintiff also filed Notice of Motion dated 4th February 2016 in which he sought the following orders:

> *1. Spent*
>
> *2. THAT pending the hearing and determination of the application, and of this suit, the 1st and 2nd defendants by themselves, their agents, servants, heirs, their agents, servants, heirs, representatives, successors, assignees, or anyone acting or claiming through or under them, be and are hereby restrained by order of temporary injunction from selling, offering for sale, going ahead with or completing the intended sale set for 18/2/2016 or any other future date, or from transfiguring, alienating, disposing off, entering into, remaining on, wasting or in any other manner whatsoever interfering with the plaintiff's ownership, possession, occupation, and use of all the suit land or suit property known as Land Title Number Nakuru Municipality Block 9/40, situate within Nakuru town.*
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> *3. THAT costs of this application be borne by the defendants.*

2. This ruling is in respect of the above application. The application is supported by the plaintiff's affidavit sworn on 4th February 2016, Plaintiff's further affidavit sworn on 26th April 2016 and plaintiff's

further affidavit sworn on 21st July 2016.

3. Following the filing of the suit, the interested party who is the plaintiff's brother and co-owner of the suit property sought to join the suit as an interested party. His application was allowed by consent on 14th March 2016.

4. The defendants responded to the application through Alphonso Gambo's replying affidavit sworn on 19th Feb 2016 and Alphonso Gambo's supplementary affidavit sworn on 13th June 2016. The Interested Party also filed a replying affidavit sworn on 31st March 2016.

5. Parties agreed to proceed by way of written submissions. Accordingly, the plaintiff filed written submissions on 14th December 2016 while the defendants filed submissions on 23rd January 2017. The interested party opted not to file any submissions and relied entirely on his replying affidavit.

6. The plaintiff and the interested party are jointly registered as proprietors of all that parcel of and known as Nakuru Municipality Block 9/40. The plaintiff deposed that the plaintiff and the interested party charged the suit property to the bank pursuant to legal charge dated 25th March 2009 for Ksh.24 million, further charge registered on 13th October 2009 for Ksh. 6 million and 2nd further charge dated 19th September 2011 for Ksh.15 million. That the said charges were discharged in May 2014 pursuant to discharge of charge dated 15th May 2014 and registered on 19th May 2014. As far as the plaintiff is concerned, there was no valid charge against the suit property after 19th May 2014. Notwithstanding this situation, the 2nd defendant served the plaintiff with a notification of sale of the suit property on 11th December 2015, under the instructions of the 1st defendant. Alongside the notification of sale, the 2nd defendant also served the plaintiff with a 45 days redemption notice.

7. Prior to serving the notification of sale, the 1st defendant served the plaintiff with a statutory notice on 28th August 2015. The plaintiff maintains that the notification of sale, redemption notice and statutory notice are invalid in view of the aforesaid discharge and that in any case according to the 1st defendant's facility letter dated 20th June 2014 " the full loan" from the bank " is not yet due, as the repayment period runs up to the year 2019". Pursuant to aforesaid facility letter the 1st defendant extended to the plaintiff and the interested party loan and overdraft of Ksh. 45.3 million and that the said facility was secured by the three charges referred to above. The plaintiff therefore maintains that following registration of discharge on 19th May 2014 the facility of Ksh.45.3 million is not secured by any charge over the suit property.

8. The plaintiff deposes that he was therefore shocked to discover that another charge dated 15th May 2014 was purportedly registered against the suit property on 19th May 2014 in favour of 1st defendant securing a sum of Ksh. 40 million. The plaintiff states that even though his signature appears on this latter charge, he did not willingly sign it and in any case the exercise of the statutory power of sale has not been attributed by the defendants to this new charge. The plaintiff deposes that the suit property is currently valued at over KShs 200 million and that it is all that he has to his name. He would suffer irreparable loss if the property is sold as sought by the defendants.

9. The defendants in their replying affidavits have sought to paint a different picture in some aspects. Whereas the 1st defendant admits that the charges registered on 11th June 2009, 13th October 2009 and 22nd September 2011 were indeed discharged on 19th May 2014, the 1st defendant adds that simultaneously with the discharge, a new charge for Ksh. 40 million was registered over the suit property on 19th May 2014. That the need to discharge the earlier charges and to register the new one arose following the plaintiff's own request vide letter dated 23rd January 2014 that the 1st defendant amalgamates the then existing three facilities into one term loan repayable within five years. The 1st defendant approved the request and on 8th February 2014 the plaintiff and the interested party executed a letter of offer on the foregoing terms. Subsequently, a charge dated 15th May 2014 was prepared as per

plaintiff's request and the plaintiff and interested party duly executed it. The 1st defendant adds that as proof that the plaintiff was aware of and approved of the charge dated 15th May 2014, the plaintiff sought a temporary overdraft of Ksh. 5 million by letter dated 21st May 2014. The request was approved and through another letter dated 22nd September 2014 the plaintiff sought an extension of the overdraft facility and stated in the letter that the suit property would continue to be security.

10. It was further deposed on behalf of the defendants that the plaintiff and the interested party defaulted as regards their obligations in the charge dated 15th May 2014. Consequently, a statutory notice was issued to the plaintiff and the interested party on 28th August 2015. That the plaintiff neither honoured the statutory notice nor protested about it. Instead, on 24th August 2015, the plaintiff wrote to the bank through his advocates and while admitting that the property was charged to the bank, requested that they be allowed to sell the property by private treaty. Several other correspondence were exchanged but ultimately the 1st defendant decided to exercise power of sale since the liabilities had not been settled. That the plaintiff's outstanding loan balance exclusive of interest stood at KShs 43,440,090.40 as at 30th November 2015 for the loan account and Ksh.9,838, 226.35 as at 30th December 2014 for the current account. That the plaintiff is therefore not deserving of the equitable remedy sought.

11. In his replying affidavit the interested party admits that he and the plaintiff obtained a facility from the 1st defendant using the suit property as security. That he has tried to repay the loan but the plaintiff has refused to make his own contribution towards clearing the loan. That efforts to sell the suit property by private entity have so far failed.

12. As previously indicated, parties filed written submissions and also did oral highlighting. Counsel for the plaintiff submitted that following the registration of discharge of charge on 19th May 2014, there was no valid charge that could form the basis of exercise of statutory power of sale. That since the statutory notice dated 28th August 2015, the notification of sale dated 11th December 2015 and the 45 days redemption notice were all based on the discharged charges, the entire process of exercise of statutory power of sale was bad in law and null and void *ab initio*. It was further argued on behalf of the notification of sale and the redemption notice are invalid since they were served on the plaintiff only and not also on the interested party who is jointly registered as proprietor of the suit property with the plaintiff. Counsel for the plaintiff also argued that the statutory notice is invalid since contrary to the provisions of section 90 (2) of the Land Act 2012, it did not adequately inform the plaintiff of the extent of default and the amount payable to rectify the default. Counsel further submitted that no notice to sell was issued as required by the provisions of section 96 (2) of the Land Act, 2012 and that no forced sale valuation was done as required by section 97 (2) of the Act.

13. Regarding the charge dated 15th May 2014, counsel submitted that the plaintiff never extended this charge and that his signature thereon, if any, must have been procured without his knowledge. Consequently, Counsel argued, the charge dated 15th May 2014 is of no legal effect and that in any case it is not the charge upon which the defendants have sought to exercise power of sale. In conclusion, counsel argued that the test established in **Giella -vs- Casman Brown** had been satisfied by the plaintiff hence the application should be allowed.

14. Counsel for the defendants opposed the application and submitted that there in fact exists a valid charge registered on 19th May 2014 that the new charge was necessitated party's request for amalgamation of the facilities and securities. Consequently, the statutory was property issued since there exists a valid charge. Regarding validity of the statutory notice under section 90 (2) of the Land Act, 2012 counsel for the defendants submitted that the statutory notice amply disclosed to the plaintiff the nature and extent of default, the amount due and what the plaintiff needed to do to rectify the default and the consequences of faille to rectify. Consequently the statutory notice was valid. Regarding the issue of whether or not notices were served upon the interested party, counsel submitted that they were indeed served and that in any case, it is the plaintiff who is alleging non service upon the interested party. That the interested party has himself not denied service. Consequently, the burden of proof on this issue rests upon the plaintiff in terms of section 107 (1) of the Evidence Act.

15. As regards the issue of valuation, the defendants submitted that a valuation was in fact done by M/s Dayton Valuers Ltd in compliance with section 97 (2) of the Land Act, 2012. Counsel submitted that the plaintiff had failed to establish a prima facie case with a probability of success since there is clear evidence of existence of a charge registered on 19th May 2014. The charge document was freely signed by the plaintiff. On whether or not there will be irreparable damage if an injunction is not granted, counsel submitted that damages would in fact be an adequate remedy since the charged property had become a commodity for sale. In further support that contention, counsel cited the provisions of section 99(4) of the Land Act. Counsel therefore urged the court to dismiss the application.

16. I have considered the application, the affidavits filed in support and in reply, submissions as well as the authorities cited by all parties. The test to be applied in determining whether or not to grant an interlocutory injunction was laid down in **Giella –vs- Cassman Brown & Co. Ltd [1973] E.A 358**. In the recent case of **Nguruman Limited –vs- Jan Bonde Nielsen & 2 Others [2014] eKLR** the Court of Appeal clarified the test 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.***
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> ***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.***

17. There is no dispute that the charge dated 25th March 2009, further charge registered on 13th October 2009 and 2nd further charge dated 19th September 2011 were discharged on 19th May 2014 pursuant to discharge of charge dated 15th May 2014 and registered on 19th May 2014. There is also no dispute that there exists another charge dated 15th May 2014 and registered against the suit property on 19th May 2014. Further, the plaintiff and the interested party do not dispute that the 1st defendant advanced to them a loan and that some money is owed to the bank arising from that lending and that there has been default as regards the repayment obligations. The plaintiff also acknowledges that he was served with statutory notice, notification of sale as well as redemption notice. The plaintiff however challenges the validity of the charge dated 15th May 2014, the statutory notice, notification of sale and redemption notice.

18. The plaintiff's case revolves largely around the issue of validity of the charge dated 15th May 2014 and the process of exercise of statutory power of sale. Let's therefore begin with the issue of validity of the charge dated 15th May 2014. I have considered plaintiff's case on this charge. I note that plaintiff's annexture**"MK7Dii"** is a certificate of official search which confirms that as at 27th January 2016 the said charge existed on the register as an encumbrance against the suit property. The date of registration is given as 19th May 2014. I have also read the charge itself and I note that it bears the plaintiff's and the interested party's signatures and that there is attestation by an advocate. The interested party has not denied executing the charge. The plaintiff has denounced the charge as invalid and not being authentic.

Regarding the issue of whether or not he executed the charge, the plaintiff deposed as follows at paragraph 22 of his supporting affidavit sworn on 4th February 2016:

> … *And although my signature appears on the 2nd last page of the document, my signature thereon must have been secured thereon by trickery and/or misrepresentation by the 1st defendant bank's officials, and without my conscious knowledge….*

19. The plaintiff cannot blow hot and cold. He either executed the charge or he did not. From the material placed before the court by the defendants, there is evidence that the plaintiff wrote to the 1st defendant a letter dated 23rd January 2014 requesting that the 1st defendant amalgamates the then existing three facilities with a total of about KShs 39 million outstanding into one term loan repayable within five years. The request was approved. Subsequently on 8th February 2014 the plaintiff and the interested party executed a letter of offer. At clause 6.2 at page 5 of the letter of offer the plaintiff and interested party confirm and agree that the liability due from them to the bank is KShs 40 million plus interest and charges thereon. Through another letter dated 22ndSeptember 2014 the plaintiff sought an extension of the overdraft facility and stated in the letter that the suit property would continue to be security. In view of all this, I do not accept the argument that the plaintiff did not sign the charge dated 15th May 2014. Clearly, it was prepared, executed and registered at the plaintiff's and interested party's instance. Having received facilities from the bank on the strength of his own letter dated 23rd January 2014 and the charge, it is not open to the plaintiff to disown them. I have also read the statutory notice, the notification of sale and the redemption notice. I see nothing wrong with them.

20. In **Mrao Ltd v First American Bank of Kenya Ltd& 2 others[2003] eKLR**Kwach JA stated:

> ***I listened to the submissions of Mr Wasuna, for the appellant, and he seemed to place a great deal of emphasis on the allegation that the securities were invalid for one reason or another. And that because of that, his client is under no obligation to repay the debt. At no point in the course of argument did MrWasuna indicate to the Court when this alleged invalidity first came to the knowledge of the appellant. The appellant took a large amount of money on the strength of these securities. It has not paid back even a single cent. When First American asked for payment the appellant rushed to a court of equity and in effect told the judge, it is true I took the money, I have not paid it back but First American is precluded from realising its security because both the charge and debenture are invalid. And for good measure the appellant adds that if First American is minded to recover the debt it can file a suit in the normal way for recovery as money had and received.***
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> ***This kind of attitude, prima facie, shows that when the appellant took the money on the strength of those securities it had no intention of repaying it under the terms agreed with First American. This was a clear case of default, and as the appellant admitted this, there was no basis, on the authorities, upon which the appellant could obtain an order of injunction against First American. I have looked at the charge document and on the face of it I cannot detect anything wrong with it….***
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> ***I have always understood that it is the duty of any person entering into a commercial transaction particularly one in which a large amount of money is involved to obtain the best possible legal advice so that he can better understand his obligations under the documents to which he appends his signature or seal. If courts are going to allow debtors to avoid paying their just debts by taking some of the defences I have seen in recent times for instance challenging contractual interest rate, banks will be crippled if not driven out of business altogether and no serious investors will bring their capital into a country whose courts are a haven for defaulters***.

The circumstances that Kwach JA described are akin to what is now before me. The plaintiff and the interested party knew full well what they were getting into. Having derived benefit from the arrangement, they cannot now be permitted to resile from it.

21. The plaintiff has also argued that no notice to sell was issued as required by the provisions of section 96 (2) of the Land Act, 2012 and that no forced sale valuation was done as required by section 97 (2) of the Land Act, 2012. The plaintiff admits at paragraphs 7 and 9 of his supporting affidavit sworn on 4th February 2016 that he was served with a notification of sale and a redemption notice. He has annexed copies thereof to the affidavit. He personally received both documents on 11th December 2015 and acknowledged receipt by signing. The impugned auction sale was scheduled for 18th February 2016, more than two months after service of the notification of sale. I have read them and I find and hold that the notification of sale was a notice under Section 96 (2) of the Land Act, 2012.

22. On the issue of valuation, I note that a valuation report by DaytonsValuers Ltd dated 19th January 2016 was prepared. I am satisfied that the provisions of section 97 (2) of the Land Act, 2012 were complied with. In any case, if there were to be any non-compliance with those provisions the plaintiff would have ample remedy under the provisions of section 97 of the Act. In view of the foregoing and looking at the matter in totality, I find that no prima facie case with a probability of success has been established. In line with the sequence adopted by the Court of Appeal in **Nguruman Limited –vs- Jan Bonde Nielsen & 2 Others [2014] eKLR** I do not need to investigate whether the tests of irreparable injury and balance of convenience have been established.

23. In the end Notice of Motion dated 4thFebruary 2016 is dismissed. Costs to the defendants.

Dated, signed and delivered in open court at Nakuru this 30th day of May 2017.

D. O. OHUNGO

JUDGE

In the presence of:

Mrs. Gatu Magana for the Plaintiff/applicant

Mr. Wanga holding brief for Mr. Kisila for the Defendants/respondents

No appearance for the Interested Party

Court Assistant: Gichaba