



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ELC CASE NO. 2 OF 2016

KAAB INVESTMENTS LIMITED.....1ST PLAINTIFF/APPLICANT

TAHIR SHEIKH SAID AHMED.....2ND PLAINTIFF/APPLICANT

VERSUS

KENYA COMMERCIAL BANK LTD.....DEFENDANT/RESPONDENT

RULING

1. In the Application dated 11th January, 2016, the Plaintiffs are seeking for the following orders:

a. That pending the hearing of this suit, an injunction do issue restraining the Defendant, by itself, its appointed receivers, servants, auctioneers and specifically Garam Investments Auctioneers, agents, or advocates or any of them or otherwise from advertising or offering for sale, or selling or purporting to sell, or in any other way alienating or dealing with the proprietary interests in the suit properties known as Portion Number 10801 (CR 34037) and Portion No. 11215 (CR 46603).

b. The pending the hearing of this suit, an injunction do issue restraining the Defendant, by itself, its appointed receivers, servants, auctioneers and specifically Garam Investments Auctioneers, agents, or advocates or any of them or otherwise from advertising or offering for sale, or selling, or purporting to sell, or in any other way alienating or dealing with the proprietary interests in the plant and machinery of all nature and form situate on the suit property known as Portion Number 10801 (CR 34037) and Portion No. 11215 (CR.46603).

c. That pending the hearing and determination of this suit, an order for discovery be made directed at the Defendant to produce all the security documents relating to the loan granted to the Plaintiffs secured by the property known as Portion Number 10801 (CR. 34037) and Portion No. 11215 (CR 46603).

d. That an order be made appointing an independent commissioner for purposes of investigating, ascertaining and reporting to court.

i. The rate of interest applied by the Defendant on the loan from time to time from the time of disbursement to 15th July, 2015 when the Defendant issued an addendum to the Letter of Offer dated 8th August, 2014.

ii. The market value of the suit properties known as Portion Number 10801 (CR. 34037) and Portion No. 11215 (CR. 46603).

e. That the court be pleased to make any other order fit in the circumstances of this case.

f. That costs be provided for

2. The Application is supported by the Affidavit of the 1st Plaintiff's Director.

3. In his Affidavit, the 1st Plaintiff's Director deponed that the 2nd Plaintiff is the registered proprietor of land known as Portion Number 10801 and Portion Number 11215 (*the suit properties*) located in Malindi whose combined market value as at 18th November, 2013 was Kshs. 635 million.

4. The 1st Plaintiff's Director deponed that in the year 2008, the Defendant agreed to advance credit facilities to the 1st Plaintiff; that the Defendant created charges over the suit properties and that the Plaintiffs do not have all the documents that were prepared and registered securing the loan.

5. According to the Plaintiffs, the loan was to be paid partly through the business of the 1st Plaintiff; that the Defendant has been offsetting the loan amount against the deposits on the 1st Plaintiff's account and that by the year 2014, the 1st Plaintiff had made substantial payment of Kshs. 2.2 Billion towards the liquidation of the loan.

6. It is the 1st Plaintiff's case that despite repaying the loan, the Defendant informed the 1st Plaintiff that it was still indebted to the Defendant in the sum of Kshs. 29 million and USD 2,328,377 arising from what the Defendant termed as "*suspended interest*".

7. The 1st Plaintiff's Director deponed that vide the letter dated 12th July, 2014, they agreed to settle the outstanding amount in monthly instalments; that the Defendant agreed to restructure the liquidation of the alleged amount and that despite agreeing to restructure the repayment of the amount due, the Defendant reneged on its promise and did not implement the new terms of liquidation.

8. Instead, it has been deponed, the Defendant commenced the process of selling the suit properties; that the 2nd Plaintiff was issued with a 40 days' statutory notice dated 16th September, 2015 and that the exercise of the Defendant's statutory power of sale was premature.

9. The Plaintiffs have faulted the Defendant's exercise of its statutory power of sale because: that the Defendant has not issued the 90 days' statutory notice; that the Defendant has discriminately issued a 40 days' statutory notice dated 16th September, 2015 to the 2nd Plaintiff; that one of the guarantor's, Alwaya Mohamed, has not been issued with the 40 days' statutory notice by the Defendant; that the Defendant has not issued to the Plaintiffs and the guarantors with the 45 days' Redemption Notice and that the notice that was issued to the 2nd Plaintiff contrary to Section 90(2) of the Land Act is ambiguous.

10. It is the Plaintiff's case that in any event, the Defendant has not undertaken a forced sale valuation of the suit properties and that the Defendant has been applying different interest rates to the loan which is contrary to the 8 Provisions of the Land Act.

11. In response, the Defendant's "*Section Head*" deponed that the 2nd Plaintiff charged the suit properties by way of a charge dated 30th October, 2009 and a Further charge dated 30th August, 2010 for an aggregate principal amount of Kshs. 205,000,000.

12. When the Plaintiffs defaulted in meeting their financial obligations owed to the Bank, it was deponed that the Bank commenced the process of realizing the securities held by the Bank; that the said default is still continuing; that the Plaintiffs have admitted their indebtedness to the Bank and that the Plaintiffs were duly served with the three (3) months Statutory Notice by the Bank.

13. After the expiry of the three (3) months notice, it was deponed that the Bank issued and served the

Plaintiffs with the Chargee's forty (40) days' statutory notice dated 16th September, 2015; that the Plaintiffs were thereafter served with the 45 days auctioneers' notice and that the properties were then advertised for sale.

14. The Defendants "*Section Head*" deponed that the Bank is not bound to accept any proposal of restructuring the Plaintiffs' debt; that the 1st Plaintiff declined to honour the obligation to pay the Bank its dues pursuant to the proposed scheme and that the Bank is entitled to charge interest on monies advanced to the Plaintiffs.

15. The Defendant denied that it has charged illegal interest and that in any event, a dispute as to interest and the amount due is not a ground for the grant of an injunction against the Bank's exercise of its statutory power of sale.

16. The Defendant's "*Section Head*" finally deponed that the Bank carried out a forced sale valuation of the suit properties before the intended sale by public auction and that the Bank has no intention of selling the charged properties at under value.

17. Both the Plaintiffs' and the Defendant's advocates filed detailed submissions which I have considered. I have also considered the filed authorities.

18. The 2nd Plaintiff (*deceased*) is the legal owner of parcel of land known as Portion Numbers 10801 and 11215 both situate in Malindi, Kilifi County.

19. In his Affidavit, the 1st Plaintiff's Director admitted that the suit properties were charged to the Defendant after the Defendant advanced to the 1st Plaintiff credit facilities. The copies of the grant in respect to the two properties, the charge and the further charge have all been annexed on the Defendant's Replying Affidavit.

20. In its letter dated 12th July, 2014 and annexed on the Plaintiff's Affidavit, the 1st Plaintiff admitted owing the Defendant USD 2,328, 377 and Kshs. 29,000,000.

21. In the said letter, the 1st Plaintiff was agreeable to settling the said indebtedness within 36 months at the interest rate of 10% and 17% respectively.

22. According to the Plaintiffs, the Defendant agreed to restructure the liquidation of the admitted amount as suggested in the 1st Plaintiff's letter. However, it reneged on the promise and instead issued a statutory notice of 40 days.

23. In its letter dated 15th July, 2015, the Bank agreed to reschedule "the outstanding USD Terms Loans Facility to be repaid at monthly instalment of USD 35,000 in 96 consecutive months. The letter of offer was prepared by the Bank and the same was accepted by the 1st Plaintiff.

24. The Plaintiffs have not placed any evidence before the court to show that after the rescheduling of the repayment of the loan, they honoured their obligation by paying the suggested monthly payments.

25. In any event, it would appear from the Defendants' letter of 15th July, 2015 that the Bank only agreed to reschedule the outstanding USD Term Loans Facility and not the Kenya Shilling loan facility.

26. The Bank having agreed to reschedule the USD Loan Facility, it was incumbent on the Plaintiffs to show by way of evidence that it paid the suggested amount of USD 35,000 upon signing the "*rescheduled*" agreement. That evidence is not before the court.

27. The Plaintiffs cannot therefore argue that the Bank reneged on its promise.

29. After the letter of 15th July, 2015 in which the Bank agreed to reschedule the USD Loan Facility, the Defendant issued to the Plaintiffs with the forty (40) days' statutory notice pursuant to the provisions of Section 96(2) and (3) of the Land Act, having issued to the Plaintiffs with the 90 days' Statutory Notices dated 12th June, 2015.

29. The Defendant has annexed the certificate of posting showing that indeed the said statutory notices were served on the Plaintiffs by way of registered post. The Plaintiffs have not denied that the addresses that the Defendant used belonged to them.

30. Having perused the certificates of posting and the statutory notices, I am satisfied that the Plaintiffs were served with the said notices and further that the said notices complied with the provisions of Section 90(2) of the Land Act.

31. Indeed, the statutory notices were not only served on the 2nd Plaintiff but also on the 1st Plaintiff, whose address is indicated as 84831-80100 in the certificate of posting. It is therefore not true as submitted by the Plaintiffs' counsel that the 1st Plaintiff was never served with the notices.

32. Other than the 90 days' statutory notices, the court is also satisfied that the Plaintiffs were served with the 40 days' statutory notices dated 16th September, 2015 as shown in the certificate of posting annexed on the Defendant's Replying Affidavit.

33. The 45 days Notification of sale dated 5th November, 2015 by Garam Investments Auctioneers has also been exhibited by the Defendant. According to the Certificate that was issued under Section 15 (c) of the Auctioneers Rule, Joseph Mungai Gikonyo auctioneer served the 2nd Plaintiff, who is the registered proprietor of the suit land, with the said Notification of sale.

34. The Defendant has also exhibited two Valuation Reports by Nile Real Appraisers (EA) Ltd dated 20th January, 2016 in respect to the suit properties.

35. According to those reports, the market value for Portion Number 11215 is Kshs. 200,000,000 while the forced sale value is Kshs. 150,000,000. The market value for Portion Number 10801 is indicated as Kshs. 87,000,000 while the forced sale value is Kshs. 31,550,000.

36. The fact that the Plaintiffs are in possession of other valuation reports indicating that the value of the suit properties is higher than that indicated in the Defendant's valuer's valuation report does not amount to an infringement of Section 97 (1) of the Land Act.

37. If it turns out at the hearing that indeed the valuation given by the Defendant's valuer was not the best price reasonably obtainable, then the Plaintiffs will be entitled to damages.

38. As was held in the case of ***Mrao Limited vs. First American Bank of Kenya Ltd & 2 others (2003) KLR***, the 1st Plaintiff having conceded that it had obtained money from the Defendant, and had given the 2nd Plaintiff's properties as security, which money had not been repaid, the Plaintiffs cannot say that they are entitled to the equitable remedy of an injunction.

39. In the circumstances, I find and hold that the Plaintiffs have not established a *prima facie* case with chances of success.

40. Having offered the suit property as security, the Plaintiffs were well aware that in the event of default, the said properties would be sold to off-set the debt. The Plaintiffs cannot now plead that they will suffer irreparable damages if the injunctive order is not granted.

41. The Plaintiffs' other prayer's for discovery of documents cannot also issue at this stage.

42. I say so because discovery of documents will be done when the matter will come up for pre-trial directions.

43. In any event, the Defendant has annexed on its Replying Affidavits most, if not all of the documents viz-a-viz the charged properties.

44. For those reasons, I dismiss the Plaintiffs' Application dated 11th January, 2016 with costs.

DATED AND SIGNED AT MACHAKOS THIS 2ND DAY OF MAY, 2017.

O.A. ANGOTE

JUDGE

DATED, DELIVERED AND SIGNED AT MALINDI THIS 12TH DAY OF MAY, 2017.

J.O. OLOLA

JUDGE