



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC NO. 529 OF 2016

JAMES MAMBOLEO.....1ST PLAINTIFF

ZIPPORAH NYAWIRA MAMBO

T/A TEXTEX ENTERPRISES.....2ND PLAINTIFF

-VERSUS -

CONSOLIDATED BANK OF KENYA.....1ST DEFENDANT

CLEVERLINE AUCTIONEERS.....2ND DEFENDANT

RULING

The Plaintiffs are the registered proprietors of all that parcel of land known as L.R No. 12952/2, Hinga Road, Nairobi (hereinafter referred to as “the suit property”). On or about the 29th day of March 2011, the 1st Defendant offered to the Plaintiffs a mortgage loan in the sum of Kshs. 12,000,000/= repayable in 180 months at the rate of Kshs. 161,830/= per month inclusive of interest. The Plaintiff charged the suit property to the 1st defendant on 18th April 2011 to secure the said loan amount.

What is now before the court is the Plaintiffs’ Notice of Motion application dated 18th May 2016 seeking a temporary injunction to restrain the Defendants from advertising for sale or in any way offering for sale, selling, disposing of, leasing, occupying or in any way dealing with or alienating the suit property pending the hearing and determination of this suit. The Plaintiffs have also sought an order restraining the 1st Defendant from continuing to refer to Credit Reference Bureaus for adverse listing, the Plaintiffs’ account or from in anyway clogging the Plaintiffs’ access to credit facilities pending the hearing and determination of this suit. The Plaintiffs’ case against the Defendants as set out on the application and the affidavit of the 1st Defendant filed in support thereof is as follows. The 1st Defendant advanced to the Plaintiffs a sum of Kshs. 12,000,000/= which was secured by a charge over the suit property. The said sum of Kshs. 12,000,000/= was disbursed to the Plaintiffs in April 2011. The interest payable on the loan was agreed at 14.25% per annum and the monthly loan repayment was agreed at Kshs. 161,830/= per month inclusive of interest. Within a period of seven (7) months after the disbursement of the loan and the commencement of the repayment thereof, the 1st Defendant increased the interest rate from 14.25% per annum to 25% per annum. The 1st Defendant also increased the monthly loan repayment amount from Kshs. 161,830/= to Ksh. 250,000/= per month. All these changes were made by the 1st Defendant without notice to the Plaintiffs. As a result of the increase in the interest rate and the monthly loan repayment amount without notice as aforesaid, the Plaintiffs fell into arrears without loan repayment. Sometimes in the year 2012, the Plaintiffs approached the 1st Defendant and requested for rescheduling of

the loan which request was accepted by the 1st Defendant in January 2013. The restructured loan of Kshs.10,034,973.20 was to be paid in 180 months at an interest rate of 19% per annum. The monthly repayment installment was to be Kshs. 168,876/= inclusive of interest. Although the Plaintiffs committed themselves to paying the monthly installment of Ksh. 168,876/=, the 1st Defendant did not effect this reduced monthly installment and continued debiting the loan account with a higher amount. The 1st Defendant kept the Plaintiffs in total darkness regarding the administration of the mortgage account. The Plaintiffs request for information and documents relating to their account did not yield favourable response. Apart from the statement of account, the 1st Defendant failed to provide other documents and information that the Plaintiffs had sought relating to their account.

On 3rd August 2015, the 1st Defendant wrote to the Plaintiffs asking them to regularize their account which was said to be overdue to the tune of Kshs. 2,214,145.34. The 1st Defendant thereafter instructed the 2nd Defendant to serve the Plaintiff with a 45 days mortgage redemption notice which notice was served on 21st March 2016. The Plaintiffs fell into arrears in the payment of the loan as a result of the irregular and illegal increase of interest rate from 14.25% per annum to 25% per annum which in turn increased the monthly installment payable from Kshs. 168,000/= to Ksh. 250,000/=. The Plaintiffs were not notified of this variation in interest rate and the adjustment of monthly installments which at its peak reached Kshs.300,000/=. The intended sale of the suit property by the 1st Defendant in purported exercise of its statutory power of sale is premature and unlawful. The 1st Defendant has failed to comply with the mandatory provisions of Section 90, 96(2) and 97 of the Land Act, 2012. The 1st Defendant has also failed to carry out valuation to ascertain the market value and forced sale value of the suit property before purporting to put it up for sale. The sum of Kshs. 12,419,193.25 which the 1st Defendant has claimed from the Plaintiffs through the said redemption notice by the 2nd Defendant is not the correct amount due by the Plaintiffs to the 1st Defendant. The amount claimed includes illegal interest and other levies which the 1st Defendant loaded onto the Plaintiffs' loan account. The Defendants have advertised the suit property for sale and would proceed to dispose of the same by public auction unless restrained by the court. The Plaintiffs contended that they would suffer irreparable loss if the orders sought are not granted.

The application was opposed by the Defendants through a replying affidavit sworn by the 1st Defendant's Credit Officer, Sophie Irene Obanda on 13th June 2016. The 1st Defendant's response to the Plaintiffs' claim and the present application is as follows. The Plaintiffs charged the suit property to the 1st Defendant to secure a loan of Kshs.12,000,000/= which was advanced by the 1st Defendant to the Plaintiffs. The loan was repayable over a period of 180 months in equal monthly installments of Kshs. 161,830/=. It was a term of the loan agreement that the 1st Defendant could vary the rate of interest at its discretion from time to time. The Plaintiffs failed to repay the loan in accordance with the terms of the loan agreement as a result of which the loan account remained in arrears for several months thereby attracting higher interest rate. The Plaintiffs' loan account stood at Kshs. 10,524,491.25 as at 20th May 2016. In view of the Plaintiffs default to service the loan account in accordance with the agreement between the parties, the 1st Defendant had no alternative but to exercise its statutory power of sale. The 1st Defendant issued the Plaintiffs with the three (3) months statutory notice of its intention to sell the suit property by way of public auction unless the Plaintiffs paid the amount then outstanding. The Plaintiffs did not heed to the demand which was contained in the said notice. The 1st Defendant thereafter instructed the 2nd Defendant to serve the Plaintiffs with a redemption notice and notification of sale. The Plaintiffs failed to redeem the property and the 1st Defendant was left with no alternative but to put up the suit property for sale. The Plaintiffs acknowledged their indebtedness to the 1st Defendant and made promises to clear the loan arrears which promises they did not honour. The Plaintiffs concealed to the court the fact that they had admitted their indebtedness to the 1st Defendant and as such have come to court with unclean hands. The 1st Defendant did not breach any term of the loan agreement it entered into with the Plaintiffs and as such there is no justification for restraining it from exercising its statutory power of sale. The Plaintiffs defaulted in their loan repayment even after the 1st Defendant had restructured

their loan repayment and adjusted the monthly installments downwards. The suit against the Defendants is unmerited and brought in bad faith. The Plaintiffs would not suffer irreparable injury if the orders sought are not granted.

The Plaintiffs' application was argued by way of written submissions. I have considered the application together with the affidavit and further affidavit which were filed in support thereof. I have also considered the affidavit which was filed by the 1st Defendant in opposition to the application and the parties' respective submissions. The principles upon which this court exercises its discretion in applications for temporary injunction were set out in the case of Giella vs. Cassman Brown & Co. Ltd. (1973) E. A. 358. An applicant for a temporary injunction must show that he has a prima facie case with a probability of success and that he stands to suffer irreparable harm unless the order sought is granted. In case the court is in doubt as to the above, the application would be determined on a balance of convenience. Injunction is a discretionary remedy. The court has the discretion to grant the order with or without conditions. The court also has the discretion to refuse the order even if the conditions for grant of such order have been met if the court forms the view that it would not be equitable to do so. The Plaintiffs have brought this suit to challenge the exercise of the 1st Defendants statutory power of sale. The Plaintiffs have challenged the manner in which the 1st Defendant has set out to exercise its statutory power of sale on various grounds. In summary, the Plaintiffs have contended that the amount claimed by the 1st Defendant as due on their loan account is not correct because it includes illegal interest charged by the 1st Defendant and unlawful charges levied by the 1st Defendant on the Plaintiffs loan account. The Plaintiffs have accused the 1st Defendant of varying the interest rate without notice and without complying with Section 44 of the Banking Act, Cap 488 Laws of Kenya. The Plaintiffs have also accused the 1st Defendant of exercising its statutory power of sale without serving the notices required under the law. In the case of, Priscillah Krobought Grant vs. Kenya Commercial Finance Co. Ltd. and 2 Others, Court of Appeal at Nairobi, Civil Application No. Nai 227 of 1995 (108/95 V.R) (unreported), the court stated as follows:-

“Finally, it will bear repetition, we think if we were to state that a court does not normally grant an injunction to restrain a mortgagee from exercising its statutory power of sale solely on the grounds that there is a dispute as to the amount due under the mortgage – see Barmal Kanji Shah & Another Vs. Shah Depar Devji (1965) E. A. 91, 32 Halsbury’s Laws of England (4th Edition) paragraph 725 and Uhuru Highways Development Ltd. Vs. Central Bank Kenya and 2 Others, Civil Application No. Nai 140 of 1995 (unreported) per Kwach J. A.”

As I have stated above, the Plaintiffs have contended that the amount of Kshs. 12,419,193.25 claimed by the 1st Defendant in the redemption notice served upon the Plaintiffs by the 2nd Defendant was exaggerated. The Plaintiffs have submitted that it is not even clear whether the outstanding amount is Kshs. 12,419,193.25 stated in the redemption notice or Kshs.10,524,491.25 given in the 1st Defendant's replying affidavit. The statements of the Plaintiffs loan account annexed to the 1st Defendant's replying affidavit shows that the Plaintiffs were indebted to the 1st Defendant to the tune of over Kshs. 12,000,000/= as at 20th May 2016. The Plaintiffs have claimed that this amount is erroneous in that it comprises of interest wrongly charged by the 1st Defendant. I am unable at this stage to make any conclusive findings on the issues raised by the Plaintiffs. What I can say is that there is no evidence that the 1st Defendant varied interest rate outside the contractual arrangement it had with the Plaintiffs and that the variation required ministerial approval under Section 44 of the Banking Act. Clause 3.1 of the charge permitted the 1st Defendant to vary the interest that had been agreed at 14.25% per annum at its own discretion without any notice to the Plaintiffs. Clause 3 of the letter of offer of the loan which was accepted by the Plaintiffs also allowed the 1st Defendant to charge interest at 18% per annum above the 1st Defendant's then base rate of 13.75% per annum for the loan amount in arrears. It is clear from the statement annexed to the 1st Defendant's affidavit that the Plaintiffs were not paying their loan monthly installments as and when the same fell due. At times, the Plaintiffs would go for several months without making any payment. On account of these defaults which the Plaintiffs admitted in writing in a letter to the 1st Defendant, the 1st Defendant was entitled to charge interest at default rate of 18% per annum above

the base rate of 13.75% per annum. It is no wonder that the interest rate charged on the Plaintiffs account varied between 14.25% per annum and 25% per annum. I am of the view that the 1st Defendant did not require ministerial approval to charge the Plaintiffs default interest rate of 18% per annum above base rate for the loan amount which was in arrears. With the increase in the interest rate, the monthly installment was expected to increase automatically. I am not surprised that the amount which the Plaintiffs were to pay monthly increased from Kshs.161,830/= to Ksh. 250,000/=. For the foregoing reasons, I am not satisfied that the Plaintiffs have established a prima facie case against the 1st Defendant based on the alleged illegal variation of interest rate. In any event, as I have stated earlier, the mere fact that there is a dispute of over the mortgage amount is not a ground for restraining a mortgagee from exercising its statutory power of sale.

Apart from the issue of interest rate, the Plaintiffs have also contended that the intended sale of the suit property is illegal because the 1st Defendant's statutory power of sale has not arisen. On this issue, the Plaintiffs contended that the 1st Defendant failed to serve the requisite notices before instructing the 2nd Defendant to serve the Plaintiffs with a redemption notice and notification of sale of the suit property. The Plaintiffs contended that the notices provided for under section 90 and 96 (2) of the Land Act, 2012 were not served by the 1st Defendant. The Plaintiffs also contended that the 1st Defendant did not carryout a valuation of the suit property as required under Section 97(2) of the Land Act, 2012. I am in agreement with the submissions by the Plaintiffs that once they disputed service of the said notices, the onus was upon the 1st Defendant to prove that the said notices which are provided for in law were served. I am of the view that the 1st Defendant did not discharge this burden of proof. The 1st Defendant annexed to its affidavit in reply a notice said to have been served upon the plaintiffs under Section 90 of the Land Act. The 1st Defendant did not however provide proof that the notice was infact served. A certificate of posting a registered mail which is the acceptable proof of posting was not exhibited. The 1st Defendant did not show any proof that it issued a notice under section 96 (2) of the Land Act, 2012. There was also no proof that a forced sale valuation was carried out as required under Section 97(2) of the Land Act. Due to the foregoing, I am satisfied that the Plaintiffs have established a prima facie case against the Defendants on account of failure on the part of the 1st Defendant to comply with the statutory notice requirements. I am also satisfied that the Plaintiffs would suffer irreparable harm if the injunction sought is not granted. In any event, the 1st Defendant cannot be allowed to proceed with a flawed sale of the Plaintiffs property because it can pay damages.

Apart from the injunction which was sought to restrain the sale of the suit property, the Plaintiffs had also sought an injunction to restrain the 1st Defendant from referring their accounts to any Credit Reference Bureau. The Plaintiffs did not lay any basis in their submissions for this relief. From the material before me, there is no doubt that the Plaintiffs are indebted to the 1st Defendant. Under clause 6 (VIII) of the Letter of Offer, the Plaintiffs agreed that the 1st Defendant could at its sole discretion supply the information concerning the Plaintiffs' default in the repayment of the loan to a Credit Reference Bureau. The Plaintiffs have admitted that they are in default in the repayment of the loan. I find no basis for restraining the 1st Defendant from reporting the default to a Credit Reference Bureau.

In the final analysis, the Plaintiffs' application would succeed in part and in view of the fact that the Plaintiffs are still indebted to the 1st Defendant, the orders of injunction would issue conditionally. I therefore allow the Plaintiffs' application dated 18th May 2016 in terms of prayer 3 thereof on the following conditions;

- (i) Pending the hearing and final determination of this suit or further orders by the court, the Plaintiffs shall pay to the 1st Defendant a sum of Kshs.161,830/= per month with effect from 1st August 2017 and on the 1st day of each subsequent month.
- (ii) In the event that the Plaintiffs fail to pay the amount referred to in (i) above on the due date, the injunction granted herein shall lapse automatically without any further reference to the court.

