



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

CASE NO. 560 OF 2017

NEW AGE DEVELOPERS & CONSTRUCTION CO. LTD.....PLAINTIFF

VERSUS

JAMII BORA BANK LIMITED.....DEFENDANT

RULING

The application before Court is the Plaintiff's Notice of Motion dated 24th March, 2017 brought

pursuant to Section 1A, 1B and 3A of the Civil Procedure Rules, Order 40 Rule 2(1), Order 51 Rule (1) of the Civil Procedure Rules 2010, Section 33 B of the Banking Act, Section 13 of the Consumer Protection Act and all the other enabling provisions of the law. The application is premised on the grounds which in summary are that on 13th March, 2017 the Plaintiff saw an advertisement published in the Daily Nation by the Defendant's Agents Purple Royal Auctioneers advertising the suit property land parcel number KAJIADO/KAPUTIEI NORTH/908 for sale on 30th March, 2017 at 11.00 am. The Plaintiff was not served with the mandatory Notification of Sale and Statutory Notice as required by Rules 15(c) and 15(d) respectively of the Auctioneers Rules. The Land Control Board Consent dated 2nd September, 2015 is fraudulent and the proposed sale of the suit property is illegal. The Defendant has not issued the Plaintiff a three months notice in accordance with section 56(2) of the Land Registration Act. The interest rates levied by the Defendant are illegal and punitive approaching 50% of the Plaintiff's account contrary to the provisions of Section 33B of the Banking Act. The Defendant is in breach of Section 13(2) of the Consumer Protection Act by pricing its services as sums that grossly exceed those readily available to other consumers and representing its dealings in a manner adverse to the consumer.

The application is supported by the affidavit of GEORGE GAKUO GATHIGIA who is a Senior Manager with the Plaintiff where he deposes that the Company is the registered owner of the suit land measuring 46.64 hectares or 115.25 acres. He avers that they received a written confirmation that no Land Control Board meeting was held on 2nd September, 2015 contrary to the averments in the purported Land Control Board Consent, which renders the Charge dated 2nd October, 2015 a nullity and unenforceable. He states that whereas the Defendant issued a letter dated 18th August, 2016 purporting the same to be a statutory notice issued under Section 90 of the Land Act, it purported in the same letter to state that the said letter also constituted a statutory notice under Section 56(2) of the Land Registration Act. Further that a three months' notice must be issued under Section 56(2) of the Land Registration Act and expire, before a fresh notice is issued under Section 90 of the Land Act. He further deposes that the Defendant's Statutory power of Sale has not accrued and it cannot exercise any power of sale over a property on the basis of a fraudulent Land Control Board Consent which renders the Charge a nullity.

He states that any suggestions that Section 33B of the Banking Act does not apply to existing loans or to a defaulting customer, is a figment of imagination of the Defendant Bank, which is not captured within this Section.

He further states that on 10th November, 2016, the Defendant issued the Plaintiff with a 21 day notice of its intention to present an Application for Liquidation of the Plaintiff Company under the Insolvency Act and to advertise it in the media and vide Nairobi Milimani Commercial Suit No. 2 of 2017 on 5th January, 2017 the Plaintiff was granted temporary orders restraining the Defendant from filing and proceeding with any application for liquidation of the Company nor publishing the application in the media or elsewhere. That despite the Court Order, the Defendant contemptuously proceeded to file an application on 17th January, 2017 seeking to have the Plaintiff company wound up for insolvency. He avers that the suit property has been subdivided into 730 portions which are on sale by the Plaintiff for a total of Kshs. 288,350,000 which is more than enough to clear any legitimate debt owing to the Defendant. He proposes that it be permitted to dispose off and sell each of the portions of the suit property and remit payment to the Defendant from time to time as sales are made without imposing any deadlines as to the time of full payment.

The Defendant opposed the application and filed a replying affidavit sworn by JAMES MURAGE who is the Head of Legal for the bank where he deposes that vide a Letter of Offer dated 31st July, 2015 and a Supplemental Letter of Offer dated 14th October, 2015 the Defendant offered to the Plaintiff a Term Loan Facility of Kshs. 95,000,000/= under terms set out in the two Letters of Offer, which would be repayable within 60 months with monthly installments of Kshs. 2,957,902.96. He avers that the Letter of Offer dated 14th October, 2015 amended the clause on Interest Rates and provided that the Defendant would charge interest at the rate of 28% per annum and excess over limit/default interest rate at 31% applicable in the event of default. He states that the loan was disbursed on the strength of a Legal Charge dated 2nd October, 2015 over all the suit property and by a Deed of Guarantee signed jointly and severally by the Directors of the Plaintiff being PAUL MUTHEE and ANNETTE EDNA MUTHONI MBATI dated 12th October, 2015. He further deposes that the Directors of the Plaintiff confirmed having read and understood the terms of the Letter of Offer dated 31st July, 2015 and Supplemental Letter of Offer dated 14th October, 2015 and the Charge Instrument dated 2nd October, 2015 and hence duly bound by the terms therein.

He further avers that on 18th August, 2016 the Defendant issued the first statutory notice under section 90(1) (2) (3) (e) of the Land Act as the Plaintiff was in default of the loan arrears. Further that the aforesaid ninety (90) days statutory notice elicited no response and expired without rectification by the Plaintiff and on 25th November, 2016 the Defendant issued the 40 days' statutory notice to sell under section 96(2) of the Land Act. He avers that on 13th January, 2017, the Defendant through its advocates on record, issued instructions to M/S Purple Royal Auctioneers to issue the Fourty Five (45) days notification of sale in accordance with the Auctioneers Rules. Further on 17th January, 2017 the Defendant duly conducted valuation to the suit property pursuant to section 97(2) of the Land Act and forwarded the said report to M/S Purple Royal Auctioneers who then issued a Fourty Five (45) days Auctioneers Notification of Sale on 27th January, 2017 pursuant to section 15 of the Auctioneers Rules, which notice expired without rectification. Further on 27th March, 2017 the Auctioneer proceeded to advertise the suit property for sale on the 30th March, 2017.

He states that the Banking Act does not apply retrospectively to loan facilities advanced prior to the said amendment but to the ones advanced after 14th September, 2016; interests on loan facility do accrue at the point of advancement of the loan facility and interest rates applicable to the subject loan facility herein is the Defendant Bank's interest rate as per the loan facility Agreement. He deposes that the Petition for insolvency filed by the Defendant vide Insolvency Petition no. 2 of 2017 was withdrawn as the Bank opted to pursue its statutory power of sale. Further that the Land Control Board sat on 2nd September, 2015, letter of Consent dated 2nd September, 2015 is authentic and letter dated 9th February, 2017 addressed to Githii & Co. Advocates allegedly confirming that the Land Control Board never sat on 2nd September, 2015 is a forgery. He states that the Land Control Board Consent was obtained lawfully and its validity cannot be doubted and the Plaintiff benefited from the Charge Instrument registered in favour of the Defendant. He avers that as at 29th March, 2017 the Plaintiff's account is currently outstanding at Kshs. 112,217,848.58 and whereas the Plaintiff acknowledges its indebtedness to the Defendant, it has sought protective orders of court without making payment of the outstanding amount or proposal on mode of payment.

The Plaintiff filed a further affidavit sworn by GEORGE GAKUO GATHIGIA where he reiterates the facts of its case and deposes that no Land Control Board meeting was held on 2nd September, 2015 and no mandatory statutory notices were issued under Section 56(2) of the Land Registration Act. He avers that the notices were not sent to the Plaintiff as there is no Certificate of Posting and the Statutory notice issued on 18th August, 2016 called for payment of total outstanding amount as opposed to demanding the amount that was required to rectify default. He states that there is no dispute that service of the mandatory 45 days' notice on the Plaintiff by the Defendant's Auctioneer agent was not done. He states that the Valuation report by the Defendant grossly undervalues the suit property.

Counsels filed written submissions which they highlighted on 13th June, 2017 which I have read and considered.

Issues and determination

Upon perusal of the materials presented by the Plaintiff and the Defendant in respect to the Notice of Motion the 24th March, 2017, I find that the only issue for determination is whether the Plaintiff is entitled to the temporary injunction orders sought.

The principles of granting interlocutory injunction are established in the case of **Giella vs. Cassman Brown & Co. Ltd (1973) E.A 358** where the court held inter alia that for an injunctive order to be granted the Applicant has to demonstrate it has prima facie case with a probability of success, and it stands to suffer irreparable loss or injury which cannot adequately be compensated in damages. If the court is in doubt, it should decide the application on a balance of convenience.

As to whether the Plaintiff has established a prima facie case with a probability of success, the Plaintiff raised an issue on the authenticity of the Charge, claiming the consent that led to the registration of the Charge was invalid as there was no Land Control Board meeting held.

Section 79 (5) of the Land Act states that '***a formal charge shall take effect only when it is registered in a prescribed register and a chargee shall not be entitled to exercise any of the remedies under that charge unless it is so registered.***'

In the instant case the Court notes that the Charge was duly registered at the Kajiado Land Registry on 8th October 2015. The Court further notes that the Plaintiff admits receiving the loan which was extended after the registration of the said Charge. What is curious is that the Plaintiff claims the Charge is not authentic and yet he signed the two Letters of Offer and even gave the suit land as security for the loan which was disbursed by the Defendant. The Plaintiff on the same breath seeks the Court intervention to allow it to sell the subdivided plots of the suit land and repay the debt gradually without giving any time lines. According to a letter by the Assistant County Commissioner Isinya, he indicated that a Land Control Board was duly held on 2nd September, 2015, letter of Consent dated 2nd September, 2015 is authentic and letter dated 9th February, 2017 addressed to Githii & Co. Advocates allegedly confirming that the Land Control Board never sat on 2nd September, 2015 is a forgery.

On the Plaintiff's allegation that no statutory notices were issued to it in accordance with the provisions of sections section 56(2) of the Land Registration Act and Sections 90 (1) (3) and 96 of the Land Act, the Defendant submitted various notices it issued to the Plaintiff.

Section 90 (1) stipulates that '***If a chargor is in default of any obligations, fails to pay interest or any other periodic payment or any part thereof due under any charge or in the performance or observation of any covenant, express or implied, in any charge, and continues to be in default for one month, the chargee may serve on the chargor a notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be.***'

Section 90 (3) stipulates that ' if the chargor does not comply within two months after the date of the service of the notice under, subsection (1), the chargee may -

- (a) sue the chargor for any money due and owing under the charge;
- (b) appoint a receiver of the income of the charge land;
- (c) lease the charged land, or if the charge is of a lease, sublease the land;
- (d) enter into possession of the charged land; or
- (e) sell the charged land.

The Court notes that annexures JM - 4a, JM - 4b, JM - 5a, JM - 5b, JM - 7a, and JM - 7c in the Defendant's replying affidavit sworn by JAMES MURAGE who is the Head of Legal, are various notices and certificate of posting issued to the Plaintiff informing it of its default and the fact that the Defendant intended to exercise its statutory power of sale. A cursory look at the Certificate of posting indicates that it contains the same last address as indicated in the two Letters of Offer. The Plaintiff does not deny this is its last known address. From the above the Court finds that the Plaintiff was indeed served with the requisite statutory notices in accordance with section 90 (1) of the Land Act. Further annexure JM - 7b is a sworn affidavit by a process server confirming he went to serve the directors of the Plaintiff who advised him to serve their Secretary as they were held up in a long meeting.

Section 96(1) is further clear that a chargee shall proceed to exercise its statutory power of sale where a chargor is in default of the obligations under a charge and remains in default at the expiry of the time provided for the rectification of that default. In the instant case, the Court notes that after the various notices issued to the Plaintiff, it admits it is yet to repay the loan and requests for time to sell the charged property and pay up the loan whenever it does so. It is the Court's finding that it cannot be made a party to the contractual obligation between the Plaintiff and the Defendant.

The Court notes that the Plaintiff has admitted its indebtedness to the Defendant and requests for time to repay the loan. The Plaintiff however does not say how much he intends to pay nor the period of repayment. I am persuaded by the case of **LABELLE INTERNATIONAL LTD. AND ANOTHER – VS – FIDELITY COMMERCIAL BANK & ANOTHER, CIVIL CASE NO. 786 OF 2002** where it established that *“. . . when part of amount claimed is admitted or proved to be due, a Chargee cannot be restrained by an injunction.”* It is hence the Court's finding that in the instant case the Defendant cannot be restrained from realizing the security since the Plaintiff already admitted its indebtedness to the bank.

The principles of equity require that he who comes to equity must come with clean hands. On the question of illegality of the Charge, one question that comes to mind is why did they receive the money from the Defendant. The Court notes it was also the duty of the Plaintiff to obtain the consent to Charge the suit land before they received the money. The Court notes that the Plaintiff has not come to court with clean hands where it purports that it was never furnished with statement of accounts.

In terms of the issue raised by the Plaintiff on the arbitrary interest rate applied to their loan account by the Defendant. The Court notes that the Plaintiff's indeed signed two Letters of Offer and accepted the terms of interest therein. They cannot refute now and claim the interest rates were against the Banking Act and the Defendant is further contravening the provisions of the Consumer Protection Act. Further Section 84 (1) of the Land Act is clear on variation of interest rate and stipulates as follows: *' where it was contractually agreed upon that the rate of interest is variable, the rate of interest payable under a charge may be reduced or increased by a written notice served on the chargor by the chargee.....*

From the above, it is clear that Plaintiff has not established a prima facie case to meet the threshold for the grant of orders of injunction. I consequently dismiss the Plaintiffs' Notice of Motion dated the 24th March, 2017 with costs.

Dated signed and delivered in open court at Kajiado this 19th day of September, 2017.

CHRISTINE OCHIENG

JUDGE

REPRESENTATION

M/s Njuguna holding brief for M/s Githii for plaintiff

No appearance for defendant.

Mpoye – Court Assistant