



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT NYAHURURU

ELC CASE NO 287 OF 2017

EAST AFRICA VENTOR CO. LTD.....PLAINTIFF/APPLICANT

VERSUS

AGRICULTURAL FINANCE CO-OP LTD....1ST DEFENDANT/RESPONDENT

LEGACY AUCTIONEERS SERVICE.....2ND DEFENDANT/RESPONDENT

RULING

1. Before me is a Notice of Motion dated 30th October 2016 and filed on the 1st November 2016 brought under *Order 40 Rule 1,2 and 4, of the Civil Procedure Rules, Section 1A, 1B and 3A and 63 of the Civil Procedure Act and all other enabling provisions of the Law* where the Applicant seeks that:

a) **Spent.....**

b) **Spent.....**

c) That pending the inter-parties hearing and determination of this suit; the defendants through themselves their servants, employees, nominees, assigns, agents and/or other person or authority connected therewith be restrained by a temporary injunction order from offering for sale, selling, disposing, leasing occupying or in any way dealing with or alienating the property rights in the plaintiff's charged properties being land parcels No. SIPILI DONYOLOIP BLOCK 1/9010 and SIPILI DONYOLOIP BLOCK 1/9012.

d) That pending the inter-parties hearing and determination of this suit the court be pleased to issue an order of prohibition, prohibiting the defendants from continuing to refer for adverse listing or listing adversely the plaintiff's accounts or accounts related to the plaintiff in Kenya Credit Reference bureau or in any way clogging the plaintiff's access to credit facilities from other financiers.

e) That costs of this application be borne by the defendants.

2. The said application is supported by the sworn affidavit of Mr. Geoffrey Wahome Muotia the Managing director of the plaintiff company.

3. Ex parte interim orders were issued before my bother Judge sitting in Nakuru, on the 1st November 2016 on condition that the plaintiff deposits with the 1st defendant a sum of Ksh 200,000/=. This was done.

4. Directions were subsequently taken that parties dispose of the matter by way of written submissions, which was adequately done

The Plaintiff/Applicant's case.

5. The Applicant gave the background information in his written submission to the effect that sometime in December 2014, he applied for a financial facility from the 1st Defendant amounting to Ksh. 10,000,000/= and charged the suit land as security, for the purpose of undertaking large scale farming.

6. That between the months of November 2015 and December 2015, the plaintiff's land was invaded by elephants and the crops estimated at Ksh. 14,310,537/= were destroyed. The plaintiff sought for compensation from the Ministry of Natural Resources and wild life.

7. In the meantime, the plaintiff sought a reschedule of the repayment plan from the 1st Defendant after explaining their predicament. Instead they 1st defendant kept sending them loan default notices to which the plaintiff approached Development Bank limited and requested them to take over the loan from the 1st Defendant at a fairer and more flexible repayment terms.

8. That Development Bank limited agreed to take over the loan but asked for some time to facilitate the same. In the process the 2nd Defendant, vide instructions by the 1st Defendant proceeded to advertise the suit properties for sale without the requisite Notification of sale and a 45 day Redemption Notice.

9. The property had been valued at Ksh 75,000,000/= whilst the sale for the properties was advertised for Ksh 12,599,983/= A valuation report was attached which proved that the advertisement had been a gross understatement of the value of the suit property.

10. The 1st defendant further adversary listed the plaintiff in the Kenya Credit Reference bureau thereby thwarting efforts to seek alternative facilities from other financiers and hence clogging the plaintiff's right to redeem his property and unfairly limiting its options.

11. The plaintiff's written submission was to the effect that despite his efforts to source for funds to offset its account, the 1st defendant has clogged his right of redemption, actions which the plaintiff finds to be tainted with mala fides as the defendants are overly eager to sell the properties and defeat the plaintiff's right of redemption. The Applicant/Plaintiff and relied on Section 89 of the Land Act which prohibits a chargee to foreclose the equity of redemption in a charged land.

12. The plaintiff also submitted that the 1st defendant was not entitled to exercise its statutory power of sale over the suit properties while at the same time undercutting and/or frustrating the borrower's efforts to source funds from other financiers in order to repay the loan.

13. The plaintiff further submitted that no statutory Notice was ever issued to the Principle debtor which vitiates the intended action of sale. Reliance was put on the case of **Kositany and another vs. ICDC and another [2004]2 KLR 440** where the court had held that where a charge is valid, the statutory notice must be sent to the principal debtor, even where the chargor is a director of the principal debtor of the company.

14. The plaintiff submitted that coupled with the lack of the issuance of the notice, that there was gross undervaluation of the suit properties by the defendants, and relied on section 97 of the Land Act which mandated the defendants to carry out a valuation on the property and dispose it only at a value that fetches the best price.

15. The defendants in this case did not value the suit properties before attempting to realize the security in breach of the provisions of the law.

16. The combined value of both properties as submitted by the plaintiff as Ksh 42,024,000/= and therefore the forced sale value of Ksh.16, 840, 000/= was a gross undervaluation of the properties according to the plaintiff.

17. Vide the valuation carried out in July 2016 by M/s Ardhiworth (Real Estate) Limited, the open value was of Ksh. 75 Million Kenya shillings and forced Sale Value of Ksh. 56.5 Million Kenya shillings and a mortgage value of Ksh. 65 million Kenya shillings. The plaintiff relied on the case of **David Gitome Kuhiguka vs. Equity Bank Ltd [2013] eKLR** where the court held that:

*"I find that the Defendant has not complied with **Section 97 (2)** of the Land Act in this connection. The obligation on a chargee to ensure that a forced sale valuation is undertaken by a valuer comes under the heading to **Section 97** of the Land Act, 2012 – "Duty of chargee exercising power of sale".*

To my mind, such a duty is obligatory.

18. The plaintiff concluded his submission by stating that they had met the threshold for the grant of the injunctive orders as is stated in the Giella vs. Cassman Brown case and relied on the principles laid down in the case Mrao **Limited vs. First American bank of Kenya and 2 others [2003] KLR 125** to prove that they had established a prima facie case by showing that they had not denied the fact that they owed the 1st defendant a loan facility but despite that fact that they had put in efforts to acquire funds to repay the said loan facility, these efforts have been undermined by the 1st defendant's unwillingness to co-operate with them.

19. Reliance was also put on the case of **Joseph Shiro Mosiomo vs. Housing Finance Company of Kenya [2008] eKLR** to show that the Defendant's actions were tainted with mala fides as they are overly eager to sell the properties which they have grossly undervalued and that if they sold the suit property at a loss, it would occasion grant damage to the plaintiff and its business thus causing irreparable damage not compensable by way of damages.

20. The plaintiff's submission on the third Principle on the balance of convenience, was that if the court was in doubt as to whether the plaintiff had established a prima facie case with probability of success and damages would not be adequate compensation for the loss suffered that the balance of convenience should tilt in favor of preserving the suit property until the application is heard and determined. They relied on the case of **Alice Awino Okello vs. Trust Bank Ltd and another LLR No.625 (CCK)** where the court of Appeal held that;

"the balance of convenience is in favour of the applicant as the sale of one's property is a serious matter that deprives one of a right recognized in law and as such should not be allowed to proceed on doubtful circumstances".

The 1st defendant's case.

21. The 1st defendant's written submission was to the effect that indeed they facilitated the plaintiff with a loan facility of Ksh 10,000,000/= for agricultural development which sum was to be paid in full with interest and cost within a period of 36 months. That the suit properties were offered as security for the loan.

22. That when the plaintiff defaulted in the re-payment, they run to court seeking interim orders of injunction while denying receipt of the loan facility for agricultural loan.

23. The Defendant submitted that this case invokes the provisions of section 97(1) and (2) of the Land Act to wit;

(1) A chargee who exercises a power to sell the charged land, including the exercise of the power to sell in pursuance of an order of a court, owes a duty of care to the chargor, any guarantor of the whole or any part of the sums advanced to the chargor, any chargee under a subsequent charge or under a lien to obtain the best price reasonably obtainable at the time of sale.

(2) A chargee shall, before exercising the right of sale, ensure that a forced sale valuation is undertaken by a valuer.

24. The Defendant confirmed that they knew that they were under statutory duty to first to ensure that a forced valuation is under taken by a professional valuer and secondly to obtain the best price reasonable attainable at the time of sale. While relying on the case of **Olkasasi Limited vs Equity Bank Limited [2015] eKLR** the defendant submitted that the plaintiff's valuation report herein relied upon was exaggerated as compared to the report that was used during the appraisal of the loan. They questioned the competence of the valuer therein and stated that they had discharged the onus of forced valuation.

25. The defendants in their written submission stated that in as far as drafting of the Statutory Notices was concerned, that there was no one format on how the same should be drawn as it was a matter of style which was not cast in stone. So long as the notice complied with the requirements set out in section 90(1) of the Land Act, the validity could not be quashed. What was mandatory in the notice under Section 90 of the Land Act, was to inform the chargor the amount that must be paid to rectify the default. In their case, the plaintiff was issued with a statutory notice informing it of the amount owing to be Ksh. 11,878,8660/= which sum was inclusive of the principle amount together with interest thereon.

26. The defendant further submitted that the plaintiff's interpretation of section 90(1) to the effect that, when a default is rectified, interest and other charges should be applied to protect the lender from inflation and loss of value of money over the period of the default which had been rectified, would defeat the objects of the Act.

27. It was the defendant's contention that a prima facie case was more than an arguable case and it was not sufficient to merely raise issues. That evidence must show an infringement of a right and the probability of the applicant's case upon trial. The plaintiff in the present case was then one who had infringed on the 1st defendant' right.

28. The defendant's submission on the issue of reparation in damages was that once the plaintiff had charged their property, then the same became a commodity for sale and it was not open for them to say that they had sentimental value for the property, as it as their ancestral home.

29. In conclusion the defendant's submission was to the effect that since the orders sought by the plaintiff were equitable remedies it was paramount that they too came to court with clean hands and must also do equity which they have not done and as a result their application ought to be dismissed with condemnation to pay costs.

Court's finding;

30. Having read the written submission and applicable law, as well as perused through the affidavits and annexures herein attached, I find that:

31. From the documents before me, it is not in dispute that in December 2014, the Plaintiff herein applied for and was advanced by the 1st Defendant, a loan facility of Ksh. 10,000,000/= to undertake farming, which facility was secured by the plaintiff's securities namely No. SIPILI DONYOLOIP BLOCK 1/9010 and SIPILI DONYOLOIP BLOCK 1/9012.

32. It is also not in dispute that the plaintiff's crop was destroyed by wild animals (elephants) in the following year between November and December 2015 and that the plaintiff raised concerns with the relevant ministry and is awaiting compensation.

33. Having defaulted, the plaintiff not only applied to the 1st Defendant for rescheduling of the loan repayment terms to enable him deal with the increase exposure to liability, but also approached Development Bank limited and requested them to take over the loan from the 1st Defendant at a fairer and more flexible repayment terms.

34. That while this was going on, a Statutory Notice dated 3rd March 2016 was served upon the plaintiff. Thereafter a Notification for sale and a 45 days Redemption notice dated the 26th August 2016 were served upon the plaintiff's receptionist who received it on behalf of the plaintiff but declined to sign for the same.

35. The 2nd Defendant, on instructions of the 1st Defendant then caused the charged property to be advertised in the newspaper for sale on

the 2nd November, 2016.

36. The Plaintiff does not dispute that he has defaulted in servicing of the loan.

37. I also find that in the exercise of its power of sale, the 1st Defendant did not comply with section 90(2) (b) and 96 of the Land Act and neither did it discharge the duty of care under section 97(2) of the Land Act to undertake valuation of the suit property in order to obtain the best market value of the suit property. In the absence of a Notice to sell under section 96(2) of the Land Act, the scheduled sale of the suit property was illegal.

Matters for determination:

- i. Whether the Defendant served the Plaintiffs with a Statutory Notice pursuant to section 90(2) of the Land Act
- ii. Whether there was gross undervaluation of the suit properties by the defendants.
- iii. Whether the Respondent's right of statutory power of sale has accrued.

Notices

38. A statutory notice pursuant to the **Agricultural Finance Act**, dated the 3rd March 2016, addressed to the Plaintiff and copied to the Plaintiff's directors by the Defendant's Director was served upon the director of the plaintiff company on the 4th March 2016 recalling the loan.

39. The Notice demanded a payment of a total sum of Ksh. 11,878,860/-, and recalled the loan which was to be fully redeemed.

40. The same gave three months' notice for the full payment to be made failing which the 1st Defendant would realize the charge on the suit lands.

41. Suffice to say that the Constitution of Kenya 2010 introduced three classifications of land: community land, private land and public land and drastically changed the structure for administration and management of all land after 2010. The Land Act of 2012 provides the substantive law regulating land matters in Kenya which includes and is not limited to general provisions relating to Charges.

Section 78 relates to all charges on land and provides as follows:

1(a) the provisions of this Part shall not be construed so as to affect the validity of any entry in the register or any charge, mortgage or other security instrument which was valid immediately before the commencement of this Act and the entries in the register and the charges, mortgages or other instruments shall continue to be valid in accordance with their terms notwithstanding their inconsistency with the provisions of this Part;

(a) the provisions relating to the realization of any charge, mortgage or other instrument created before the commencement of this Act shall apply save for the requirement to serve notice to spouses and other persons who were not required to be served under the repealed Acts of Parliament.

2. References in this Part to "the charged land" shall be taken to mean and include a charged land, a charged lease and sublease and a second or subsequent charge.

42. Coupled with the aforesaid, section 90 of the Land Act, to which is of importance in the instance case, provides for remedies of a charge to the effect that.

Provisions of section 90(2) of the Land Act to wit:

90(1) If a chargor is in default of any obligation, 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.

90(2) The notice required by Subsection (1) shall adequately inform the recipient of the following matters –

The notice required by subsection (1) shall adequately inform the recipient of the following matters—

a) the nature and extent of the default by the chargor;

b) if the default consists of the non-payment of any money due under the charge, the amount that must be paid to rectify the default and the time, being not less than three months, by the end of which the payment in default must have been completed;

c) if the default consists of the failure to perform or observe any covenant, express or implied, in the charge, the thing the chargor

must do or desist from doing so as to rectify the default and the time, not being less than two months, by the end of which the default must have been rectified;

d) the consequence if the default is not rectified within the time specified in the notice, the chargee will proceed to exercise any of the remedies referred to in this section in accordance with the procedures provided for in this sub-part; and

e) the right of the chargor in respect of certain remedies to apply to the court for relief against those remedies

43. It is worth noting that a statutory notice issued under section 90 of the Land Act, prompts a process, which leads to the chargee ultimately exercising its remedies outlined under section 90(3) of the Act. The notice is issued where the chargor is in default of any obligation under the charge or has failed to pay interest or any other periodic payment and such default continues for one month.

44. As read together with section 90(3), section 90(2) of the Land Act obligates the chargee to firstly, state the nature and extent of default. Secondly, where the default consists of non-payment, to state the amount required to be paid within three months for the purposes of making good the default or where the default is non observance of a covenant in the charge, then the notice is to state what the charger is to do or desist from doing so as to rectify the default. Thirdly, the notice ought to state the fact that if the default is not rectified within the time stated in the notice, then the chargor would thereafter sue for money due and owing under the charge, appoint a receiver of the income of the security property, lease the security property, enter into and keep possession of the security property or sell the security property. The fourth and final requirement under the notice is that the notice needs to state that the chargor has the right to apply to court and seek any relief or challenge the exercise by the charge of any of the statutory remedies. The notice crystallizes after the expiry of ninety days from the date it is received by the chargor.

45. The statutory notices stipulated under the Land Act are mandatory legal requirements. The right to exercise the statutory remedies accrues only after full compliance with the legal framework on statutory notices. The Statutory notice in the present case in my humble view was not in accordance with section 90(2) of the Land Act and therefore the acts of the defendant in seeking to exercise its chargee's statutory power of sale are unlawful.

46. Secondly, section 96 of the land Act is explicit to the effect that after the borrower has failed to remedy the default in accordance with the notice issued under the law, the chargor, who is the guarantor is entitled to a notice of not less than 40 days under section 96(2) of the Land Act, before the chargee can sell the charged property. The notice under section 96(2) of the Land Act is mandatory, and is quite different from the Redemption Notice issued under rule 15 of the Auctioneers Act as herein explained.

Section 96(2) of the Land Act which provides as follows:-

“Before exercising the power to sell the charged land, the chargee shall serve on the chargor a notice to sell in the prescribed form and shall not proceed to complete any contract for sale of the charged land until at least forty days have elapsed from the date of the service of the notice to sell”.

47. In the decided case of **David Ngugi Ngaari v Kenya Commercial Bank Limited [2015] eKLR**, Justice F. Gikonyo had this to say on a Charge under Section 96(2) of the land Act as compared to the Redemption Notice issued under rule 15 of the Auctioneers Act.

‘Of importance, when Parliament enacted section 96(2) of the Land Act, the provisions of the Auctioneers Act were existing law as per section 7 of the Sixth Schedule of the Constitution. Again, rule 15 of the Auctioneers Rules applies to sale by public auction of any immovable property in execution of a decree or on instructions such as by a chargee. It is not specially tailored for purposes of section 96(2) of the Land Act. One other important thing: Until the enactment of the Land Law, 2012, equity of redemption had been left to judicial interpretation and case law. But now it has gained statutory expression in section 89 of the Land Act which provides expressly that equity of redemption will not be extinguished except in accordance with the provisions of the said Act. Therefore, exercise of Chargee’s Statutory Power of Sale will only extinguish the Chargor’s Equity of Redemption if it is strictly exercised in accordance with the Land Act. Section 96(2) of the Land Act is one of the provisions of the Land Act which reinforce the Chargors Equity of Redemption. I refuse that section 96(2) of the Land Act is an embellishment in the statute or a duplication of or could be read to mean Rule 15 in the Auctioneers Act.’

I couldn't agree more.

48. I have not seen any notice under section 96(2) of the Land Act issued to the Applicant, to sell the charged land. What I see in the documents annexed to the replying affidavit are the Statutory Notice dated the 3rd March by the chargee’s managing Director, Notification of Sale by the auctioneers and a 45 days Redemption Notice. In the absence of a notice clearly indicated to be a notice under section 96(2) of the Land Act, I am not able to legally pronounce that such notice was issued.

Valuation

49. The applicant’s contention was that there had been gross understatement of the value of the suit property by the defendants when they caused the same to be advertised for sale for Ksh 12,599,983/= while the real value, according to his valuer, a valuation report which was attached, was Ksh 75,000,000/=.

50. The primary provision on forced valuation is found in Section 97(2) of the Land Act No. 6 of 2012 and applies where the charged land is to be sold in the exercise of power of sale or pursuant to an order of the court.

51. Section 97(2) of the Land Act provides as follows:-

(2) A chargee shall, before exercising the right of sale, ensure that a forced sale valuation is undertaken by a Valuer.

52. The arguments by the Respondent on valuation take quite an opposite coordinate from the Applicant's argument in that in their written submission, the 1st Defendant stated that the plaintiff's valuation report was extremely exaggerated as compared to the valuation report used during the appraisal of the loan. In essence therefore the defendant was relying on the valuation report that was conducted when the plaintiff first applied for the loan and which report was not annexed to their documents.

53. The loan facility was granted in the year 2014 when the first valuation was supposedly conducted by the 1st Defendant. The court has not been furnished with a copy of the said valuation. By the time the suit land was advertised for sale on the 10th October 2016, it was over a period of close to two years surely the property must have appreciated in its value even for the purpose of a forced sale. The 1st Defendant initiated the process of exercising the statutory power of sale and it was incumbent upon them to have caused the forced valuation.

54. Although section 97 of the Land Act is silent on the time within which a forced valuation should be done except that it is done before the public auction, however in the interest of justice, and to reinforce the rights of the chargor to have reasonable value for his property, the same ought to be done within reasonable time before the sale.

55. The obligation on a chargee to ensure that a forced sale valuation is undertaken by a valuer is provided for in **Section 97** of the *Land Act, 2012* which makes it statutory and obligatory. It should not be left to the whims of the chargee and its agents especially the auctioneers.

56. I have not seen any forced sale valuation report as none was annexed in the affidavits by the 1st Defendant.

57. I also find that the 1st Defendant's continued reference for adverse listing or listing adversely the plaintiff's accounts in Kenya Credit Reference bureau was made on the basis of flawed notices, the same is premature and should be reversed immediately.

58. The upshot of this application is that the right to exercise the statutory remedy of sale accrues only after the mandatory statutory valuation stipulated under Section 97 of the Land Act. Failure by a chargee to comply with the law is a sufficient basis for the court to grant restraining orders in favour of a defaulting borrower.

59. Accordingly, I hereby grant an injunction to restrain the sale of the suit property as long as a proper statutory Notice, Notice to sell the property and Notification of Sale under section 96(2) of the Land Act have not been issued, respectively. That is to say, the Chargee is at liberty to issue the required Notices and thereafter have the property sold in accordance with the Auctioneers Act and Rules.

60. The injunction to restrain the 1st and 2nd Defendants from selling the suit property will last for as long as proper notices have not been issued as directed. They should also carry out the forced sale valuation as required under section 97 of the Land Act.

61. The application dated 30th October, 2016 succeeds only to the extent stated herein above.

62. I will not award costs of the application. Each party shall bear own costs. It is so ordered.

Dated and delivered at Nyahururu this 17th day of October 2017.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE