



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KWALE
ELC CASE NO. 2 OF 2016
STOW CITY LIMITED.....PLAINTIFF/APPLICANT
VERSUS
IMPERIAL BANK LIMITED
(IN RECEIVERSHIP) KENYA DEPOSIT
INSURANCE CORPORATION...DEFENDANTS/RESPONDENT

RULING

1. This is the Notice of Motion dated 27th September 2016. It is brought under order 40 Rules 1(a), 2(i) of the Civil Procedure Rules, Section 3A, 1B, of the Civil Procedure Act.
2. It seeks orders that;
 - a) Spent
 - b) Spent
 - c) That the Honourable Court be pleased to grant an order of injunction restraining the defendant/respondents, their agents, servants and/or M/s Kinyua and Company Auctioneers from selling by public auction or otherwise by private treaty the Applicant's parcel of land known as Kwale/Galu/Kinondo /1122 and/or transferring the said parcel of land to any other person or at all pending the hearing of the suit
 - d) The costs of the application be provided for.
 - e) The application is based on the following grounds;
 - i) The Defendant/Respondents have advertised for sale the Applicant's parcel of land known as Kwale/Galu/Kinondo /1122 without the requisite statutory notice.
 - ii) The failure to pay the outstanding loan was occasioned by the closure and subsequent placing of the first defendant/respondent under receivership of the second defendant/respondent.

iii) The applicants parcel of land risks being sold through an irregular public auction and shall expose the Applicant to loss and damage.

iv) Failure to repay the loan was not fault of the plaintiff/applicant.

3. The application is supported by the affidavit of Damaris Mwongeli Mbindyo, the director of the plaintiff sworn on the 27/9/2017.

4. The application is opposed. There is a replying affidavit sworn by Mohammed Ahmed the receiver manager of the first defendant appointed by the second defendant, sworn on the 25/11/2016.

5. On 14/3/2017 it was agreed by the parties that the application be dispensed by way of written submissions.

6. I have considered the Application dated 27/9/2017 the supporting affidavit and the annexures. I have also considered the replying affidavit by the receiver manager and the annexures.

I have considered the relevant provisions of law and the submissions of both counsels. In written submissions counsel have substantiated their clients respective positions stated in their respective affidavits.

7. The issues of determination are;

i) Whether the plaintiff/Applicant was under an obligation to notify the Defendant/Respondents of her change of address.

ii) Whether the Plaintiff/Applicant's failure to pay the overdraft was occasioned by the placement of the first defendant under receivership.

iii) Whether the Defendant/respondents are within their rights in exercising their statutory power of sale.

iv) Whether the plaintiff/Applicant is in breach of contract.

v) Whether the plaintiff/Applicant is entitled to injunctive relief/orders sought.

8. It is now appropriate to consider the facts that have emerged and the legal principles applicable. The principles were laid down in the precedent setting case of **Giella –versus- Cassman Brown And Company Limited (1973) EA 358**. First, the applicant must show a prima facie case with a probability of success.

Secondly, that an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages.

Thirdly, if the court is in doubt it should act on a balance of convenience.

9. It is the Applicant/Plaintiff's case that she is a director of the plaintiff company. That the plaintiff is the registered owner of land parcel number Kwale/Galu/Kinondo /1122.

She further told the court that the Applicant applied for and obtained a loan of Kshs. 2,000,000/= from the first defendant bank payable for a period of 36 months.

She told the court that the plaintiff has plaid a huge sum of money towards the liquidation of the loan. Further that in 2015 the first defendant bank was placed under receivership of the second defendant. There was no communication from the defendants on where to pay the outstanding loan. Later the parcel of land was advertised for sale which sale is irregular.

10. The Defendants/Respondents on their part through a sworn affidavit of Mohammed Ahmed the receiver manager, confirms that a statutory notice dated 30/9/2015 was issued to the Plaintiffs address.

That various notices were sent to the plaintiff/Applicant but there was no response. That the statutory notice to sell was finally issued on 17/3/2016 pursuant to section 96 of the Land Act 2012 and the same expired on 3/5/2016. That the Plaintiff/Applicant's indebted to the first defendant.

Further that the plaintiff/Applicant has failed to disclose to the court that a statutory notice was served. They have relied on the case of *Pelesia Atieno Wamidha –versus- Cooperative Bank of Kenya Limited And 4 others (2015) eKLR*. (2) *National Bank of Kenya Limited –versus- Pipeplastic Samkolit (K) Limited And Another Civil Appeal No. 95 of 1999*. (3) *Al Jalal Enterprises Limited –versus- Gulf African Bank Limited Civil Appeal No. 161 of 2014*. (4) *ARI Bank Corporation Limited (in liquidation) –versus- Lake Victoria Fish Limited (in receivership)*.

11. In paragraph 7 of the supporting affidavit, Damaris Mwongeli Mbindyo states that there was no communication from the defendants on where to pay the outstanding loan. A statement of Paula Ngetich legal officer of the first defendant dated 15/2/2017 confirms that it was a term and condition on the banks account opening forms, that the address as given by the customer in the application form was considered by the bank to be the official registered address of the customer. That all postal communication from the bank to the customer were to be sent to that address.

The first defendant have stated that the statutory notices were sent through that address. The first defendant discharged its obligation.

12. In any case the Plaintiff/Applicant had changed their address for any reason then the plaintiff was under an obligation to inform the bank of the change of address.

I therefore find that the 1st defendant cannot be faulted for sending notices to the Chargor's last known address.

13. As to whether the first defendant/respondent is right in exercising the statutory power of sale, the plaintiff/Applicant does not deny that it has not made payments towards the settlement of the loan. The reason given for not remitting payment cannot be taken to be the truth. The Plaintiff/Applicant was under an obligation to remit payments to the first defendant. The reason that the closure caused confusion does not hold any water.

14. The directors were under an obligation to repay the loan since they knew the consequences of not repaying the loan. They have not demonstrated to the court what steps they took to try to repay the loan even after the first defendant was placed under receivership. I find that the first defendant property sent the statutory notices as required under section 90 of the Land Act 2012. They are therefore within their right in exercising their statutory power of sale in accordance with section 90 of Land Act 2012.

15. The Plaintiff/Applicant seeks orders of injunction. The issue is whether a prima facie case with a probability of success has been established. In the case of *Mrao Limited –versus- First American Bank of Kenya Limited And 2 others (2003) eKLR* the court in determining what amounts to a prima facie case stated that,

“So what is a prima facie case? I would say that in civil cases this is a case in which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation on rebuttal from the latter”

I find that the Plaintiff/Applicant has failed to demonstrate that they have a prima facie case with a probability of success.

16. The Plaintiff/Applicant's director admits they owe the first defendant. The land parcel was offered as

security for the loan. They were aware of the consequences of not repaying the loan. I am guided by the case of *Maithya –verses- Housing Finance, Corporation of Kenya And Another (2003) EA 133* where Nyamu J held that **“Those who come to equity must do equity, failure in servicing the loan and to pay the lender is enough not to grant injunctive orders.**

17. I also find that the plaintiff/Applicant has failed to demonstrate what loss or damage it will suffer if the orders are not granted. In any case, should they win the case and it is found that the sale was irregular then they can be compensated by way of damages. Section 96(4) of the Land Act 2012 states, **“a person prejudiced by an unauthorized, improper or irregular exercise of the power of sale shall have a remedy against the person exercising that power”**.

The balance of convenience tilts in favour of the first defendant/respondent which risks losing the amount advanced to the Plaintiff/Applicant.

18. All in all I find that the plaintiff/Applicant has failed to prove that it has a prima facie case with a probability of success. I find no merit in this application and the same is dismissed with costs to the defendants/respondents.

It is so ordered.

Dated, signed and delivered at Mombasa on the 12th day of October 2017.

L. KOMINGOI

JUDGE

12/10/2017

Mr. Wachenje – We pray to be supplied with a certified copy of the ruling.

L. KOMINGOI

JUDGE

12/10/2017

Order – To issue upon payment the requisite fees.

L. KOMINGOI

JUDGE

12/10/2017