



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 803 OF 2017

ROBERT MWANGI.....PLAINTIFF

VERSUS

SPRINGBOARD CAPITAL LIMITED.....DEFENDANT

RULING

The application before Court is Plaintiff's Notice of Motion dated 7th July, 2017 brought pursuant to Order 51 Rule 1 and Order 40 Rule 1, 2, 3 and 4 of the Civil Procedure Rules 2010, Sections 1A, 1B, 3A and 63 (c) of the Civil Procedure Act and all the other enabling provisions of the law.

The application is based on the following grounds which in summary is that the Defendant vide a letter dated 2nd June 2015, advanced a loan facility of Kshs. 2 million to one TROPICAL RECLAIM LIMITED which facility was secured by the Plaintiff's land parcel number NGONG/NGONG/23311 (suit land) that was charged on 24th June, 2016. The Defendant vide Regent Auctioneers have unlawfully advertised the suit land for sale by public auction on 11th July, 2017. The Plaintiff has not been served with the requisite statutory notices as required by law and the suit land has been undervalued by the Defendant.

The application is supported by the affidavit of ROBERT MWANGI the Plaintiff herein where he avers that he was a guarantor to the loan facility advance to TROPICAL RECLAIM LIMITED by the Defendant. He deposes that he has experienced financial difficulties in the repayment of the loan thereof and informed the Defendant but to his utter shock he learnt that the suit property had been advertised for sale by public auction. He states that the evaluation of the suit property undertaken by Dreamscape Valuers Limited prior to disbursement of the loan that indicated that the market and forced values were Kshs 14.5 million and Kshs 10.8 million respectively but the second valuation report dated 16th June, 2017 by messrs Accurate Valuers Limited shows market and forced value to be Kshs 10.5 million and Kshs 7.875 million respectively. He indicated that he has managed to carry out another valuation of the suit property through M/s Index Africa Limited whereof which states that Market and Forced Sale Values were Kshs 15 million and Kshs. 11 million respectively. Further that the Defendant seeks to sell the suit land at and undervalue; and he stands to suffer harm, loss, damage if the Defendant continues to unlawfully exercise its statutory power of sale.

The application is opposed by the Defendant who filed a replying affidavit sworn by WILSON KARANJA who is its Chief Executive Officer where he deposes that they indeed advanced the Plaintiff the loan which he has defaulted in repaying but he has deliberately omitted to enjoin the principal borrower that is his sole company in this suit. He avers that the 90 days statutory notice was served upon the Plaintiff via registered post to the address indicated in the Charge Documents in accordance with the law. Further that the Auctioneer also issued the requisite notification of Sale was duly served upon the Plaintiff before the suit land was advertised. He states that the original valuation of the suit land done by Dreamscape Valuers in April 2016 was undertaken when there was ongoing construction however the property has been vacant for over one year and vandalized since Plaintiff left it in disuse. Further that the recent valuation by Accurate Valuers has taken into account the current state of the suit land. He insists the Plaintiff's valuation of Kshs 11 million has been done with a predetermined opinion to defeat the Defendant's statutory power of sale. He further deposes that the Plaintiff has never repaid the loan for over one year, should be granted the orders sought but ought to deposit Kshs. 3, 074, 385/= as at 15th September, 2016 to enable him enjoy the courts equitable remedy.

The Plaintiff ROBERT MWANGI filed a rejoinder to the replying affidavit and deposed that the purported statutory notice dated 29th September, 2016 is invalid, incompetent and defective in both form and substance as the same calls for payment of the entire loan contrary to section 90(2)(b) and fails to stipulate the rights highlighted therein in accordance with section 90(2)(e).

Further that section 96(2) of the Land Act mandatorily requires the Defendant to issue a forty (40) day notice to sell in the statutorily prescribed form, which notice to sell has not been issued. He avers that the purported Notification of Sale issued by Regent Auctioneers dated 31st January, 2017 is defective, invalid and unsustainable in law. Further that section 97 of the Land Act provides that forced market value must not be less than 25% of the market value and allowing Defendant to sell suit land who result in an injustice.

On the 24th July, 2017 the parties argued the application which arguments I have considered.

Issues and determination

The court has considered the materials presented and arguments canvassed by the respective parties in respect to the Notice of Motion dated 7th July, 2017 and analyzed that the following are the issues for determination:

- whether statutory notices were issued to the Plaintiff before Defendant exercised its statutory power of sale.
- Whether the Defendant is entitled to the injunctive orders sought.

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 principles for granting of temporary injunctions were settled in the case of **Giella Vs. Cassman Brown & Co. Ltd (1973) EA 358** as follows:

"First, an applicant must show a prima facie case with a probability of success. Secondly, 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 will decide an application on the balance of convenience."

Bearing this principle in mind, it behoves this honourable court to interrogate whether the applicant has made out a prima facie case with a probability of success at the trial.

On the first principle as to whether the Plaintiff has established a prima facie case, it is not in dispute that the Plaintiff charged the suit land. It is also not in dispute that the Plaintiff is in default of loan repayment. What is in dispute is the valuation of the suit land and the statutory notices issued. The question we need to ask is whether the statutory notice issued by the defendant is defective and offends the provisions of the Section 90 (1), (2) and (3) of the Land Act.

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A cursory look at the Statutory notice dated 22nd August, 2016 issued by Messrs Koceyo & Company advocates I note the first second and third paragraphs were framed as follows:

' We act for Springboard Capital Limited (hereinafter referred to as 'our client') on whose behalf and instructions we write this letter to. At your request our client has advanced to you a substantial amount of money in which you offered you LR NGONG/NGONG/23311 as a security for due payment of such sums of money as you would from time to time be due and owing from yourselves to our client, detailed particulars whereof are well within your knowledge. We are informed that you

have defaulted in making scheduled repayments in respect of the loan. Consequently, we are instructed that a sum of Kshs. 274, 064.00 (Two hundred and Seventy Four Thousand Sixty Four Shillings only) is due and owing to our client as at 21st August, 2016 inclusive of the penalty for late payment at the rate of 5 % per month. Despite numerous requests and reminders having been sent to you to settle the outstanding balance, you have failed, neglected so to do. Take Notice that if the said sum of Kshs. 274, 064.00 (Two hundred and Seventy Four Thousand Sixty Four Shillings only) together with interest thereon as aforesaid is not paid to our client within 14 days from the date hereof, we have our client's FIRM instructions to institute legal proceedings and recovery process against you for the recovery of the same and to realize security without any further correspondence and at your risk as to costs and attendant consequences.

It is worth noting that the said statutory notice only issued 14 days contrary to the provisions of Section 90 (2) (b) of the Land Act which provides that the notice period should not be for less than three months. I further note that the Defendant's Lawyers Messrs Kocoyo & Company advocates issued another notice on 19th September, 2016 and 29th September, 2016 respectively demanding for the whole amount of debt amounting to Kshs. 3, 074, 385.00. It is my finding that the said statutory notices were defective contrary to the provisions of the Land Act. However failure alone is not enough to support a grant of an injunction but failure to comply with statutory provisions in accordance with the law gives rise to prima facie case with probability of success.

As regards the valuation of the suit property, I note that there are three valuation reports. The issues raised in the said reports can only heard and determined after hearing of the main suit and not at this interlocutory stage.

In the case of **Cieni Plains Company Limited & 2 others v Ecobank Kenya Limited [2017] eKLR Justice Onguto** held that : 'A statutory notice issued under section 90(2) of the Land Act, triggers the security realization process, which leads to the chargee ultimately exercising its remedies outlined under section 90(3). The notice is issued where there is default or breach of any covenant under the charge. There is no prescribed format promulgated as yet by the Cabinet Secretary in charge of lands and housing under section 90(5) of the Land Act. Different formats of the notice have thus emerged leading to a veritable maze where challenges and questions on what truly constitutes a valid statutory notice are numerous. I must state that there is however need to ensure that the notice is compliant with section 90(2) which provides for matters to be included in the notice. 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 chargor 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 section 90 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 chargee of any of the statutory remedies. The notice crystallizes after the expiry of ninety days from the date it is received by the chargor.'

In relying on this case and based on the Plaintiff's arguments above, I find that the statutory notices of sale issued for the intended sale slated for 11th July, 2017 was not in accordance with Section 90 (2) and (3) of the Land Act and proceed to nullify them. I however will not stop the Defendant from realizing the security held over the loan if the Plaintiff persists in the default and so long as proper statutory notices are issued in accordance with section 90 (2) and (3) of the Land Act.

In so far as the Plaintiff has established a prima facie case to partially meet the threshold for the grant of orders of injunction,. I will allow his application dated the 7th July, 2017 in the following terms:

- a) The intended Sale by public auction on 11th July, 2017 by the Defendant of land parcel number NGONG/NGONG/23111 be and is hereby set aside
- b) the interim injunction granted on 11th July, 2017 will remain in force until the defendant issues proper statutory notices in accordance with Section 90 (1) (2) and (3) of the Land Act.

Costs will be in the cause.

Dated signed and delivered in open court at Kajado this 5th day of October, 2017.

CHRISTINE OCHIENG

JUDGE