



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

THIKA LAW COURTS

ELC.445 OF 2017

SELIAN HOLDINGS COMPANY LIMITED.....PLAINTIFF/APPLICANT

-VERSUS-

NIC BANK LIMITED.....DEFENDANT/RESPONDENT

RULING

The matter for determination is the Plaintiff's/Applicant's Notice of Motion application dated 13th April 2017 brought under Order 40 Rules 1, 4, Order 51 Rule 1 of the Civil Procedure Rules 2010 and Sections 1A, 1B, 3A and 63 (c),(e) of the Civil Procedure Act and under Section 103 of the Land Act, 2012. The Plaintiff/Applicant has sought for the following orders:-

1) Spent.

2) Spent.

3) Spent.

4) That a temporary injunction do issue to restrain and prevent the Defendant by itself and/or its agents, servants, employees, assigns or otherwise howsoever from interfering with the Plaintiff's quiet possession of or marketing and/or advertising for sale or selling, leasing, subdividing, receiving or taking possession of the charged suit property in LR.No.21096/87, 88 and 89 Kiambu or in any manner exercising or continuing to exercise a Statutory Power of Sale over the said properties of the suit herein.

5) Costs of this application be borne by the Respondent.

The application is based on the grounds stated on the face of the application and on the **Supporting Affidavit** of **Fredrick Kariuki Maina**, a Director of the Plaintiff/Applicant company herein. The grounds in support are:-

a) That the Plaintiff/Applicant is the registered owner of the properties in LR.No.21096/87,88 and 89 in Juja, Kiambu which was charged to the Defendant on 27th November 2014, as collateral to secure a principal loan of Kshs.101,000,000/= for the construction of the Plaintiff's three-star room, nine storeyed Hotel building on site, projected to cost Kshs.313,731,344/36.

b) The agreement and projections by the parties at the time of and after the negotiating and

signing the loan and security documents were that the construction would initially be fully finished up to the 4th Floor and leased out for additional income generation even as the completion of the rest of the structure is undertaken. This was frustrated by the rejection of the Plaintiff's application for a partial occupation permit which insisted that the entire hotel must be fully completed before the issue of occupation of the premises is considered.

c) The Defendant refused to refinance the project to completion or otherwise restructure the loan debt and interest t performing status so as to allow willing and potential lenders like I & M Bank to take over this loan and has unreasonably rejected a debt take-over by Afrexim Bank and Shina Caital.

d) The Defendant issued a statutory notice recall and demand for the payment of Kshs.26,258,699/98 (as arrears) and Kshs.119,592,016/92 (as outstanding debt).

e) It was agreed at a meeting of the parties on 25th November 2016, it was agreed that issuance of any other notice would be withheld, however on 16th December 2016, the Defendant did issue a 40 day notice to sell under Section 96 (2)(3) of the Land Act.

f) The Bank's attempts to mischievously exercise a Statutory Power of Sale would shortchange the Plaintiff and unfairly curtail the equity of redemption, resulting in an unlawful foreclosure to the irreparable detriment of the Applicant.

g) It is only fair, just and in the best interest of justice that the orders herein be granted in order to preserve the suit land pending the determination of the dispute.

The Plaintiff's/Applicant's case is that they are the registered owner of the properties in **LR.No.21096/87,88** and **89 in Juja, Kiambu** which was charged to the Defendant on **27th November 2014**, as collateral to secure a principal loan of **Kshs.101,000,000/=** for the construction of the Plaintiff's three-star room nine storeyed Hotel building on site, projected to cost **Kshs.313,731,344/36**. The Plaintiff averred that the company was also at that time enjoying an overdraft facility of **Kshs.5 million**, from KCB which the Defendant took over when it became the bankers of the company. They further averred that the agreement and projections by the parties at the time of and after the negotiating and signing the loan and security document were that the construction would initially be fully finished up to the 4th floor and leased out for additional income generation even as the completion of the rest of the structure was being undertaken. They further averred that they identified a tenant, M/S International Hotel & Tourism Institute and a lease agreement was entered into. This was frustrated by the rejection of the Plaintiff's application for a Partial Occupation Permit by the County Government of Kiambu which insisted that the entire hotel must be fully completed before the issue of occupation of the premises is considered. They further averred that the Bank was informed accordingly but that the bank continued making the remaining payments to the project superstructure through Architects Certificates. The company also injected further equity of **Kshs.12M** to the project on the mutual understanding and belief that the bank was going to fund the balance. The Plaintiff also averred that the Bank however on **12th January 2016**, rejected the request for refinancing and on **9th February 2016**, stopped and refused to renew the overdraft facility extended to the company and thereby crippling the source of funds that was being used to repay the existing facility. They also averred that the project has stalled and they need the bank to disburse financial facilities to enable it complete the second phase of the construction. They claimed that the bank had caused the suit property and unfinished works thereon to be valued at **Kshs.171,000,000/=**. They further averred that the Defendant issued a Statutory Notice recall and demand of the payment of **Kshs.26,258,699/98**(as arrears)and **Kshs.119,592,016/92**(as outstanding debt). The Plaintiff contended that it was agreed at a meeting of the parties on **25th November 2016**, that issuance of any other notice would be withheld in abeyance, but that the Defendant did issue a 40 day notice to sell under Section 96(2)(3) of the Land Act. They further contended that the Defendant later purported to cancel the meeting that withheld issuance of a second notice. The Plaintiff claims that the Bank's attempts to mischievously exercise a Statutory Power of Sale would shortchange the Plaintiff and unfairly curtail the equity of redemption, resulting in an unlawful foreclosure to the irreparable detriment of the Applicant. The Plaintiff therefore contended

that it has made attempts to mitigate the aftermath by reaching out to potential lenders whilst continuing to service the charge debt to the best of its current abilities, yet the Defendant has rejected the potential financiers hence inviting a stalemate. The Plaintiff stated that unless otherwise restrained by the Court, the Bank will proceed to prematurely advertise the suit property for sale or otherwise dispose of it to the irrevocable detriment of the Company.

The application is opposed by the Defendants/Respondent. **Kelvin Mbaabu**, filed a **Replying Affidavit** on the **15th May 2017**, and averred that he is the Senior Manager, Legal Services of the Defendant Bank. He denied the allegations set out in the supporting affidavit sworn by the director of the Plaintiff Company. He averred that the Plaintiff being the Principal debtor had entered into charge agreement dated **27th November 2014**, as deponed in the Plaintiff's Director's Affidavit. He however contended that immediately after the facilities were disbursed the Plaintiff failed to honour their obligation of repaying the monthly instalments and fell into arrears which prompted the Bank to issue a demand letter to the Plaintiff for the arrears due **Kshs.16,609,835/83** as at **26th May 2016**. He also claimed that upon receipt of the demand, the Plaintiff arranged a meeting where it was agreed that the Plaintiff would clear their arrears but failed to make good their promises. It was his further contention that following the Plaintiff's failure to honour their obligations, the Bank issued the first Statutory Notice dated **7th September 2016**. He also contended that despite receiving the Notice the Plaintiff made no attempts to clear their arrears. On the claim that the Bank continued to give disbursements despite knowledge of the frustration of the leasing agreement, the Defendant claimed that the Plaintiff borrowed **Kshs.85M** and **Kshs.11M** to finance the constructing project which the Defendant duly obliged to and that the Plaintiff failed to honour terms of repayment. He further averred that the loan advanced was strictly as per the letter of offer and that there was no obligation to issue additional facilities and such was expressed to the Plaintiff through the Bank's advocate. He admitted that the parties did meet on **25th November 2016**, upon which the Defendant agreed to suspend any more notices and a further follow up date was set for **9th December 2016**. However, the Plaintiff made no communication on the follow up meeting and later cancelled it which prompted the Defendant to proceed with realizing the security. The Defendant also contended that Plaintiff reached out again to the Bank and they had another meeting but the Plaintiff still failed to meet the obligation under the agreement discussed at that meeting. He claimed that this is when they wrote the letter to revoke the agreement made during the meeting. The Defendant claimed that the Plaintiff's application has no merit and has failed to show a prima facie case. He further avers that the Plaintiff was given all opportunities to redeem the charged property but has failed to honour various terms of agreements. The Defendant claimed that granting the orders sought would extremely prejudice the Defendant.

The Plaintiff/Applicant herein filed a **Supplementary Affidavit** dated **30th June 2017**, and averred that in the loan application and project proposals, the Plaintiff sought funds to complete the construction, finishing and furnishing of the Hotel project and that the Defendant opted to guide the Plaintiff in the project by suggesting two phases to the project. They further alleged that the Bank's retail Director, **Mr. Robert Kibaara**, had informed the deponent that the Bank would fund the Hotel project to completion. The Plaintiff denied that they fell into arrears from inception and claimed that they enjoyed a moratorium on the principal sum for two years and they dutifully paid the interest. The Plaintiff averred that they may have occasionally overstepped the strict deadlines, but they paid the interests nonetheless. The Plaintiff further averred that it is evident from the evidence attached that crippling of the working capital overdraft facility earlier extended frustrated other financial contracts the Plaintiff had. The Plaintiff reiterated the contents of their affidavit and denied the contents of the replying affidavit filed by the Defendant.

The application was canvassed by way of written submission which this Court has carefully read and considered. The Court has also considered the pleadings in general and the annexures thereto. The Court makes the following finding:-

There is no doubt that the Plaintiff herein did borrow a loan facility of **Kshs.101,000,000/=** from the Defendant on **27th November 2014**. The Plaintiff charged its properties **LR.No.21096/87,88** and **89 Juja in Kiambu** to secure the said loan.

There is no doubt that the Plaintiff defaulted in payment of the said loan and they are in arrears. It is evident that on **7th September 2016**, the Defendant Bank issued a Statutory Notice, recalled and demanded payment of **Kshs.26,258,699/98** as arrears and **Kshs.119,592,016/=** as the outstanding debt. It is evident that on **25th November 2016**, a meeting was held between the Plaintiff's representative and the Bank whereas it was agreed no Notices would be issued on condition that the Plaintiff pays the outstanding arrears.

The Defendant has alleged that the Plaintiff did not pay the outstanding arrears and thus the issuance of the 40 days Statutory Notice to sell the property as provided by Section 96(2)(3) of the Land Act. However, the Plaintiff/Applicant has alleged that the said 40 days Statutory Notice was issued in error and is illegal and therefore the Court should cancel the same.

On its part, the Defendant has alleged that the Plaintiff failed to make any payment or give payment proposal acceptable to the Bank as agreed in the meeting of **25th November 2016**. Therefore the Bank proceeded and issued the 40 days Statutory Notice in an attempt to realize the charged properties. Therefore the Defendant averred that the 40 days Statutory Notice is legal and procedural as the Plaintiff has defaulted in repayment of its monthly repayments and thus breached the terms of the agreement and the arrears in respect of the amounts disbursed under the Charge Instrument.

The Applicant herein has sought for injunctive orders which are equitable reliefs granted at the discretion of the Court. The said discretion must be exercised judicially. See the case of ***Agip (K) Ltd...Vs...Maheshchandra Himatlal Vora & 2 Others, Civil Appeal No.213 of 1999***, where the Court held that:-

“grant of injunction being discretionary, the appellate court only interferes in exceptional circumstances.....”

This being an interlocutory application, the Court will also be cautious not to delve into substantive issues and make finally concluded views of the disputed issues before hearing the oral evidence. The Court is only supposed to determine whether the Applicant is deserving of the orders sought using the usual criteria. See the case of ***Edwin Kamau Muniu..Vs..Barclays Bank of Kenya Ltd Nairobi HCCC No. 1118 of 2002***, where the court held that:

“In an Interlocutory application, the Court is not required to determine the very issues which will be canvassed at the trial with finality. All the Court is entitled at this stage is whether the Applicant is entitled to an Injunction sought on the usual criteria....”

This criteria is the one set out in the case of ***Giella..Vs..Cassman Brown & Co. Ltd 1973 EA 358***, and later repeated in other judicial pronouncements. See the case of ***Francis Jumba Enziano & Others... Vs....Bishop Okeyo & 2Others, Nairobi HCCC No.1128 of 2001***, the Court held that:-

“The settled principles of grant of an injunction are: first that the Applicant must show a prima-facie case with probability of success at the trial: secondly an interlocutory injunction will not normally be granted unless the Applicant can show irreparable injury which cannot be adequately compensated by an award of damages: thirdly, if the court is in doubt, it should decide the application on a balance of convenience”

Further, in the above states case, the Court held that;

“the court should not venture into making definitive findings of fact or law and particularly where the affidavits filed are contradictory....”

Therefore the Applicant herein has a duty to establish the above stated principles. The Applicant needed first to establish that it has a *prima-facie* case with probability of success. In the case of ***Mrao...Vs...First American Bank of Kenya Ltd & Others (2003)KLR***, the Court held that:-

“A prima-facie case means more than an arguable case. It means that the evidence must show

an infringement of the right and probability of success of the applicants case at the trial”.

The Applicant herein therefore needed to establish that its right has been infringed and that it has a probability of success of its case at the trial. It is also evident that the purpose of seeking an injunction is to protect the right of an Applicant from violation of an act which cannot be compensated by a award of damages.

As the Court stated earlier, the Plaintiff/Applicant took a loan facility from the Defendant. The Plaintiff/Applicant defaulted in payment of the arrears and consequently the Defendant issued a Statutory Notice of 90 days as provided by Section 90(1) of the Land Act. The said Notice was issued on 7th September 2016. Section 90(1) provides:-

“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 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”.

It is also evident that the Plaintiff/Applicant did not clear the arrears even after the meeting of its representatives and the Bank on **25th November 2016**. The Defendant alleged that the Plaintiff’s representative cancelled the meeting scheduled for **9th December 2016**, and consequently, it proceed to issued the 40 days Notice as provided by Section 96(2) of the Land Act which provides:-

“Before exercising the power to sale of 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 the sale of the charged land until at least forty days have elapsed from the date of the service of that notice to sell”.

It is this Notice that the Plaintiff is disputing. However, it is clear that by **16th December 2016**, the Plaintiff had not cleared the loan arrears and as provided by Section 96(2) of the Land Act, the Defendant was within its power to issue the said 40 days Statutory Notice before sale of the suit property.

The Court will rely on the case of **Henry Wanyama Khaemba...Vs...Standard Chartered Bank Ltd & 3 Others (2005) ECLR**, where the Court held that:

“Where a party has a statutory right of action, the court will not usually prevent the right being exercised except that the court may interfere if there is no basis on which the right could be exercised or if it was being exercised oppressively”.

The Plaintiff had taken a loan facility and they had a duty to pay the said loan facility as provided by the charge document. The first Statutory Notice was issued on **7th September 2016**. The 90 days expired on or around **7th December 2016**. The Defendant was within its right to issue a 40 days Notice as provided by Section 96(2) of the Land Act. The meeting that the Plaintiff and Defendant representatives held on **25th November 2016**, did not legally prevent the Statutory Notice from running. As was held in the case of **David Kamau Gakuru...Vs...National Industrial Credit Bank Ltd, Civil Appeal No.84 of 2001**:-

“an injunction being a equitable remedy cannot be granted to a party who has demonstrated openly through his conduct that he is undeserving of the equitable relief”.

It is not in doubt that the Plaintiff/Applicant herein is in default of payment of the arrears. The Plaintiff/Applicant had not made any agreeable proposal to the Defendant by the time of coming to court. It cannot therefore ask the Court to cancel the 40 days Notice issued to it by the Defendant. The Defendant was within its right provided by Section 96(2) of the Land Act, in issuing the said Notice. Therefore the Applicant has not demonstrated that

its right has been infringed or violated by the Defendant herein.

For the above reasons, the court finds that the Applicant has not established that it has a *prima-facie* case with probability of success at the trial.

On the second limb of if orders not granted, the Applicant will suffer irreparable loss which cannot be compensated by an award of damages, it is

evident that the Plaintiff/Applicant took a loan facility and offered the three parcels of land as security for the said loan. As a Chargee, the Defendant has its remedies provided in Section 90(3) of the Land Act, and one of such remedy is sale of the charged land/property. The Defendant herein chose to exercise its Statutory Power of Sale as provided by Section 90(3)(e) of the Land Act, after giving the relevant Notices. Further the Applicant knew that by using the three parcels of land as security, they became commodities for sale in the event of default. See the case of *Moses Nganye Kahindo..Vs...Agricultural Finance Corporation HCCC No.1044 of 2001*, where it was held that:-

“A person who charges his property to secure a loan does so knowing only too well that upon default, the property could be sold to recover the loan. It does not therefore lie in the mouth of such a person to state that he could suffer an injury which cannot adequately be compensated in damages if the lender realizes the security in question”.

Equally, the Plaintiff/Applicant herein willingly gave out its suit properties as security and they became commodity for sale and it cannot be heard to say that it will suffer irreparable loss which cannot be compensated by an award of damages.

Further Section 99(4) of the Land Act provides that:-

“A person prejudiced by unauthorized, improper or irregular exercise of the power of sale shall have a remedy in damages against the person exercising the power”.

Having carefully considered the available evidence, the Court finds that the Plaintiff/Applicant has not established the second limb for grant of injunctive orders.

On the third limb, this court is not in doubt and therefore, it will not decide on the balance of convenience.

Having now carefully considered the instant ***Notice of Motion*** dated ***13th April 2017***, the Court finds it not merited and the said application is dismissed entirely with costs to the Defendant/Respondent.

It is so ordered.

Dated, Signed and Delivered at Thika this **10th** day of **November 2017**.

L. GACHERU

JUDGE

10/11/2017

In the presence of

Mr. Maweu for Plaintiff/Applicant

No appearance for Defendant/Respondent

Lucy - Court clerk.

L. GACHERU

JUDGE

10/11/2017