



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 473 OF 2017

TOP – AD GRAPHICS LIMITED.....PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK1ST DEFENDANT

HIGH CLASS AUCTIONEERS.....2ND DEFENDANT

RULING

The application before Court is the Plaintiff’s Notice of Motion dated 27th February, 2017 brought pursuant to Sections 1, 1B, 3 & 3A of the Civil Procedure Act, Order 40 Rules 1, 2, & 3 and Order 51 Rules 1, 3 & 4 of the Civil Procedure Rules and all enabling provisions of the law.

The application is based on the following grounds which in summary is that the Defendants have advertised to sell land parcel number NGONG/NGONG/ 28843 hereinafter referred to as the ‘suit land’ , on 1st March, 2017 without giving any notice to the Plaintiff/applicant. No demand letter was ever served on the Plaintiff/Applicant before the Bank decided to exercise its statutory power of sale. Plaintiff has repaid a substantial amount of the loan in question and no accounts have been take so far. The property sought to be sold is the residential home of the Applicant’s directors and any interference with it will result to irreparable loss and/or damage to the directors and their children.

The application is supported by the affidavit of MARTIN WINGA NYATUODO who is one of the co director’s of the Plaintiff where he deposes that in the year 2011 he was advanced monies by the 1st Defendant whereby the suit land was used as a collateral. He avers that in 2016 he was unwell and diagnosed with a heart disease, which made it impossible for him to service the loan. He claims at the time of charging his property, he had also taken an insurance with Kenya Commercial Bank Insurance Brokers so that in the event of any sickness and/or death, any outstanding balance would be taken care of by the insurance. He reiterates that after falling sick, he informed the Insurance Company and the 1st Defendant and therefore expected the Bank to first stop any further interests on the balance of the loan and for the insurance, to pay off the outstanding amounts as at March 2016. He states that in May 2016, the Bank demanded for full payment of the outstanding amount upon which he reminded them of his predicament and urged them to write off any outstanding balance or have it covered by the insurance. Further that after the incident of May, 2016 he thought the matter had been settled until 24th February, 2017 when a good Samaritan found a notice from High Class Auctioneers pinned on the suit land indicating it was scheduled for auction on 1st March, 2017. He contends that it took him by surprise as he is still sick which fact the bank was well aware of, and he has not been served with any demand notice nor statutory notice of the intended sale and/or any reminders of the 1st Defendant’s intention to revisit the issue. He insists his co-director Christina Adhiambo happens to be a non – active director in the

activities of the company and she would not be in a position to deal with the issues at hand as he only introduced her into it as a legal requirement expected at the time of registering the company. He confirms that at the time of Charging the suit land he was advanced Kshs.4.5 million of which he had made payments before falling sick yet the bank demands Kshs. 6.2 million and wish to sell the suit land inspite its market value of more than Kshs.8 million. He admits he does not have documents to show the substantial amount repaid of the loan but after falling sick most of the documents got misplaced.

The 1st Defendant opposed the application and filed a replying affidavit sworn by FREDRICK MUNGATHIA who is its Manager, Credit Support where he deposes that the Plaintiff's application is hopelessly misconceived and only amounts to an abuse of the court process aimed at delaying the 1st Defendant's right to realize the security. He avers that the Plaintiff was advanced a loan facility of Kshs. 4.5 million by the 1st Defendant vide a Letter of Offer dated 13th March, 2011. Further that the loan was to be repaid in equal monthly instalments of Kshs.72, 018 within a period of one hundred and twenty (120) months. He states that the directors of the Plaintiff namely Martin Winga Nyafuodo and Christine Adhiambo Winga executed the Letter of Offer and a legal Charge was registered over the suit land to secure the loan. Further, the Legal Charge was duly executed in accordance with the relevant laws and the 1st Defendant is entitled to the remedies available to it in the event of default in repayment of the loan by the Plaintiff. He reiterates that the sole purpose of introducing these extraneous issues of health of one of the directors of the Plaintiff herein is solely to convolute issues for determination in this matter and to deceive the court into making erroneous decision and issue orders the Plaintiff does not deserve. He retorts that the Plaintiff is a separate legal entity from its directors and as such the illness of a single director should not preclude the Company from performing its obligations under the Letter of Offer. He insists the Plaintiff has not shown from its records and pleadings the existence of another director who should continue running of the Company in view of the occurrence of the purported illness and/or inability of the co – director.

He states that the Bank issued a statutory notice dated 8th August, 2013 in accordance with Section 90(1) (2) (3) (e) of the Land Act as the Plaintiff was in arrears for over one month, which notice elicited no response and expired without rectification from the Company necessitating the Bank to move to exercise its statutory power of sale over the suit land. Further that on 1st July, 2014, the Bank issued a notice to sell under Section 96(2) (3) of the Land Act and following the persistent default, instructed the 2nd Defendant to issue the Plaintiff/Applicant herein with the Fourty Five (45) day redemption notice which was issued on 27th July, 2016. He confirms that the 1st Defendant conducted a valuation of the suit land through messrs. Clayton Valuers Limited which revealed that the forced sale value is Kshs.4.9 million. He insists the Plaintiff has not approached the Bank with a proposal on how it intends to settle the loan amount and furthermore the terms of repayment were contractually agreed and the Company should endeavour at all times to fulfill its part of the contractual agreement. Further that the Plaintiff has acknowledged its indebtedness and the bank stands to suffer in the event the orders are granted while the Plaintiff continues to neglect to repay the loan which now stands at Kshs.11, 708, 283.55/= . He reiterates that the application lacks merit, is a clear abuse of the Court process and ought to be dismissed, as the Plaintiff has not satisfied the grant of the equitable relief sought as set out in the case of *Giella vs. Cassman Brown*.

The Plaintiff and the 1st Defendant filed their respective written submissions which I have considered.

Analysis and Determination

The court has considered the materials presented and arguments canvassed by the respective parties in respect to the Notice of Motion dated 27th February, 2017 and analyzed that the only issue for determination at this juncture is whether the Plaintiff is entitled to the injunctive order sought pending the outcome of this suit.

It is not in dispute that the Plaintiff charged the suit property to secure a loan of Kshs. 4.5 million with the 1st Defendant. The Plaintiff is not denying in principle that they owe a debt to the 1st Defendant. It is

seeking for a temporary injunction claiming that the 1st Defendant did not serve it with the requisite notices as stipulated under section 90 of the Land Act; and the one of the directors of the Plaintiff has been unwell hence their inability to repay the loan. Further, that the Plaintiff took out an insurance with the Kenya Commercial Bank Insurance Brokers so that in the event of any sickness and/or death, any outstanding balance would be taken care of by the insurance, but they did not do so. Further, it claims the 1st Defendant has not furnished it with the statement of accounts.

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 Plaintiff's allegation that no statutory notice was issued to it. The 1st Defendant annexed various notices it issued to the Plaintiff in its replying affidavit. From the said annexures within the 1st Defendant's replying affidavit the answer is in the affirmative. It is worth noting that the address where the statutory notices were posted is the Plaintiff's address on the charge document as well as in the Letter of Offer. In the case at hand, the Defendant served all the requisite notices via registered mail to the Plaintiff as proven in annexures 'FM 3, FM4, FM5 and FM6' respectively. Nowhere in the supporting affidavit is the postal address disputed. According to the said annexures, the Plaintiff was issued with a statutory notice dated 8th August, 2013 in accordance with Section 90(1) (2) (3) (e) of the Land Act, and on 1st July, 2014, the Bank issued a notice to sell under Section 96(2) (3) of the Land Act and thereafter instructed the 2nd Defendant to issue the Plaintiff with the Fourty Five (45) day redemption notice which was issued on 27th July, 2016. In case of **Tinah Mwikali Musee Vs Family Bank Limited & Others Machakos ELC No. 142 of 2016** Angote J held as follows: *'The Plaintiff has not denied that she is the co – director of the borrower. As a co – director of the borrower, the Plaintiff is presumed to have received all correspondences that were sent to the postal address of the borrower.'*

It is against the foregoing and in relying on his case, I find that the Plaintiff was indeed served with the requisite statutory notices before the sale of the scheduled suit land through public auction.

On the issue of the statement of account and the amounts owed. 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.

A cursory look at the statement of accounts marked as annexure 'FM7' in the replying affidavit, I note from January 2013 upto August 2016 the Plaintiff has not paid a single cent of the said loan. One of the Directors admit they owe some money to the 1st Defendant but claim they had paid a substantial amount and failed to pay the remaining loan as he has been unwell since 2016. Except for the medical reports for 2016, I however note that he did not furnish court with any banking slips or documents to provide proof of the amount they had paid. The Plaintiff also claims the interest rates charged are exorbitant and arbitrary.

It is a long established legal rule that ***“ . . . when part of amount claimed is admitted or proved to be due, a Chargee cannot be restrained by an injunction.”*** This position has clearly been stated in the case of **LABELLE INTERNATIONAL LTD. AND ANOTHER – VS – FIDELITY COMMERCIAL BANK & ANOTHER, CIVIL CASE NO. 786 OF 2002.**

In the case of **Sammy Japheth Kavuku vs Equity Bank Limited & Another [2014] eKLR** the Court held as follows: ***‘The law as established by judicial precedent is that even if the borrower has a dispute with the interest and charges levied by the lender, he should not stop repayments until a court of law makes pronouncement as to the illegality or otherwise of the interest rate and the charges.’***

It is against the foregoing that I find that the Plaintiff has indeed defaulted in repaying the loan and even if it had a dispute on interest rate, it should have continued to repay the loan.

On the issue as to whether the Plaintiff will suffer irreparable loss which cannot be compensated by way of damages. I note the Plaintiff claims the suit land is home to the directors of the company. I however note that the suit land was willfully charged to the 1st Defendant by the Directors of the Plaintiff. The Plaintiff has defaulted in repaying the loan which now stands at over Kshs.11 million shilling. The fact that the charged property is matrimonial home does not deter the Chargee from exercising its statutory power of sale so long as the requisite consents were properly obtained. In the case of **Maithya Vs. Housing Finance Company of Kenya Limited & Another Civil Case No. 1129 of 2002** the Court held as follows: ***‘Charged properties are intended to acquire or are supposed to have a commercial values, otherwise lenders would not accept them as securities. The sentiment of ownership which has been greatly treasured in this country over the years has in many situations given way to commercial transactions.’***

Further section 99(4) of the Land Act stipulates that ***‘a person prejudiced by an unauthorized, improper or irregular exercise of the power of sale shall have a remedy in damages against the power exercising that power.’*** I hence find that the suit property has a commercial value and the Plaintiff can be adequately compensated by way of damages.

In the circumstances, I find that the Plaintiff has not established a prima facie case to meet the threshold for the grant of orders of injunction. I consequently dismiss the Plaintiff's Notice of Motion dated the 27th February, 2017 with costs.

Dated, signed and delivered in open court at Kajiado this 11th day of December, 2017.

CHRISTINE OCHIENG

JUDGE

Present:

Nonego holding brief for Onyancha for 1st Defendant

N/A for Plaintiff

N/A for 2nd Defendant