REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT NYAHURURU

ELC CASE NO 444 OF 2017

WILLIAM KANYI HEZEKIAH.....APPLICANT/PLAINTIFF

VERSUS

EQUITY BANK LTD.....1ST RESPONDENT/DEFENDANT

J. M KARIUKI T/A JO-MWAKA AUCTIONEERS.....2nd RESPONDENT/DEFENDANT

RULING

1. By a Notice of Motion dated 9th June 2017 filed under Section 1A,1B and 3A of the Civil Procedure Act, Order 40 Rule 1 and 3 and Order 51 Rule 1 of the Civil Procedure Rules where the plaintiff/Applicant seeks orders that:-

i. Spent

ii. Spent

iii. That pending the hearing and determination of the main suit, a temporal order for injunction be issued restraining the Defendant/ Respondents, by themselves their servants and/or agents, from selling, disposing and/or in any way interfering with the Parcel No. Njabini Township/363, the suit property.

iv. That costs of this application be borne by the Defendant/Respondents.

v. That any other or further interlocutory orders as may appear to the court to be just and convenient.

2. The said application is supported by the grounds set on the face of the application as well as on the sworn affidavit of Mr. William Kanyi Hezekiah the plaintiff/Applicant.

3. The Applicant represented himself while the Defendant/ Respondents were represented by Mr. Chege. G. Advocate.

4. Briefly the Plaintiff/Applicant's case is that he was the proprietor of the suit premises known as Njabini township/363 measuring 0.0469 hectares upon which he was constructed a commercial premise comprising of a bar, restaurant and lodgings.

5. That in the year 2014, having had begun the above construction, he run short of money and thus took a loan of Ksh 12,000,000/=from the 1st Defendant/Respondent herein and placed the suit property as security.

6. While submitting, the Plaintiff/Applicant informed the court that he was aware that he owed the 1st Defendant Ksh. 12,000,000/= and went on to state that he took the first loan of ksh. 5,000,000/= in March 2013 and used to pay 126,000/= per month wherein he paid for 14 months up to February 2014 by which time he had paid up to Ksh. 1,638,000/=

7. That thereafter the 1st Defendant/Respondent topped up the loan with Ksh. 7,000,000/= in April 2014 of which he continued servicing it at 228,000/ up to the end of 2014 by which time he had paid a total of Ksh 1,824,000/=. At the end of the year in 2015, he had serviced the loan to the tune of Ksh 2,736,000/=

8. Come the next year of 2016, he paid for two months a total of Ksh 456,000/= making the total of 5,016,000/= until his business went down and he could no longer service his loan as expected. All the same he continued servicing the loan according to how he received money.

9. That he then instructed the bank to sell his 12,000 safari com shares to which they sold at Ksh 16/= per share amounting to Ksh 204,000/=,

sums which the 1st Defendant/Respondent did not reflect in his statement. Secondly the 1st Defendant/Respondent sold his pick up motor vehicle, which he had put up as security, at Ksh 1,400,000/= but again the 1st Defendant/Respondent did not reflect the same on his bank account.

10. The plaintiff/Applicant submitted that he had never stopped servicing his loan with the latest instalment being on the 20th April 2017.

11. The plaintiff's argument is that although his contract with the 1st Defendant/Respondent was to the effect that the loan granted would be repaid together with the interest at the rate of 18% per annum for 10 years, the 1st defendant in breach of the agreement varied the same from 18% to 28% per annum without serving him with any notice.

12. Secondly in 2015, the Value of the parcel No. Njabini Township/363 at an open Market was pegged at Ksh 33,000,000/= and Ksh. 25,000,000/= at a forced sale of which the Defendant/Respondent had undervalued the suit property and as such he stood to suffer great loss and irreparable damage if the 2nd Defendant/ Respondent, having been instructed to sell the suit property by the 1st Defendant/Respondent was not injuncted from selling the suit said property.

13.The Plaintiff/Applicant's further grievance is that the amount demanded by the Defendant/Respondent is excessive and although he had been making some payments, the same has been used up by the interest and Charges.

14. The Application was opposed by counsel for the Defendant/Respondent who relied on the sworn affidavit of Jediel M'ndaka the credit manager of the 1st defendant/Respondent.

15. Briefly the Defendant/Respondent's response to the application is to the effect that indeed they had facilitated the plaintiff with a loan facility of Ksh. 12,702,300/= vide their letter of offer dated the 10th April 2014, for the purpose of clearing of an outstanding project and completion of construction of a commercial property the subject matter of the suit herein.

16. That sum was to be paid in full with interest and cost within a period of 120 months with installments of Ksh 228,877/= and an interest of 18%per annum and a further 6% per annum in case of default. That the suit properties were offered as security for the loan.

17. That by a letter of offer dated the 29th April 2015, the Applicant was granted a further loan of Ksh 3.000.000/= on a security of an existing Charge over the suit property and joint Registration of a chattel's Mortgagee over a motor vehicle Registration No. KBW 900S.

18.That the plaintiff/Applicant subsequently defaulted in his loan payment and Defendant/Respondent, having followed due process, sold the Motor Vehicle realizing Ksh 1,400,000/= which was insufficient to clear the total loan owed to it which stood at Ksh. 15,624,005.15/= and continues to attract interest.

19. That a demand letter was sent to the Plaintiff/Applicant on the 12th February 2016, and on the 1st July 2016 a further demand letter was sent to him. That upon failure to make good the demand notices a Redemption Notice dated the 24th October 2016 was sent to the Applicant herein for Ksh 15,624,005.15/=

20. That when the Applicant failed to redeem the loan, the 1st Respondent issued him with a 45 days Notification of sale dated the 23rd January 2017 wherein the Applicant filed suit against the Respondent which suit was struck out on a technicality on the 6th April 2017 and the Respondent then re-advertised the suit property for sale by auction on the 13th June 2017 thereby precipitating the preset suit.

21. That valuation of the suit premises was conducted on the 7th February 2017 by Homeplus Realtors Ltd which gave the forced sale value of Ksh. 17,625,000/= and a market value of 23,5000,000/=

22. The Respondent denied ever having charged the interest at the rate of 28% as submitted by the Applicant but stated that they had all along charged the Applicant interest as per the terms of the letter of agreement and averred that the monies owed by the Applicant was not excessive as the same was truly due and owing over the loan contract. Further that the Applicant had not exhibited any statement from the bank or any expert report showing that he had been over charged by the 1st Respondent.

23. The Respondent further submitted that a dispute on valuation of the suit premises cannot be the basis for granting an injunction against the sale of a loan security.

24. The defendant/Respondent submitted that any default which is admitted is sufficient to entitle the bank to sale under the charged instrument. The clause on default was stipulated under clause 9 of the agreement while the issue on interest was stipulated under clause 2 of the charge.

25. The Respondent also submitted that the Applicant had not brought himself within the principle laid down in the celebrated case of Giella vs. Cassman Brown. That the Applicant had not established a prima facie case with the probability of success or that if the injunction was not granted, he would suffer irreparable loss and damage which could not be atoned by an award of monetary damages. Finally that the applicant had not demonstrated that the balance of convenience tilts in favor of granting an injunction.

26. To buttress their opposition to the application, the Respondent/ Defendant relied on the cases of:

i. Anne Njeri Mwangi vs. Cooperative Bank of Kenya [2013] eKLR

ii. Mary Ngaru vs. Family Bank Ltd & two others [2014] eKLR

27. Having heard submission by the Applicant/Plaintiff as well as counsel for the Respondent/Defendants as well as having perused the affidavits and annexures herein attached, as well as the applicable law, I find that the matters for determination are as follows:

i. Whether there was gross undervaluation of the suit properties by the defendants.

ii. Whether the Respondent's right of statutory power of sale has accrued.

iii. Whether the conditions for issuance of an injunction have been met herein.

28. On the first issue as to whether there was gross undervaluation of the suit properties, 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 25,000,000= while in 2015 the same property had been valued by Zenith (Management) Valuers Ltd at Ksh 33,000,000/= The valuation report dated the 6th October 2017 was attached as an annexure. The property must had appreciated since then.

29. The arguments by the Respondent on the valuation take quite an opposite coordinate from the Applicant's argument in that, vide the valuation made on the 7th February 2017 by Homeplus Realtors Ltd, a report which was attached as annexure JM6, the valuers gave the forced sale value of the suit property at Ksh. 17,625,000/= and a market value of 23,500,000/=

30. The primary provision on forced valuation is Section 97(1) and (2) of the Land Act No. 6 of 2012. It applies where the charged land is to be sold in the exercise of power of sale or pursuant to an order of the court. The section is clear that it applies even if the chargor is a guarantor of a loan. Section 97(1) and (2) of the Land Act provides as follows**;-**

(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.

31. Form the above section two things are clear. The Respondent is under a statutory duty to;

i. to ensure that a forced valuation is undertaken by a valuer

ii. to obtain the best price reasonably obtainable at the time of sale.

32. On that basis, the Applicant concluded that the Respondent has grossly undervalued the suit property.

33. In the cases of **Zum Zum Investment Limited v Habib Bank Limited [2013] eKLR** , Kasango J stated the following:

It is not sufficient for the Applicant to merely claim that the intended selling price is not the best price obtainable at the time by producing a counter-valuation report. The Applicant must satisfactorily demonstrate why the valuation report that the Respondent intends to rely on in disposing of the suit property does not give the best price obtainable at the material time……..The Applicant needs to show, for instance, that the Respondent's valuer is not qualified or competent to carry out the valuation, or that the valuation was carried out in consideration of irrelevant factors or that the valuation was done before the time of the intended sale.

34. The Applicant in the present case has not raised any of such grounds.

35. In the case of ***Palmy Company Limited vs Consolidated Bank of Kenya Limited*** **[2014] eKLR** the Court stated as follows:

"The onus of establishing on prima facie basis, that the Applicant's right has been infringed by the Respondent by failing to discharge the duty of care under section 97(1) of the Land Act lies on the Applicant….The court needs cogent evidence and material in order to say that prima facie, there has been an undervaluation of the suit property which is an infringement of section 97(2) of the Land Act by the Respondent as to entitle the court to call for an explanation or rebuttal from the Respondent."

37. The Applicant has not offered sufficient evidence to show that the valuation is a complete undervaluation of the suit property. The Report was done by a Valuer whose competence has not been questioned. The fact that the Applicant used a valuation report that was conducted in 2015 in comparison to that conducted by the 1st Defendant herein does not mean the Respondent undervalued the suit property. The Report must be dislodged on real items, terms and legal parameters which are acceptable in the practice and profession of Valuers. There is no evidence of that caliber here and, therefore, the arguments by the Applicant that the Respondent failed to discharge the duty of care under section 97 do not hold sway.

37. 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 which in my opinion, the Respondent/Defendant had complied. In this case, the valuation was done on the 7th February 2017 whereas the advertisement of the suit property for sale by auction was on the 13th June 2017. In my view, this was within reasonable time. I dismiss this line of argument.

38. On the second issue as to whether the Respondent's right of statutory power of sale has accrued, a statutory notice pursuant to Section 90 of the Land Act, dated the 12th February 2016, addressed to the Plaintiff was served upon the plaintiff through registered post asking the Plaintiff to pay the amount in arrears of Ksh. 1,227,406.05/=, before expiration of 3 months in default to which they shall proceed to exercise their statutory power of sale in realization of the security and if the default persisted the 1st Defendant would recall the entire loan.

39. A further notice to exercise the 1st Defendant's statutory Power of sale dated 1st July 2016 was subsequently sent to the Plaintiff pay the outstanding loan balance of Ksh 14,626,376.50/= before expiration of 3 months . This was pursuant to section 96 of the Land Act as read with section 108 of the Land registered Act 2012.

40. On the 24th October 2016, a Redemption Notice for Ksh 15,624,005.15/= was sent to the Applicant herein for failure to settle the loan pursuant to section 96 of the Land Act as read with section 108 of the Land registered Act 2012.

41. 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.

> 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.
>
> (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—
>
> the nature and extent of the default by the chargor;
>
> 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;
>
> 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 at to rectify the default and the time, not being less than two months, by the end of which the default must have been rectified;
>
> 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 the right of the chargor in respect of certain remedies to apply to the court for relief against those remedies

42. 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.

43. 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 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 lawful.

44. 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.

45. 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".**

46. In the instance case, I find that 1st Respondent, having adhered to the provisions of sections 90 and 96 of the Land Act, its right of statutory power of sale had accrued which fact is not disputed by the Applicant/Plaintiff.

47. Turning on the third issue of determination on whether the conditions for issuance of an injunction have been met herein. The principles are well set out by the court of Appeal in Giella Vs Cassman Brown where the court has to consider the following questions before granting injunctive relief.

> i. Is there a prima facie case….
>
> ii. Does the applicant stand to suffer irreparable harm…

> iii. On which side does the balance of convenience lie? Even as those must remain the basis tests, it is worth adopting a further, albeit rather special and more intrinsic test which is now in the nature of general principle. The Court in responding to prayers for interlocutory injunctive relief, should always opt for the lower rather than the higher risk of injustice……

48. Going by the statements of accounts before me, there is clear evidence that the Applicant herein took a loan of Ksh 12,702,300/= which was payable over a period of 120 months at a rate of Ksh 228,877/= per month inclusive of interest.

49. After careful consideration of the pleadings, the affidavit evidence, submissions of the parties and the applicable law, the question to ask is whether the material presented to the Court, can enable the court properly directing itself thereto, to conclude that there exists a right which has apparently been infringed by the opposite party so as to call for an explanation or rebuttal from the Defendant.

50. The court having found that the principal debtor was served with the requisite statutory notice to remedy his default within 90 days, and was informed of the acts needed to remedy the default and his right to apply for relief, the notice had fully complied with section 90(1) of the Land Act.

51. The same was properly issued and liability on the guarantor attached. When the Chargor failed to comply with the notice under section 90(1) to remedy the default, he was issued with another Notice under section 96(2) of the Land Act of the chargee's statutory power to sell the charged property. The Applicant has therefore not established a *prima facie* case with a probability of success.

52. I find that the property was legally charged to the bank so as to secure its interest on the sum advanced in favor of the borrower. The applicant herein surrendered the Title documents for the aforesaid property to the 1st Defendant pursuant to the charge instrument and in so doing; he fully understood and agreed to the full import of the terms set out in the charge instrument registered in favour of the bank.

53. In the case of **Mrao supra** Kwach, JA (as he then was), had this to say:

> 'I have always understood that it is the duty of any person entering into a commercial transaction particularly one in which a large amount of money is involved to obtain the best possible legal advice so that he can better understand his obligations under the documents to which he appends his signature or seal. If courts are going to allow debtors to avoid paying their just debts by taking some of the defences I have seen in recent times for instance challenging contractual interest rate, banks will be crippled if not driven out of business altogether and no serious investors will bring their capital into a country whose courts are a haven for defaulters. I agree entirely with the Commissioner of Assize Shah that the appellant was not entitled to an injunction upon any one of the grounds urged on its behalf.'

54. On the issues of irreparable loss, this case brings out an important contractual principle that security pledged to a financial institution or bank stands the risk of being sold and the intended sale is within the contemplation of the parties to the loan agreement. In other words, the sale of property by the mortgagee cannot lead to irreparable loss since it is the contractual arrangement or intention of the parties and expressly provided for in the loan agreement or mortgage deed. Exceptions to the general rule must relate to issues like whether the mortgagor is in default and whether statutory power of sale has arisen. Where the agreed amount has not been paid and the borrower is still in default on the agreed amount, the right of the bank to sell is established and what the court can do is to cause the ascertainment of the right value for forced sale of the property.

55. In determining where the balance on convenience lies, considering the facts of this case in totality, I find that the balance of convenience is not in favour of the Applicant.

56. Since the 1st Respondent's statutory power of sale has arisen, I find that the balance of convenience lies in enforcing the contractual obligations of the parties.

57. Consequently, I find that the application under determination has no merit and that the Plaintiff/Applicants have not satisfied the test for granting the injunction sought as laid down in the Giella vs Cassman Brown case. Accordingly, I dismiss the application dated 9th June 2017 and vacate the interim orders.

58. Costs to the Respondent.

Dated and delivered at Nyahururu this 7th day of December 2017.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE