



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO 363 OF 2015

TURBO HIGHWAY ELDORET LIMITED.....1ST
PLAINTIFF

PANNA DILIP CHAUHAN.....2ND PLAINTIFF

VERSUS

BANK OF AFRICA KENYA LIMITED.....
.....DEFENDANT

AND

ELC NO. 364 OF 2015

TURBO HIGHWAY ELDORET LIMITED.....1ST
PLAINTIFF

AMIT AGGRARWAL.....2ND PLAINTIFF

VERSUS

BANK OF AFRICA KENYA LIMITED.....
.....DEFENDANT

RULING

(Application for injunction; principles to be applied; plaintiffs having received financial accommodation from defendant bank; default not denied; plaintiffs alleging that no notices have been issued to them and that interest and other charges were illegal; default not having been denied, Bank is entitled to its statutory power of sale; all requisite notices demonstrated to have been issued; issue of illegal charges does not negate default; application for injunction dismissed; Bank at liberty to sell)

1. On 12 August 2015, two suits were filed against Bank of Africa Limited in the Environment and Land Court at Eldoret. In the first, registered as Eldoret ELC Case No. 229 of 2015, the plaintiffs are Turbo Highway Eldoret Limited and Panna Dilip Chauhan. In the second suit, registered as Eldoret ELC Case No. 230 of 2015, the plaintiffs are Turbo Highway Eldoret Limited and Amit Aggarwal. The two cases however raise similar questions of law and fact only that the proprietorship of some of the land parcels in issue differ.

2. The facts of the case are largely not in dispute. About the year 2011, Turbo Highway Eldoret Limited (Turbo Highway) applied for and was granted an overdraft facility by the Bank of Africa Limited (hereinafter the Bank) in the sum of Kshs. 540,000,000/=. The said monies were secured by charges registered against several land parcels being Eldoret Municipality Block 12/131; Eldoret Municipality Block 2/87, 88, 89, 90, and 91; and Eldoret Municipality Block 2/87/1, 88/1, 89/1, 90/1 and 91/1 (the suit properties). The first property, Eldoret Municipality Block 12/131 is owned by Mr. Aggarwal whereas the rest are owned by Mr. Chauhan. In the plaint, Turbo Highway has admitted falling back on the repayments but which it claims were as a result of irregular, invalid and unnotified increase in interest rates. It is pleaded that the Bank has now threatened to sell the suit properties despite not having served the requisite notices. Specifically, the plaintiffs have pleaded the following against the Bank.

(a) *Failing to issue a statutory notice as required under Section 90 of the Land Act (Act No. 6 of 2012).*

(b) *Failing to comply with the provisions of Section 96 (3) of the Land Act, (Act No. 6 of 2012).*

(c) *Failing to comply with the provisions of Section 96(3) (c) of the Land Act (Act No. 6 of 2012).*

(d) *Tendering incorrect amounts.*

(e) *Failing to notify the plaintiffs of the fluctuation in interest rates.*

3. The plaintiffs have also disputed the various sums claimed in a letter dated 26 June 2015 which itemized the following as owing :-

(a) *Kshs. 104, 885, 072.04/= on account number *****8 with interest thereon at the rate of 15% per annum for amounts upto Kshs. 68,800,000/= and 16.5% per annum for the remaining balance until payment in full.*

(b) *USD 1, 692,469.98 on current account number *****6 with interest accruing thereon at the rate of 16.5% per annum until payment in full.*

(c) *Euros 883,059.56 on current account number *****3 with interest accruing thereon at the rate of 16.5% per annum until payment in full.*

4. In the suit, the plaintiffs want the following:-

(a) *A declaration that the notice to sell (the suit properties) contained in the letter of 26 June 2015 is illegal, null and void.*

(b) *An order directing the defendant to provide to the plaintiffs the following:-*

- a proper statement of account in respect of the account secured by the charge.

- any and all notices notifying the plaintiffs of fluctuations in the subject account and the applicable interest rates of interest and changes thereto if at all.

- an order that the defendant do render the 1st plaintiff with the proper statements of the loan account.

(d) *Costs of the suit together with interest.*

5. Together with the plaint, the plaintiffs filed applications in both suits, seeking orders to restrain the Bank from advertising for sale, selling, auctioning or transferring the suit properties pending the hearing

and determination of the suit. Among the grounds stated are that the defendant has been unilaterally fluctuating the interest rates; that the plaintiffs have secured buyers for the properties Eldoret Municipality Block 12/131 which is likely to realize Kshs. 120,000,000/= ; Block 2/87 and Block 2/87/1 which may realize Kshs. 70,000,000/=; and certain stock held by a third party which is expected to realize Kshs. 18,000,000/= in a bid to raise the funds to pay. It is also stated that the requisite notices have not been issued. These grounds are more or less repeated in the supporting affidavit to the application.

6. The Bank entered appearance and filed Defence. It also filed a reply to the application for injunction. In respect of the allegation that no proper notices were issued, the Bank has stated as follows :-

(a) That the 90 day statutory notice dated 22nd December 2014 was duly issued to the 2nd plaintiffs and copied to the 1st plaintiff in compliance with Section 90 of the Land Act.

(b) That the 40 day Statutory Notice dated 24th April 2015 was duly issued to the 2nd plaintiffs and copied to the 1st plaintiff in compliance with Section 96(2)(3) and (3)(c) of the Land Act.

(c) Correct amounts were tendered.

(d) Change in interest rates was communicated by way of monthly statements as well as on demand by the plaintiffs.

7. The Bank has averred that it has the legal right to exercise its statutory power of sale. On the sale agreements for some of the properties, the Bank has stated that one of the alleged sales, was by Mr. Aggarwal to Oryx Energies Kenya Limited. Their investigations revealed that the signature of the Managing Director of Oryx was a forgery and that the seal on the agreement did not belong to them. It is also averred that the defendants have been making empty promises to pay and promising that another Bank would take over their debt but all has come to naught.

8. The Replying Affidavit has been sworn by Ben Mwaura who is the defendant's Senior Recoveries Manager. He has inter alia annexed copies of the notices which the Bank states it issued and certificates of posting. He has also annexed various correspondences written by the plaintiffs promising to pay the debt owed to the Bank. He also annexed the correspondence between the Bank and Oryx Energy on the alleged sale agreement by Mr. Aggarwal to Oryx. He has further annexed copies of Bank statements and letters of demand outlining the interest payable. He has further stated that a dispute as to the amount owing cannot be reason enough for an injunction.

9. There is a supplementary affidavit filed by Mr. Aggarwal. He inter alia denied the allegations of forgery on the agreement between himself and Oryx and explained that the agreement was received from a middleman representing Oryx. He denied receipt of statements of accounts and has further stated that the same demonstrating unilateral fluctuation of interest rates which exceed the sums forwarded and has stated that the Bank has offended Section 44A of the Banking Act, Cap 488, Laws of Kenya. He has also averred that there have been irregular debits and charges into their accounts and has pointed out at some of these.

10. The Bank also filed a further affidavit in which it averred that Turbo Highway is now the subject of several winding up petitions.

11. Before the application for injunction could be heard, my brother in Eldoret, Justice Antony Ombwayo, for personal reasons, recused himself. The matter was therefore forwarded to me here in Nakuru. Counsels appeared before me on 22nd January 2016 and urged me to write a ruling on the application for injunction based on the written submissions that they had filed.

12. I have considered these submissions alongside all the documents filed by the parties. First, there is no contention that Turbo Highway received various financial facilities from the Bank which were secured by charges over the suit properties. A look at the affidavits filed by the plaintiffs will reveal that default is

not seriously denied. I have also seen the various correspondences attached by Mr. Mwaura vide which Turbo Highway has been making promises to pay. There is even correspondence stating that the loan may be taken over by either Equity Bank or UBA Bank. Although the plaintiffs have through this suit complained of illegal interest rates and charges, I have not seen any letter written by them to the Bank complaining of anything of the sort. My view is that this is an afterthought. Without prejudicing the plaintiff's position, if there are illegal charges and interest, that can be canvassed at the hearing. What is important for now is that there has been default, and that alone, triggers the statutory right of the Bank to exercise its power of sale over the properties charged, irrespective of the claim for illegal charges and interest. Whether or not there have been illegal charges does not remove the obligation to pay the original debt and if there is default on the original debt, then one cannot stop the Bank from selling on the reasoning that there could be one or two illegal charges. The plaintiffs have not stated that they have paid in full what is not in dispute so that the if there are any monies in dispute the same can be litigated over without affecting the debt which is properly due. The true position of the matter, on my assessment of the material before me, is that Turbo Highway appears to be in financial distress and there has been default.

13. The only way through which the plaintiffs may get relief is if the requisite notices have not been sent. It is of course the position of the plaintiffs that no notices have been sent. This has been contested by the defendant Bank and the Bank has tendered copies of what it considers to be good notices appropriately sent. I have seen two letters both dated 22 December 2014 addressed to Mr. Aggarwal and Mr. Chauhan. To me, the two letters gave the two, 3 months from the date of service to make good the accounts. As far as I can see, it is a good 3 month statutory notice issued under Section 90(3)(e) and Section 96(1) of the Land Act. These letters were sent by Registered Post and the Certificates of Postage are annexed. I have also seen the letters of 24 April 2015 addressed to Mr. Aggarwal and Mr. Chauhan. From what I can see, the letters comprise of the 40 days notice said to be issued pursuant to Section 90(3) (e), 96(1) and 96 (2)of the Land Act. The certificates of postage are annexed and again I see nothing wrong in the notice. These notices were preceded by three formal letters of demand written on 17 September 2014 , 2 October 2014 and 27 October 2014, asking the 1st plaintiff to regularize its accounts. These demand letters were duly received.

14. The application before me is of course one for injunction. To succeed in an application such as this, an applicant needs to demonstrate a prima facie case with a probability of success and also demonstrate that he stands to suffer irreparable loss. If in doubt, the court will consider the balance of convenience. These principles were laid out in the case of *Giella vs Cassman Brown (1973) EA 358*.

15. In our case, I am not persuaded that the plaintiffs have demonstrated a prima facie case with a probability of success. Significantly, they have failed to demonstrate that there has not been default or that the statutory power of sale has not arisen. Despite alleging that no statutory notices were sent, on the contrary, I have seen the notices and I believe that they were properly sent. From the material presented, I do not see how I can stop the bank from proceeding to sell the properties in issue.

16. The upshot of the foregoing is that I find no merit in the applications for injunction in both Case No 363 of 2015 (formerly Eldoret ELC No. 229 of 2015) and Case No. 364 (formerly Eldoret ELC No. 230 of 2015). The same are hereby dismissed with costs.

17. For the avoidance of doubt, the interim orders issued herein are hereby lifted.

18. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 18th February, 2016.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT AT NAKURU

In presence of : -

Ms. Anne Odwar holding brief for Mr. R . M Mutiso for plaintiffs

Mr Greg Karungo present for defendant

CA: Janet

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT AT NAKURU