REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 355 OF 2015

JAMES KIPRUTO LAGAT..1ST PLAINTIFF

ELIZABETH JEBET CHERUTICH...............................2ND PLAINTIFF

VERSUS

CONSOLIDATED BANK LIMITED..................................DEFENDANT

RULING

James Kipruto Lagat and ***Elizabeth Jebet Cherutich*** hereinafter referred to as the plaintiffs have filed this application against ***Consolidated Bank Ltd*** for a temporary injunction to issue to restrain the defendants by themselves, their servants or agents from selling or otherwise disposing off the plaintiffs' land being Baringo/Sabatia/103/155 on 24.9.2015 or any other date whatsoever until the final determination of the suit.

The application is based on grounds that the plaintiffs by themselves do not owe the defendant any sum of money and that the purported sale by the defendants is invalid, void and/or illegal as the plaintiffs have never at any time taken a loan directly from the defendant nor have they ever been notified previously of any claim by the defendants as required by Section 90 of the land Act.

The application is supported by the affidavit of James Kipruto Lagat who states that sometime in the month of February, 2013 David Tanui one of the Directors of Glory Chemist Ltd approached him and requested him to be part of guarantors in a loan which they were receiving from consolidated bank. The plaintiffs decided to guarantee the Glory Chemist to obtain the loan amounting to Kshs.15,000,000/=. The Glory Chemist Directors offered their personal guarantee. That there has been no other transaction involving any borrowing between themselves and the defendants. He is informed by the said David Tanui of Glory Chemist Ltd which information he verily believe to be true that his company has been regularly servicing the loan as per the statement of account (JK2) and the bank pay in slips (JK3). He learned from a friend of his that their said property land parcel Baringo/Sabatia 103/155 was advertised for sale in the Daily Nation of September 3rd, 2015 which information he confirmed to be true and also from his workers that the Auctioneers notification of sale and the 45 sale had been left with them sometimes in the month of August, 2015 and that at no single time since the execution of the charge have the defendants intimidated to them that there were problems with the operations of the loan account.

They have never been served with the mandatory 90 days notice by the defendant to redeem the property as per law required under section 90 of the land Act. The Directors of Glory Chemist who had also provided personal guarantee were not served under section 96(3) and as such, the sale will be premature. The interest rates described in clause 3 of the letter of offer is contrary to section 44 of the banking Act.

The plaintiff's claim that the advertisement of their property for sale without any notice is illegal, a nullity

and of no legal consequences and that the proposed sale of their property in such a clandestine manner would be wrongful especially as they personally do not owe the defendants any money. That the defendants shall proceed with the sale of the aforesaid property unless restrained by this court.

The defendant/respondent filed a replying affidavit sworn by Jackson Kiptala Taliboy who states that the plaintiffs guaranteed a loan facility granted by the defendant to Glory Chemist Ltd who was the principal debtor for an amount of Kshs.15,000,000/= and offered their title deed over Baring/Sabatia 103/155 as security. In addition to the charge referred to above, the plaintiffs also executed deeds of guarantees and indemnity in favour of the defendant where they undertook to repay the defendant in the event of default by the Principal debtor in repayment of the loan advanced. The principal sum plus interest in loan facility advanced to the principal debtor whom the plaintiff guaranteed was to be repaid over a period of 60 months through equal monthly instalments of Kshs.405,800/=.

The defendant claims that after the Principal Debtor's account was credited with the loan amount as per the loan agreement, it experienced serious defaults in repayment and the loan account remained in arrears attracting huge interests and currently, the outstanding amount not cleared by the plaintiff is Kshs.15,376,611.85. Due to the failure by the Principal Debtor to honour his obligation to repay the outstanding amount as per the agreed instalments, the defendant had no alternative but to exercise its statutory power of sale and issued the Principal Debtor and the plaintiffs with the relevant three months statutory notice hoping the plaintiffs would exercise their right to redeem the suit property. Before exercising its right to sell the plaintiff's charged land after the expiry of the statutory notices issued as stated in paragraph 9 above, the defendant issued the plaintiff a redemption notice and notification of sale and served the same upon the plaintiff. That all cash deposits and recoveries made by the defendant from the principal debtor have been credited to the loan account.

That the account statement produced by the plaintiffs in support of their application is not the loan account statement in respect of the loan facility advanced by the defendant to the Principal Debtor but that of a different account operated by the Principal debtor with the defendant and has only been annexed to the application to hoodwink the court into believing that the principal debtor is not in arrears. That the plaintiffs' depositions under paragraph 11 of their supporting affidavit that the interest rates charged as agreed between the parties in the letter of offer contravenes the Banking Act are baseless and without any legal justification. The defendant has not breached any covenant in the mortgage agreement with the plaintiff and therefore, it should be allowed to exercise its statutory power of sale over the suit property to recover what is owed to it. The plaintiffs entered into a contractual agreement with the defendant voluntarily and obtained independent legal advice on the defendant's right to exercise its statutory power of sale under the charge which is not disputed, the defendant should therefore be allowed to proceed with the sale of the suit property to recover its lawful dues.

The defendants believe that the plaintiffs have had ample and sufficient notice to repay the amount owed to the defendant and the suit herein is unmerited and made in bad faith with the aim of defeating the defendant's rights. Moreover that the plaintiffs shall not suffer any irreparable loss and damage should the defendant be allowed to proceed with the statutory power of sale as they have a remedy in indemnity from the principal debtor. That the defendant stands to suffer irreparably if it is inhibited from exercising its statutory power of sale as the outstanding amount is likely to outstrip the value of the suit property.

That he is informed by their advocates on record which advice he verily believe to be true that the plaintiff/applicant will not suffer irreparable loss if the defendant proceeds to dispose the suit property to recover the outstanding amount and that the balance of convenience lies with the defendant being allowed to recover what is owed to it by the plaintiff.

Mr. Nyamweya learned counsel for the applicants submits that the applicants are the registered owners of land parcel No. Baringo/Sabatia 103/155. They were approached by one David Tanui, one of the Directors of Glory Chemist Ltd to guarantee a loan facility the principal borrower was borrowing from the defendant which they agreed. The applicants have never heard from the defendants that the loan is not being serviced. They learnt of the sale of their property through the newspapers and learnt from their farmworkers that there was notification of sale of their property. They were not served with the statutory

notice as required by section 90 of the Land Act, 2012.

The applicants refer to the case of ***Nyangilo Ochieng & Another Vs Fanuel Ochieng & 2 Others (1995-1998) 2 EA 260***, where the Court of Appeal held that it is for the chargee to make sure that there is compliance with the requirements of section 74(1) of the Registered Land Act (repealed). The burden of proof is not in any manner on the chargor. Once the chargor alleges non receipt of the statutory notice, it is for the chargee to prove that such notice was in fact sent. On the issue of notification of sale and the 45 days redemption notice, the same were sent to the address of the principal debtor not the applicants' address. The plaintiffs further argue that the statement of account exhibited in the plaintiffs' affidavit proves that the principal debtor is still servicing the loan and that the same is not non-pertaining loan.

Mr Lagat learned counsel for the defendant on his part submits that the plaintiffs have no *prima facie* case with probability of success. He argues that there is no authority to sue granted to the 1st defendant by the 2nd defendant in view of the provision of Order 1, Rule 13(2) of the Civil Procedure Rules, 2010. He further argues that the suit is an abuse of the court process as they have annexed a wrong account statement.

He further argues that the plaintiffs have not established a *prima facie* case as they do not dispute having guaranteed as loan facility with Kshs.15,000,000/= granted by the defendant to principal debtor. They do not deny having executed a charge over the suit property as security and executed separate deeds of guarantee as further security. The defendant argues that section 44 of the Banking Act has not been breached. On service of statutory notices, the respondent contends that the statutory notice was served upon the debtor and the plaintiff. Moreover, the respondent argues that the notice of sale was duly served through Nyaluoyo Auctioneers through the postal addresses supplied. According to Mr Lagat,t the plaintiff has not demonstrated that he will suffer irreparable loss that cannot be compensated by way of damages.

On balance of convenience, the respondent submits that the balance of convenience lies in the respondent being allowed to sell the property by exercising his statutory power of sale.

The principles of grant of interlocutory injunction were set out in the locus classicus case of ***Giella v Cassman Brown & Co Ltd [1973] EA 358***. The question that follows is whether this court should grant the injunction asked for. The conditions for the grant of an interlocutory injunction are set out in the case of The applicant must show a *prima facie* case with a probability of success or that if the injunction is not granted the applicant will suffer irreparable injury that cannot be compensated by an award or damages. If in doubt the court shall decide the application on the balance of convenience.

On the issue as to whether the plaintiff has demonstrated a *prima facie* case with a probability of success, this court finds that it is not in dispute that the plaintiff guaranteed a loan facility granted by the defendant to Glory Chemists Ltd for an amount of Kenya Shillings fifteen million only and offered their title deed for Baringo/Sabatia 103/155 as security. The principal amount plus interest advanced to the principal debtor was to be repaid over a period of 60 months through equal monthly instalments of Kenya Shillings Four Thousand and Five Thousand, Four Hundred only. The respondent now claims that the principal debtor is in serious default and therefore, the defendant has commenced the process of recovery of the property that was charged as security. The defendant has exercised his statutory power of sale and issued the principal debtor and the plaintiff with the relevant three months statutory notice hoping that the plaintiff would exercise his right to redeem the property. He claims to have issued 3 months statutory notice. The defendant also states that after the expiry of the statutory notice, the plaintiff was served with redemption notice and notification of sale. The plaintiff has failed to redeem the property despite the appropriate notices hence the property was placed for sale as per the notification for sale.

This court finds that the process of recovery of the property charged as security begins with the chargee complying with section 90 of the Land Act, 2012. Section 90 of the Land Act provides;

> **(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 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—

(a) the nature and extent of the default by the chargor;

(b) 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;

(c) 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 as to rectify the default and the time, being not less than two months, by the end of which the default must have been rectified;

(d) the consequence that 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

(e) the right of the chargor in respect of certain remedies to apply to the court for relief against those remedies.

The import of the above is that time to comply begins running from the date of notice and that if the chargor fails to comply with 2 months, the chargee may sell the charged land. I have painstakingly gone through the documents herein and do not appear to see the notice under section 90 of the Land Act. It is the onus of the defendant to prove that notice under Section 90 of the Land Act was given failure of which the court holds that the same was not given.

After the expiry of 2 months, section 96 of the Land Act that provides for the chargee's power of sale comes into effect. Section 96 of the Act provides:

(1) Where a chargor is in default of the obligations under a charge and remains in default at the expiry of the time provided for the rectification of that default in the notice served on the chargor under section 90(1), a chargee may exercise the power to sell the charged land.

(2) 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 the sale of the charged land until at least forty days have elapsed from the date of the service of that notice to sell.

(3) A copy of the notice to sell served in accordance with subsection (2) shall be served on-

(a) The Commission, if the charged land is public land;

(b) the holder of the land out which the lease has been granted, if the charged land is a lease;

(c) a spouse of the chargor who had given the consent;

(e) any lessee and sublessee of the charged land or of any buildings on the charged land;

(f) any person who is a co-owner with the chargor;

(g) any other chargee of money secured by a charge on the charged land of whom the chargee

proposing to exercise** **the power of sale has actual notice;

(h)** **any guarantor of the money advanced under the charge;

(i)** **any other person known to have a right to enter on and** **use the land or the natural resources in, on, or under the** **charged land by affixing a notice at the property; and

(j)** **any other persons as may be prescribed by regulations,and shall be posted in a prominent place at or as near as may be to the charged land.

On strict scrutiny of the redemption notice, the court finds that the same was sent to the wrong address thus 2133-30100, Eldoret as opposed to 827-30100, Eldoret.

The notification of sale was also sent to the wrong address. Failure to adhere to section 90 of the Land Act, failure to send the redemption notice and notification of sale to the right address raises doubt.

I have looked at the statutory notice dated 25.9.2014 and do find that it was addressed to the chargor's address supplied in the charge document. However, the certificate of postage is missing. The respondent attached a certificate of postage in the list of documents dated 2.10.2015. The postage was made on 1.10.2014. I do find that the certificate of postage though not annexed in the affidavit is proof that the statutory notice was sent to the proper address.

Section 44 of the Banking Act provides that An institution shall be limited in what it may recover from a debtor with respect to a non-performing loan to the maximum amount under subsection (2). Subsection 2 provides that the maximum amount referred to in subsection (1) is the sum of the the principal owing when the loan becomes non-performing and interest, in accordance with the contract between the debtor and the institution, not exceeding the principal owing when the loan becomes non-performing; and expenses incurred in the recovery of any amounts owed by the debtor.

I do find that it has not been demonstrated how the defendant has breached section 44 of the Banking Act.

From the foregoing, I do find that the applicant has demonstrated that he has a *prima facie* case with a probability of success in view of the provisions of sections 90 and 96 of the land Act and the fact that the notification of sale and redemption notice were sent to the wrong address.

On irreparable loss, the applicants have not demonstrated to this court through affidavit or submissions that they will suffer irreparable loss. The applicants have a duty to bring the court evidence that if temporary injunction is not granted, they will suffer irreparable loss.

On balance of convenience, this court finds that it tilts towards granting an order of temporary injunction in view of the fact that there is procedural irregularity on the part of the defendant. Ultimately, a temporary injunction is granted as prayed.

DATED AND DELIVERED AT ELDORET THIS 15TH DAY OF APRIL, 2016.

ANTONY OMBWAYO

JUDGE