



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT KITALE

LAND CASE NO. 59 OF 2016

EDNA CHERONO BORE.....PLAINTIFF

VERSUS

EQUITORIAL COMMERCIAL BANK LTD.....1ST DEFENDANT

PAMPA CHURRASCARIA LTD.....2ND DEFENDANT

JOSEPH M. GIKONYO T/A

GURAM INVESTMENTS AUCTIONEERS.....3RD DEFENDANT

R U L I N G

BACKGROUND

1. The applicant Edna Cheronno Bore is the registered owner of **LR.No. 2116/1050** situated at Kibomet area of Kitale Municipality. The first respondent is a banking institution which advanced the second respondent a loan of **Kshs.50,000,000/=** and an overdraft facility of **Kshs.10,000,000/=**. The applicant offered her land as security over which a legal charge was registered. The principal sum was also guaranteed by the applicant, two directors of the second respondent as well as two corporate guarantors namely Pampa Grill Ltd and Al Pasha Coffee Lounge Bar Ltd.

2. The second respondent defaulted in repayment. The 1st respondent engaged the second respondent in correspondence over the default. The applicant was duly notified of the default in repayment by the second respondent. As the second respondent did not make the loan repayment as agreed, the first respondent instructed the third respondent to sell the charged property. The property was advertised for sale which sale was to take place on 1/4/2016. This prompted the applicant to move to court seeking orders of injunction stopping the impending sale.

APPLICANT'S APPLICATION

3. The applicant contends that the first respondent did not serve her with the statutory notices required before the charged property could be advertised for sale. The applicant further contends that the first respondent's statutory power of sale has not arisen and that the advertisement for sale of her property was premature. That the first and third respondents have colluded to sell her property in secrecy and that there are three different valuations which all show different amounts as value of the property.

4. The applicant further argues that it was not her business to monitor how the second respondent repaid the loan and that she has never been informed of the default in repayment by the second respondent. That there was no debenture registered over assets of the second respondent and that she was not properly advised on the implications of that. She further contends that no efforts have been made to recover the amount due from the other guarantors.

FIRST RESPONDENT'S CONTENTION

5. The applicant's application is opposed by the first respondent through a replying affidavit sworn on 29/3/2016. The first respondent contends that the applicant was duly informed of the default by the second defendant and that all the required statutory notices were served upon the applicant as required. The first respondent further contends that the applicant's claims that no notices were served upon her are not true. The requisite notices were actually served and that the Auctioneers fully complied with the law.

ANALYSIS

6. I have carefully gone through the applicant's application as well as the opposition thereto by the first respondent. There is no contention that the second respondent defaulted in repayment of the loan amount. The applicant has not denied the default in repayment. The second respondent entered appearance but did not file any reply to the applicant's claim. The second respondent's lawyers attempted to settle the issue but this was not forthcoming. The only issue for determination in this application is whether the applicant was served with the requisite statutory notices before the property was advertised for sale.

7. Though the applicant denies that the issue of default by the second respondent was not brought to her attention, the first respondent has annexed a letter dated 19/8/2015 addressed to the second respondent with a copy to the applicant and other guarantors. This letter was notifying the second respondent of the default in repayment and demanding that the default be remedied. The applicant was invited to the offices of the first respondent where the issue of the loan was discussed. She even gave her new contacts. This is admitted in the applicant's own affidavit in support of her application. She cannot therefore turn round and claim that she was not notified of the default by the second respondent.

8. The applicant denied that there was no service of statutory notices as required. Contrary to her allegations, the first respondent has annexed a letter dated 19/8/2015 sent by registered post to the applicant's postal address. This letter brought to the attention of the applicant the default by the second respondent and required her to pay the outstanding amount due. A copy of certificate of posting has been annexed. Clause 38 of the charge document clearly stipulated the mode of service of any notice upon the chargor. The prescribed modes included delivery by registered post. The applicant had given her postal address as Box Number 175-30200 Kitale. This is the address to which the letter of 19/8/2015 was addressed.

9. The applicant was given notice as required under Section 96(2) of the Land act of 2012. This notice was sent by registered post to the new address which the applicant had given to the first respondent. This notice was issued on 25/11/2015 and was dispatched by registered post to the address given by the applicant. The applicant had been to the offices of the first respondent on 1/9/2015 where she gave her new address in Nairobi. She also gave her telephone and e-mail contact. This is the address to which the letter was sent. The applicant has herself annexed a copy of the note on which she gave the new address in her supporting affidavit. The first respondent has provided proof of service by registered post.

10. After the period given under Section 96(2) of the Land Act expired, the first respondent gave instructions to the third respondent to sell the charged property. The notification of sale was personally served upon the applicant and as a further proof of service, the same notification was sent by registered post. All this has been exhibited by the first respondent. The property was advertised for sale after all the required notices had been issued. There is therefore no basis upon which the applicant can claim that she was never served with the statutory notices.

11. The applicant is seeking a permanent injunction at interlocutory stage. This is clear from prayer 5 of

the application. Be that as it may, I have to consider whether the applicant has made out a case for grant of injunction. The principles for grant of injunction are well spelt out in the case of ***Giella -vs- Cessman Brown [1973] EA 358***. First an applicant has to demonstrate that he has a prima facie case with probability of success. Secondly an injunction will not normally be granted unless otherwise the applicant will suffer irreparable injury which cannot be compensated by an award of damages. Thirdly if the court is in doubt, it will decide the application on a balance of convenience.

12. In the instant case, I have to consider whether the applicant has shown that she has a prima facie case with probability of success. What amounts to a prima facie case was aptly set out in the case of ***Mrao Ltd -vs- First American Bank of Kenya Ltd & 2 Others [2003] eKLR*** as follows:-

“A prima facie case in civil application includes but is not confined to a “genuine and arguable case”. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”.

13. The applicant’s complaint was that no statutory notices were served upon her. Contrary to her contention, it has been demonstrated that she was actually served with all the requisite statutory notices. The service was done as provided in the charge document. This being the case I do not think that there is any of her right which has been infringed as to call for an explanation from the first respondent. All that needed to be done was done. The Auctioneers (third respondent) acted in accordance with the Act governing Auctioneers.

14. There is no collusion between the first respondent and the third respondent as the applicant alleges. The first respondent was seeking to recover money due to it and the Auctioneer was discharging his duties as required. The applicant seems to be complaining that the Auctioneer advertised the sale in the Daily Nation in a nondescript page devoid of prominence. I know of no requirement that advertisements for sale have to be prominently displayed. The fact remains that there was advertisement as required. The applicant became aware about the advertisement and she cannot therefore complain that it was not prominent. The property had been valued. Though there was variation in three different valuations, the variation has been explained and in any case the variation would have not prejudiced the applicant in any material way. What was required under the law had essentially been met.

15. The applicant in her plaint seems to be complaining that the first respondent discriminated against her in that it did not go after the other guarantors. I do not think that the applicant has any basis for this. The first respondent was at liberty to use an option which to it will have given it results. There was no requirement that the bank had to go after all the guarantors at ago. The liability was joint and several and the bank had the liberty to go after any of the guarantors or realize the security. There is therefore no basis for arguing that the bank is discriminating against the applicant. The charged property is solely in the name of the applicant. The guarantees were in addition to the charged property. If the charged property is enough to realize the loan amount, there was no need for the bank to go for the guarantors. In the circumstances I find that the applicant has not demonstrated that she has a prima facie case with probability of success.

16. The charged property is an asset which can be valued. It has already been valued. If the same is sold and in the unlikely event that the applicant succeeds in her case, she can be compensated in damages. There is no contention that the bank cannot meet the damages. An injunction can only be given where it is shown that the process leading to the sale is so flawed or so capricious that the court’s intervention is justified. In this case, the amount due is not contested. The process leading to the advertisement of the charged property has been above board. It will be unfair for the court to intervene in the circumstances.

CONCLUSION

17. This is a clear case where the applicant has come to court not because any of her rights have been infringed but to stall the process of recovery of the money due to the bank. The court cannot come to her aid. I find that the application lacks merits. The same is hereby dismissed with costs to the 1st and 3rd

respondents. The injunction orders which had been given before are hereby vacated.

It is so ordered

Dated, signed and delivered at Kitale on this **28th** day of **July, 2016**.

E. OBAGA

JUDGE

In the presence of Ms. Oketch for Mr. Midiwa for Applicant and Mr. Litunya for Mr. Wilson for 1st respondent.

Court Assistant – Isabellah.

E. OBAGA

JUDGE

28/7/2016