REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 128B OF 2015

PETER KIMANI NENE……..PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LIMITED….DEFENDANT

RULING

What calls for my determination in this case is whether a proper notice was issued to the applicant under ***Sections 90 (1) and (2) and 96 (1) and (2) of the Land Act*** before property known as L.R THIKA MUNICIPALITY BLOCK 6/202 was advertised for sale by **LEAKEY'S AUCTIONEERS.**

Briefly, the applicant is the registered proprietor of the parcel of land known as L.R. No. THIKA MUNICIPALITY BLOCK 6/202 situated within Kiambu County but he denies being aware of any charge or further charge on the said property in respect of sums of money paid on his behalf to Nation Newspaper Limited. It is his case therefore that the notification of sale issued by **LEAKEY'S AUCTINEERS** is invalid as the charge pursuant to which it is issued is null, void and un-enforceable and in any event, the sum claimed is exaggerated. Further, that no notification of sale or mandatory statutory notice was issued and the applicant has paid off the sums paid by the respondent to Nation Newspaper Limited. The applicant therefore seeks an injunction restraining the respondent, its agents and/or servants from selling, transferring or otherwise alienating, advertising for sale or putting up for sale either by public auction or private treaty or otherwise the said parcel of land L.R No. THIKA MUNICIPALITY BLOCK 6/202 (the suit property).

In opposition to that application, the respondent's Assistant Legal Manager **DONALD OSEKO** has sworn an affidavit in which he has deponed, inter alia, that at the applicant's own request, the respondent advanced him over-draft facilities and bank guarantees to provide him with working capital for his newspaper distribution business. As security, the applicant executed a charge, a further charge and a second charge over the suit property which was registered in favour of the respondent bank to secure its interest in the amount advanced to the applicant as per the forms marked **DO – 1** and **DO - 2** and the charge and further charge marked **DO – 4.** That upon default in the repayment of the facilities, the respondent commenced recovery proceedings against the applicant by issuing a Statutory Notice dated 6th September 2012 after which the Auctioneers issued a notification of sale and redemption notices. That the applicant has not claimed any exaggerated figures as the figures quoted in the redemption notices are true and are owing to the respondent bank. That the respondent has on several occasions written to the applicant requesting him to regularize his loan account by paying the outstanding amount but the applicant has refused and/or neglected to do so as per the demand letter – **DO – 5**. That the applicant is in arrears as per the copy of current statement of account – **DO – 7** and the applicant did surrender to the respondent the original title to the suit property which is in its possession. Therefore, the proposed sale of the applicant's property is legal and this is an ordinary case of a borrower's default in repayment of money disbursed on clear conditions.

Submissions on that application have been filed both by the firm of **WATI & COMPANY ADVOCATES** for the applicant (before they ceased acting for him on 28th April 2016) and by the firm of **KALE MAINA BUNDOTICH ADVOCATES** for the respondent.

I have considered the application, the rival affidavits and the submissions by counsel.

Although the applicant has deponed in paragraph 10 of his supporting affidavit that he did not execute any charge or further charge before the advocate for the respondent and neither were the provisions of the ***Registered Land Act*** read to him, the replying affidavit of **DONALD OKELO** the respondent's Assistant Legal Manager has annexed thereto copies of the executed letters of offer dated 31st January 2008, 30th July 2008 and 3rd July 2009 – annexture **DO – 2.** Also annexed thereto are copies of his duly executed charge, further charge and second further charge duly registered over the suit property in favour of the respondent. There is a notice to the effect that the applicant acknowledged the effects of ***Section 74 of the Registered Land Act.*** It is not suggested that the signatures appearing on the charge, further charge and second further charge do not belong to the applicant. The applicant also complains that the sum outstanding which, as per the statutory notice dated 6th September 2012 and issued under ***Section 90 (1) (2) and 3 (e) of the Land Act 2012*** was Ksh. 8,756,839.95 as at 4th September 2012 is exaggerated. In support of that allegation, the applicant has annexed a copy of a statement of account showing a debit balance of Ksh. 4,085,361.70 as at 31st May 2013 after the applicant had paid Ksh. 2,100,000.00 on 27th December 2012.

An application for interlocutory injunction such as this one must be considered in light of the principles laid down in the case of ***GIELLA VS CASSMAN BROWN 1973 E.A 358*** which are:-

> ***1. The applicant must show a prima facie case with a probability of success.***
>
> ***2. 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; and,***
>
> ***3. Thirdly, if in doubt, the Court will determine such an application on the balance of convenience***.

A further fundamental principle is that the Court should take whichever course appears to carry the lower risk of injustice should it turn out to have been "***wrong"*** – ***FILMS ROVER INTERNATIONAL LTD VS CANNON FILM SALE LTD 1986 3 ALL E.R 772.*** An interlocutory injunction being an equitable remedy, he who seeks it must do so with clean hands.

As to what amounts to a prima facie case, the Court of Appeal in ***MRAO VS FIRST AMERICAN BANK OF KENYA & TWO OTHERS 2003 K.L.R 123*** said:-

> "***A prima facie case in a 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".***

From the applicant's own affidavit, he appears to be complaining that the amount being charged and demanded from him is exaggerated. His indebtedness to the respondent is not really in doubt. The legal position is that a mortgagee will not be restrained from exercising its power of sale simply because the amount due is in dispute or because the mortgagor has begun a redemption process or because the mortgagor objects to the manner in which the sale is being arranged. He will be restrained, however, if the mortgagor pays the amount into Court, that is the amount the mortgagee claims to be due to him unless on the terms of the mortgage, the claim is excessive.

Having said so, it is clear to me that although the respondent issued a statutory notice to the applicant dated 6th September 2012 indicating the outstanding debt as Ksh. 8,756,839.95 as at 4th September 2012,

the Ksh. 2,100,000.00 was only paid on 27th December 2012. The notice issued to the applicant by the Auctioneers dated 17th April 2013 demanded from him a sum of Ksh. 6,293,568.15 as at 10th April 2013. Therefore the respondent had already given the applicant credit for the Ksh. 2,100.000.00 paid on 27th December 2012. By his own plaint dated 18th June 2013 and filed in Court on 19th June 2013, the applicant had pleaded in paragraph eight (8) that he had paid the sum of Ksh. 2,756,000 made up as follows:-

27.12.2012 - Ksh. 2,100,000.00

9.2.2013 - Ksh. 500,000.00

15.2.2013 - Ksh. 50,000.00

23.2.2013 - Ksh. 50,000.00

2.3.2013 - Ksh. 50,000.00

17.5.2013 - Ksh. 6,000.00

By the respondent's own bank statement which is the applicant's annexture **KN 2,** he owed the respondent Ksh. 4,085,361.70 as at 31st May 2013 yet by the Auctioneers Redemption Notice dated 17th April 2013, the debt owed to the respondent was Ksh. 6,293,568.15. The Statutory Notice dated 6th September 2012 shows the outstanding debt as Ksh. 8,756,839.95. That seems to lend credence to the applicant's complaint that the amount being demanded from him is exaggerated, and as indicated above, an injunction can be issued where the amount is excessive in terms of the mortgage. That, prima facie, appears to be the position in this case. There is a real doubt as to what amount exactly the applicant owes the respondent. The applicant has met the first principle in the ***GIELLA*** case (supra).

As regards the issue of irreparable damage, the Court of Appeal has held in the case of ***MUIRURI VS BANK OF BARODA (KENYA) LTD 2001 K.L.R 183 at page 188*** that disputes over land in Kenya evoke a lot of emotion and except in very clear cases, it cannot be said that damages will adequately compensate a party for its loss. It is of course clear that once a property such as land has been mortgaged, it is offered as security for a value which is well documented and therefore the borrower understands that he stands the risk of the property being sold by the lender if there is a default on the loan sum. However, this presupposes that there is certainty as to what exactly is due from the borrower. If there is a doubt as to the amount due, it must be resolved in favour of the borrower. As the Court of Appeal held in the case of ***ALICE AWINO OKELLO VS TRUST BANK LTD & ANOTHER LLR No. 625 (CCK):***

> ***"--- the balance of convenience is in favour of the applicant as the sale of one's property is a serious matter that deprives one of a right recognized in law and as such should not be allowed to proceed on doubtful circumstances".***

In the circumstances of this case, there appears to be some doubt as to what exact amount the applicant owes the respondent. In a case such as this where the issue involves money that is payable to a party, it would not be asking for too much to demand that the sum claimed be clear with no room for ambiguities. Where there is a doubt, it must be resolved in favour of the party seeking the injunctive relief.

It is also clear from ***Section 90 (1) of the Land Act*** that before any charged property is sold, a notice in writing should be served on the borrower. That provision states 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 charge 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***" Emphasis added

The term serve is defined in ***BLACK's LAW DICTIONARY 9TH EDITION*** as follows:-

> ***"To make a legal delivery of (a notice or process). To present (a person) with a notice or process as required by law.***

The term service is defined in the same ***BLACK's LAW DICTIONARY*** as follows:

> "***The formal delivery of a writ, summons or other legal process. The formal delivery of some other legal notice, such as a pleading – be sure that a certificate of service is attached to the motion".***

In paragraph 13 of his supporting affidavit, the applicant has deponed as follows:-

> "***That I have not been served personally or through registered post with the mandatory 45 days notice of sale by the auctioneers or the statutory notice by the bank"***

I have perused both the statutory notice issued by the respondent and dated 6th September 2012 and the 45 day redemption notice issued by Leakey's Auctioneers on 17th April 2012 and there is no evidence that any of those two documents were served upon the applicant. With respect to the statutory notice, the Court would have expected evidence of a certificate of posting having been done by registered post. There is no such evidence. And with regard to the redemption notice, it shows that the applicant did not sign it on 17th April 2013 when it is supposed to have been served. There is no affidavit from the said Auctioneers indicting who, if any, was served with the same. The fact that it is blank simply confirms the applicant's averment that no service was effected on him. There was therefore no compliance both with the provisions of ***Sections 90 (1) and 96 (2) of the Land Act.*** That failure to comply with the law entitles the applicant to the intervention of this Court by granting an interlocutory injunction pending the hearing of this suit.

On the issue of irreparable injury that cannot otherwise be compensated in damages, this Court is guided by the Court of Appeal's decision in ***MUIRURI VS BANK OF BARODA (KENYA) LTD 2000 K.L.R 183*** where it held:-

> ***"----- disputes over land in Kenya evoke a lot of emotion and except in very clear cases, it cannot be said that damages will adequately compensate a party for its loss"***

In the circumstances of this case, it is obvious from the respondent's own documents that it is not clear exactly how much sum is owed by the applicant. If there was clarity on that issue, nothing would have stopped this Court from making an order that the sum due be paid in Court pending the hearing of this suit. If, as averred by the applicant, his property worth over Ksh. 20 million is sold for a debt that is not even certain, that would be a great injustice to the applicant.

Even if this Court was to determine the application on the balance of convenience, it would tilt in favour of the applicant so that the property is preserved while the respondent confirms what exactly is due to it.

Ultimately therefore and upon considering all the issues herein, I am persuaded to make the following orders:-

> ***1. Pending the hearing and determination of this suit, a temporary injunction is issued restraining the respondent, its agents and/or servants from selling, transferring or otherwise alienating, advertising for sale or putting up for sale either to public auction or private treaty or otherwise disposing of or dealing with L.R No. THIKA MUNICIPALITY BLOCK 6/202 KIAMBU COUNTY.***
>
> ***2. Costs in the cause.***
>
> ***3. The parties to expedite compliance with the pre-trial directions so that this case can be heard***

and determined in the next twelve (12) months otherwise the injunction shall lapse.

B.N. OLAO

JUDGE

9TH DECEMBER, 2016

Ruling dated, delivered and signed in open Court this 9th day of December, 2016

Ms Muthoni for Mr. Akide for Plaintiff present

No appearance for the Defendant.

B.N. OLAO

JUDGE

9TH DECEMBER, 2016