Associated Electrical & Hardware Supplies Limited & another v Bank of Baroda (Kenya) Limited & another (Civil Appeal E008 of 2021) [2023] KECA 647 (KLR) (9 June 2023) (Judgment)

Neutral citation: [2023] KECA 647 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL E008 OF 2021

P NYAMWEYA, JW LESSIT & GV ODUNGA, JJA

JUNE 9, 2023

BETWEEN

ASSOCIATED ELECTRICAL & HARDWARE SUPPLIES LIMITED .... 1ST APPELLANT

JARIBUNI QUARRY LIMITED ..... 2ND APPELLANT

AND

BANK OF BARODA (KENYA) LIMITED ..... 1ST RESPONDENT

PETER N. GICHUKI T/A SPORTLIGHT INTERCEPTS ..... 2ND RESPONDENT

(An appeal from the Ruling of the High Court of Kenya at Mombasa (D. O. Chepkwony J) delivered on 30th October 2019 in High Court Civil Case No. 47 of 2019)

JUDGMENT

1. This appeal arises from an application dated 26th June 2019 filed by the Appellants herein in the High Court of Kenya at Mombasa, for an injunction to restrain the Respondents from dealing the properties known as Land Reference No. 709/section III/ Mainland North, Kilifi/ Mwapula Magogoni/404, Kilifi/ Mwapula Magogoni/706, Kilifi/ Mwapula Magogoni/707, Kilifi/ Mwapula Magogoni/1044, Mombasa/ Block XVIII/256, Mombasa/ Block XIX/221, Mombasa/Block XIX/222 (hereinafter 'the suit properties') pending the hearing and determination of the suit filed therein.Upon hearing the application, the High Court (D. Chepkwony J.) granted the following orders:

    a. That the bank shall comply with Rule 15 (b) of the *Auctioneers Rules* and any sale thereafter of the charged property will abide by all relevant provisions of the *Auctioneers Act*. the bank is equally directed to re-issue the sale notices to the charged property afresh;

    b. Meanwhile, the Defendant (1st Respondent herein) shall not sell the charged property as long as the above conditions remain unfulfilled. In other words, a conditional temporary injunction

restraining the proposed sale of the charged property subject to the fulfilment of condition (a) above hereby issues. Should, these conditions be fulfilled, nothing will stop the chargee from exercising its statutory power of sale. The Applicant be and is hereby at liberty to redeem the charged property by paying the whole amount due before then.

c. The application dated 26th June, 2019 succeeds to the extent I have mentioned above.

d. And given the circumstances of the case, I order that each party shall bear own costs since each party has partly succeeded.

2. The Appellants had sought the injunction on the grounds were that they were granted various loan facilities by the 1st Respondent bank, which were secured by inter alia, the suit properties, and that they had always settled most loans granted. However, that the 2nd Respondent on 14th June 2019 advertised a sale by public auction of the suit properties, which was scheduled for 28th June 2019 at 11.30 a.m. The Appellants contended that the purported statutory notices for the statutory sale issued to the Appellants were irregular, illegal and unlawful, as they did not conform with the requirements of section 90(2)(b) of the *Land Act*, 2012 with regard to granting the Appellants not less than three (3) months' notice by the end of which payment in default must be completed and instead, they required them to pay the arrears to the 1st Respondent three (3) months from the date of service of the notice. In addition, that the sale was illegal for want of proper statutory notice, since the 1st Respondent issued the 1st Appellant with statutory notices dated 9th May 2018 issued in respect of the 1st Appellant required payment of Kshs 42,204,660.30 in order to rectify the default and the 1st Appellant sold two security properties namely, Mombasa/Block XVI/135 and Mombasa/Block XXVI/317 for a total of Kshs 100 million and paid to the 1st Respondent thereby complying with the statutory notices. The Appellants averred that the 1st Respondent was required to issue fresh statutory notices in order to undertake the sale but none was issued and the intended sale scheduled for 28th June 2019 was therefore illegal.

3. Furthermore, that that the notification of sale issued by the 2nd Respondent was not in the statutory form required by Rule 15(b) of the *Auctioneer's Rules.* The Appellant gave the particulars of non-compliance, namely that the notification of sale did not indicate the value of each property to be sold; did not show the names and addresses of the auctioneers, creditor and debtors as required; did not give the Appellants a notice of not less than 45 days within which to redeem the property by payment of the specified amounts; did not show the date of the letter of instruction; and indicated that the auction would be held on 24th May 2019 yet it was scheduled for 28th June 2019. Additionally, that the 2nd Respondent did not have territorial jurisdiction to conduct the sale scheduled for 28th June 2019 in Mombasa since he was licences to operate in Nairobi and Kajiado, and the Respondents did not undertake a forced sale valuation as required under section 97 (2) of the *Land Act*, 2012.

4. The Appellants further averred that the charges and further charges created over the suit properties are invalid, null and void for failure to comply with section 80 of the *Land Act*, 2012 for the reason the charge over the 2nd Appellant's properties did not contain an explanation of the consequence of default as mandated by section 80 (3) of the *Land Act* and the charge over the 1st Appellant's properties did not contain all the requirements of section 80 of the *Land Act*. Lastly, the 1st Respondent had loaded the Appellants' loan account with excessive and illegal interest and it was in the interest of justice that orders be granted.

5. Mukesh Kumar, a branch manager of the 1st Respondent Bank, swore a replying affidavit on 5th July 2019 in which he confirmed that the Appellants were the 1st Respondent's customers at its Digo Road Branch, and had been advanced various loans by the 1st Respondent who in turn charged interalia the suit properties. The 1st Respondent deponed that the Appellants had not been servicing their loan in

accordance with the terms contained in various offer letters and various loan accounts got downgraded to non-performing assets category in March 2018. The 1st Respondent deponed that the Appellants were served with statutory notices dated 9th May 2018 demanding the sum of Kshs 42,204,660.30 from the 1st Appellant, and the sum of Kshs. 26,634, 355.25 from the 2nd Appellant together with the interest that applied, and that all the statutory notices were complaint with the *Land Act*. That the Appellants failed to comply with the statutory Notices issued on 9th May 2018, and the 1st Appellant approached the 1st Respondent with a proposal to sell two of the secured properties namely, Mombasa/ Block XVI/ 135 and Mombasa/ Block XXVI/317, and the sale proceeds, totaling to Kshs 100,000,000/- was credited to the 1st Respondent's loan account on 14th December 2018 and 21st December 2018. That the effect of the sale was to dilute the securities held by the 1st Respondent with the result that the 1st Appellant was still indebted to the Bank for a sum of Kshs 15, 230,740.95 with interest continuing to accrue at the prescribed rate of interest. The 1st Respondent argued it was therefore not obliged to issue fresh notices as the 1st Appellant's loan arrears had not been fully repaid and continued to be non-performing.

6. The Respondent asserted that 2nd Appellant on the other hand after receipt of the statutory notice and the notices of sale failed to pay the sums demanded and contrary to the Appellants assertions, the statutory notices issued by the 2nd Respondent were all compliant with the Auctioneers Rules and the scheduled auction gave the Appellants more than 45 days to redeem the properties before the auction. The 1st Respondent reiterated that the Appellants had not repaid their loans in accordance with the terms spelt out in the various offer letters.

7. Consequently, and in accordance with the notification made to the Appellants, the 1st Respondent proceeded with the recovery process and the 2nd Respondent duly advertised the properties for sale and the auction was scheduled for 28th June 2019. In addition, that the 2nd Respondent was a valid holder of a class B Auctioneers license and was authorized to carry on the business of repossession, realization of securities, sale of movable and immovable property by auction or any other mode of sale by competition throughout the Republic of Kenya.

8. Lastly, the Respondents deponed that the valuation reports were undertaken by the 1st Respondent in November 2018 and were current at the time of the intended auction. Additionally, the charges created over the Appellants property were valid and conformed with the *Land Act* and since the 2nd Appellant's loan and overdraft facilities were downgraded to non-performing assets on 31st March 2018. Therefore, that no reason had been adduced to warrant the grant of an injunction and the Appellants had failed to demonstrate how they would be prejudiced by the Respondents' intended sale of the suit properties, and their breach of the terms of the letters by failing to repay the loan when it fell due heavily prejudiced the 1st Respondent as it caused financial distress and jeopardized the bank customer funds by their continued default.

9. The learned trial judge in her ruling set out the respective parties' cases and identified the issue arising for determination as being whether or not the Appellants had met the threshold for granting interlocutory injunction, and whether a forced valuation of the suit property was undertaken in accordance with the provision of section 97 (2) of the *Land Act*. After considering the principles guiding the grant of interlocutory applications, the trial Court found that the Appellants had failed to establish a *prima facie* case in relation to the issue of disputed outstanding figures and had not furnished the Court with a counter valuation report with a higher forced sale valuation. In addition, that it was not in dispute that the 1st Defendant extended credit facilities to the Plaintiffs for which the suit properties were offered as security and that there was a default in the loan repayment. The trial Court also noted that the statutory notices and the notice to sell pursuant to section 96 (2) of the *Land*

Act and Rule 15 of the *Auctioneer's rules*,1997 that were served by the 1st Respondent complied with the provisions of section 90 (2) (b) of the *Land Act*,as period to rectify the default was not less than three months The learned trial Judge then concluded by finding that "whereas the bank should not be prevented from exercising its statutory power of sale to realize the charged securities, and whereas the Applicant has not paid the entire debt but has shown good will to do so, the circumstances of this case call for a relief which is appropriate," and it is in this context that the orders reproduced at the commencement of this judgment were granted.

10. The Appellants, being aggrieved with the said ruling, proffered this appeal and raised five (5) grounds of appeal in their Memorandum of Appeal dated 26th January 2021. The said grounds of appeal faulted the learned trial Judge for: holding that the Appellants did not establish a *prima facie* case with a probability of success; holding that the Appellants' case was largely based on a dispute as to the outstanding amount of credit facility; holding that there was a proper valuation of the suit properties; holding that the statutory notices and the notice to sell issued by the Respondent complied with the law and failing to grant the orders sought by the Appellants. The Appeal was heard on 6th February 2023 on the Court's virtual platform. Learned counsel Mr. Oluga, appeared for the Appellants, while Learned Counsel, Mr. James Gathaiya appeared for the Respondents. The Learned Counsels all relied on their respective written submissions dated 27th January 2023 and 30th January 2023 respectively.

11. This being a first appeal, the duty of this Court is reiterated as was set out in the decision of *Selle & another v Associated Motor Boat CO. Ltd & others* (1968) EA 123 which is to reconsider the evidence, evaluate it and draw our own conclusion of facts and law, and we will only depart from the findings by the trial Court if they were not based on evidence on record: where the Court is shown to have acted on wrong principles of law as was held in *Jabane v Olenja* (1968) KLR 661, or where discretion was exercised injudiciously as held in *Mbogo & another v Shah* (1968) EA.

12. Mr. Oluga submitted on four issues. Firstly, on whether the learned trial Judge erred by holding that there was proper valuation of the suit properties, and the counsel submitted that the valuation reports relied on by the Respondents did not comply with the said section for the reason that the valuation reports were dated 6th November 2018, 12th November 2018 and 19th November 2018 and the valuer stated that he inspected the properties for valuation on 29th October 2018, 2nd November 2019 and 7th November 2018 respectively. The Appellants argued that though the *Land Act* was not explicit on the age of the valuation report that the Chargee can rely on to undertake sale by public auction, section 98 (5) of the *Land Act* provided that the valuation report for the purposes of a sale by private contract should not be more than six (6) months at the time of the sale. Therefore, that the valuation reports which the Respondents sought to rely on did not conform to Section 97 (2) of the *Land Act* because they were 8 months old and the valuer carried out mortgage valuation rather than forced sale valuation and the Learned Judge was therefore wrong when she held that there was proper valuation of the suit properties.

13. Mr. Githaiya's submissions on the issue were that that the valuation reports were less than 12 months and referred to various judicial decisions where the courts held that valuations reports should not be more than 12 months. Further, that the Appellants failed to demonstrate in what manner the 1st Respondent failed to discharge the duty of care by using the valuation report that was seven months old at the time of the schedule auction, and had also failed to annex any current valuation report that showed variance with the 1st Respondents valuation reports to support a higher forced sale valuation.

14. Secondly on whether the Learned Judge erred in law and fact by holding that the Appellant's case was largely based on a dispute as to the outstanding amount of credit facilities, Mr. Oluga submitted that the Appellants did not dispute the amount owed but their complaint was that the amount

demanded in the statutory notice dated 9th May 2018 in order to rectify/remedy the default was Kshs 42,204,660.30/- and by paying Kshs 100 million, which was way beyond the amount required to rectify the default, the Appellants fully complied with the statutory notice and there was nothing left in the said notice that could give rise to the right of sale meaning that the statutory notice dated 9th May 2018 was extinguished when the default was rectified. Further, no right of sale could accrue out of an extinguished notice and the Respondents required a fresh notice in order to legally and regularly exercise their right of sale and since the Respondents did not raise a fresh notice, the Appellants faulted the process. They made reference to section 104 (4) (a) and (c) of the *Land Act* and stated that it empowered a Court to refuse to authorize sale if the default had been remedied or steps had been taken by the Charger as required by the statutory Notice. It was their submission that they had paid Kshs 100 million to the 1st Respondent which was more than the amount demanded in the statutory notice, therefore the Respondents had no power of sale, and the 1st Respondent was required to issue fresh statutory notice in order to undertake the sale and none was issued. However, that the learned trial Judge misapprehended the complaint to mean that the Appellants were disputing the amount owed.

15. In rebuttal, Mr. Githaiya submitted that the learned trial Judge did not err in fact in arriving at her decision for the reason that she correctly considered the Appellants' application premised on the ground that by selling off Mombasa/ Block XV/135 and Mombasa/ Block XXVI/137 for Kshs 100,000,000/- and paying the same to the 1st Respondent, they did not rectify the default, and did not establish a *prima facie* case on the issue of the outstanding amount owing to the 1st Respondent.

16. Thirdly, on whether the Learned trial Judge erred in law by holding that the statutory notices and the notice to sell issued by the Respondent complied with the law, the counsel submitted that instead of giving the Appellants not less than three months' notice by the end of which payment in default must be completed, the 1st Respondent required the Appellants to pay the arrears three months from the date of service. The counsel noted that the learned trial Judge agreed with the Appellants that the notification issued by the 2nd Respondent were defective and instead of using the said reason to grant the prayers sought, the Judge granted the Respondent an opportunity to issue fresh notifications, yet it is trite law that a court of law could not issue orders which no party sought.

17. In reply, the Respondents' counsel submitted that the statutory notices and notice to sell were served on the Appellants by the 1st Respondent's advocates who thereby complied with section 90 (2) (b) of the *Land Act* and the period to rectify the default was not less than three months and therefore complied with section 96 (2) of the *Land Act*. Further, that the Appellants expressly admitted that they started experiencing financial challenges which resulted in late payment of their loans and admitted that they received the notices and were aware of the contents thereof. The counsel submitted that the said notices were therefore proper as the default consisted of non-payment, the amount due was required to be paid within three months for the purpose of making good the default, and the notices stated the fact that if the default was not rectified within the time stated then the charge would exercise the remedy of sale.

18. In addition, that the learned trial Judge correctly ruled that the Respondents should comply with Rule 15 (b) of the *Auctioneers Rules* and the Bank should reissue the notices to sell the properties afresh, and the counsel placed reliance on the case of *National Bank of Kenya Limited v Shimmers Plaza Ltd* [2009] eKLR, where the Court of Appeal stated that where the Court is inclined to grant an interlocutory order restraining a mortgage from exercising its statutory power of sale solely on the ground that the mortgage has not issued a valid notice, then the order of injunction should be limited in duration until such time as the mortgage shall give a fresh statutory notice in compliance with the law.

19. Lastly, on whether the Learned Judge erred in fact by holding that the Appellants did not established a prima facie case with a probability of success, Mr. Oluga, while citing the decision in the case of

Mrao vs First American Bank Limited & 2 Others [2003] KLR 123 submitted that the Appellants had established a prima facie case with a probability of success because of the reasons that the statutory notices, notification of sale and notice to redeem served upon them were fatally defective, the Respondent did not undertake a forced sale valuation, no statutory notice was issued in respect of the 1st Respondent and no power of sale could accrue because the charge were illegal, null and void. It was the Appellants' case that the 1st Respondent's action to sell the suit properties was in bad faith and was motivated by ill will and a desire to deprive the Appellants of the suit properties because the intended sale was scheduled and came at a time when the parties were engaged in negotiations and the 2nd Appellant had gotten a buyer for the company's assets including its security properties and the proceeds to the tune of Kshs 200 million would be used to offset the loan arrears. Additionally, by advertising the properties in the newspaper of national circulation, the Respondent put in serious jeopardy the intended sale of the 2nd Appellant which was at an advance stage as the agreement of sale had been signed.

20. Mr. Githaiya on his part, submitted that the Learned Judge correctly took into consideration the facts and law, and correctly applied the well settled principles in holding that the Appellants did not establish a prima facie case with a probability of success on the issue of the outstanding amount owing from the Appellants to the l st Respondent; and in issuing a conditional temporary injunction restraining the proposed sale of the charged property subject to the Respondents complying with Rule 15 (b) of the *Auctioneers Rules* and that the Bank should reissue the notices to sell the property afresh.

21. The grounds upon which this Court can interfere with the exercise of the learned Trial Judge's discretion were set out in *United India Insurance Co Ltd,Kenindia Insurance Co Ltd & Oriental Fire & General Insurance Co Ltd vs East African Underwriters (Kenya) Ltd* [1985] eKLR as follows:

> " The Court of Appeal will not interfere with a discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to the various factors in the case.
>
> The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong."

22. In this regard, the principles for the grant of a temporary injunction were identified by the trial Judge who cited various decisions *East African Industries vs Trufoods* (1972) EA 420, *Giella vs. Cassman Brown & Co. Ltd* 1973 EA 358. *Airland Tours & Travel Limited vs National Industrial Credit and Mrao vs First American Bank Limited & 2 others* [supra]. The principles set out by the Court of Appeal in this regard in *Mrao vs First American Bank Limited & 2 others* [supra] are as follows:

    a. The applicant must show a *prima facie* case with a probability of success;

    b. An interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not be adequately compensated by an award of damages;

    c. If the court is in doubt, it will decide an application on the balance of convenience.

    The Court went on to explain that a prima facie case in a civil application in this respect includes but is not confined to a "genuine and arguable case." and 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.

23. In this appeal, the rights which are alleged to have been infringed by the Respondents were those relating to the exercise of the statutory sale under sections 90 to 97 of the *Land Act* of 2012. Under section 90 (1), a chargee is required to serve a notice in writing to on the charger before the exercise of a statutory sale, if a charge has been in default of an obligation under a charge requiring the charger to pay the money owing or to perform and observe the agreement as the case may be. 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.

24. The main grievance raised by the Appellants with the statutory notices dated 9th May 2018 that was served upon them by the 1st Respondent were that it did not give them a period of less than three months to redress the default, that a fresh notice was required in the circumstances of the case given payment was thereafter made by the 1st Appellant of Kshs 100 million. The Notification of sale dated 18th March 2019 were faulted for not complying with the form required, and that there was no forced sale valuation before issuance of the notices. It is notable in this regard that it was not in dispute that the Appellants had taken out loan facilities with the 1st Respondent, that the 1st Respondent issued and served notices under section 90 of the *Land Act* in relation to the loan facilities, and that there was a payment made by the 1st Appellant of Kshs 100,000,000/= million after the issue of the notices.

25. To this extent, in light of this uncontested facts we find that the trial Judge did not err in finding that there was no prima facie case demonstrated by the Appellants as regards amounts due, and the issue and service of the statutory notices and notification of sale. In addition, the trial Judge took into account the intervening events after the issue of the notices, particularly the payment by the Appellants of Kshs 100,000,000/= and resultant effect on the notices issued, which were relevant factors. In the circumstances we do not see any reason to interfere with the learned trial Judge's orders, which were indicated to be the appropriate orders in the circumstances in balancing the parties' respective rights under the law. It is clear that under Section 104(2)(b) of the *Land Act*, the court has wide powers to extend the period of time for compliance by the chargor with a notice served under section 90 and this, in our view, is the power that Learned Judge exercised when she directed the bank to comply with Rule 15 (b) of the Auctioneers Rules and to abide by all relevant provisions of the *Auctioneers Act* as well as to re-issue the sale notices to the charged property afresh.

26. Lastly, it is notable that there is no time requirement is provided in section 97 within which the forced sale valuation is to be taken before the exercise of the right of statutory sale, and the issue whether or not the valuation was reasonable time and of sale was one to be addressed at full trial and not at interlocutory stage. adequate for purposes of obtaining the best price at the time of sale. Likewise, the issues raised about the legality or otherwise of the charges created over the suit properties can only in our view issues be determined after full trial and not at an interlocutory stage.

27. We accordingly find that this appeal has no merit and it is hereby dismissed in its entirety with costs to the 1st Respondent.

28. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 9TH DAY OF JUNE 2023.

P. NYAMWEYA

JUDGE OF APPEAL

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J. LESIIT

JUDGE OF APPEAL

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G. V. ODUNGA

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR