



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL CASE NO 377 OF 2013

EMRRE GLOBAL INVESTORS LTD.....PLAINTIFF

VERSUS

HOUSING FINANCE COMPANY OF KENYA LTD.....1ST DEFENDANT

JM GIKONYO T/A GARAM INVESTMENTS.....2ND DEFENDANT

JOSEPH F KABUE MUCHIGI.....3RD DEFENDANT

RULING

1. The Plaintiff's Notice of Motion application dated and filed on 30th August 2013 was brought under the provisions of Order 40 Rule 1 of the Civil Procedure Rules, Sections 1, 3 and 3A of the Civil Procedure Act and all other enabling provisions of the law. Prayer Nos (1) and (2) were spent. It sought the remaining following orders:-

1. Spent.

2. Spent.

3. THAT pending the hearing and determination of this suit, this Honourable Court be pleased to issue an order of temporary injunction restraining the Defendants either by themselves, their employees, servant and or (sic) agents from further selling, transferring, alienating, registering any transfer, executing a transfer as a charge in terms of the purported sale by auction conducted on 13th August 2013 and from any other manner whatsoever dealing with all that parcel of land known as LR No 20857/120, either by way of transfer, sale, gift, charge and or (sic) mortgage.

4. THAT costs of this application be provided for.

THE PLAINTIFF'S CASE

5. The application was supported by the affidavits of Eunice Nyawira Wanyiri, a director of the Plaintiff

that were sworn on 30th August 2013 and 22nd January 2014.

6. It stated that the 1st Defendant never served it with a demand for arrears in the sum of Kshs 700,000/= whereupon it entered into an agreement in which it was to pay accrued arrears of Kshs 700,000/- before the sale of the suit property proceeded on 13th August 2013. It paid a sum of Kshs 200,000/= but before it could pay the balance of Kshs 500,000/= as they had agreed, the 1st Defendant proceeded with the sale of its property.

7. It was emphatic that the 1st and 2nd Defendants did not issue it with the requisite Statutory Notice or Notification of Sale respectively prior to the advertisement in the newspaper in the Daily Nation on 12th August 2013 and that the address to which the purported documents were sent to was incorrect. As a result thereof, the purported auction of its property was thus fraudulent, irresponsible, malicious and in bad faith.

8. It was its submission that it had demonstrated a *prima facie* case with a probability of success and was entitled to an interlocutory injunction.

THE 1ST DEFENDANT'S CASE

9. On its part the 1st Defendant filed its Replying affidavit that was sworn on its behalf by Geoffrey Kimaita, the Head of Credit, on 4th September 2013. Its case was that the Plaintiff had admitted to being in arrears as was evidenced in the Statements of Accounts. It stated that all the requisite statutory notices were sent to the Plaintiff to the postal address it gave in the Charge Instrument.

10. Its contention was that the Plaintiff's equitable right had been extinguished after the said subject property was sold to the 3rd Defendant in a public auction held on 13th August 2013. It argued that the Plaintiff was not entitled to an injunction as it had not shown a *prima facie* case or that it would suffer irreparable loss and that in any event, the Plaintiff had not given an undertaking as to damages as was required and urged the court to dismiss the present application.

THE 3RD DEFENDANT'S CASE

11. On 18th September 2013, the 3rd Defendant swore a Replying Affidavit that was filed on even date. He was declared the highest bidder in the aforementioned auction and paid the entire price by 3rd September 2013. He annexed a copy of the Transfer showing that it had been duly executed. He therefore asked the court to dismiss the Plaintiff's application.

LEGAL ANALYSIS

12. A pertinent issue that was raised in the Plaintiff's Supplementary Affidavit was that the 1st Defendant did not provide a valuation to show the forced market valuation of the subject property pursuant to Section 97 (2) of the Land Act which vitiated the whole sale transaction. It referred the court to the case of **Mohamed Khaled Khashoggi T/A La Roche Enterprises v Equity Bank Ltd [2013] eKLR** in this regard.

13. However, this was not an issue that was raised in the Plaintiff's Supporting Affidavit as its only contention was that it had not received the requisite Statutory Notices. The Plaintiff introduced new matters that had not been raised in the 1st and 3rd Defendants' Replying Affidavit. This amounted to stealing a match from the 1st and 3rd Defendants as they did not have an opportunity to comment on the same.

14. The court will therefore disregard the said submission as the 1st and 3rd Defendants were both not given an opportunity to comment on the same. Suffice it to state that a perusal of the court record shows that the 1st Defendant had attached a copy of the Valuation Report in its List and Bundle of Documents dated and filed on 24th September 2013.

15. Turning to the issues at hand, the court notes that it was not in contention that the Plaintiff was advanced financial accommodation in the sum of Kshs 7,055,000/= which was secured by a Legal Charge dated 22nd March 2013 over the subject property. It was also not in contention that the Plaintiff made a proposal to the 1st Defendant to repay a sum of Kshs 700,000/= which were the arrears of the said loan.

16. The Plaintiff's contention was that the 1st Defendant did not follow the provisions of the law, and in particular the Sections 90(1), 90(3) 96(2), 96(3) and 97 of the Land Act. To demonstrate that it had established a *prima facie* case with a probability of success against the 1st and 2nd Defendants, the Plaintiff averred that it was not served with the mandatory statutory notice and that the 2nd Defendant did not affix the Notification of Sale at the Plaintiff's property or served it upon the two (2) tenants in the property. It placed reliance on the case of **Zadrack Oyaro Achoki & Another v Consolidated Bank of Kenya Ltd (2013) eKLR** where Havelock J granted an injunction as there was no proof of service of Notification of Sale.

17. It also submitted the address used by the 1st and 2nd Defendants to post the said notices was incorrect and different from what it provided as was evidenced in copies of cards it received from the Post office and the Proposal for Life Protection (Mortgage Protection). The Post Office Box Number in the said cards was shown as 71025 Nairobi. It did not specify the address it was referring to in the said Proposal for Life Protection (Mortgage Protection) as it contained different addresses in the United States of America.

18. It submitted that no notices were sent to it and that if the same were sent, it did not receive the same as the letters were returned to the sender. Its argument was that once the letters were returned to the sender, it was obvious that the same did not reach the recipient.

19. On its part, the 1st Defendant submitted that it used the Post Box Office Number 71025- 00622 that was provided in the Charge Instrument and that it had never received any notification of change of postal address from the Plaintiff. It furnished the court with a copy of the Certificate of Postage showing Registration Parcel Nos 041- 047 were sent to several persons at Post Office Box Number 71025 Nairobi. According to Registration Parcel Nos 041, 044, 045 and 046, the parcels were sent to the aforesaid number post code 0622 while those under Nos 042, 043, 047 were sent to the aforesaid number post code 00622.

20. From the documentation before the court, it is not clear who the other addresses shown in the copy of Certificate of Postage were but from the Witness Statement of the Plaintiff's deponent, the Plaintiff was a private limited liability company whose shareholding and directorship was made up of herself and her siblings.

21. Unless there was evidence to the contrary which the Plaintiff did not provide, the annexing of copies of cards from Postal Corporation of Kenya was sufficient proof that it accessed the said cards from its post box. It did not provide any evidence to this court to show that another person, without access to its post office box, retrieved the said cards and sent them back to the sender. However, even if that was the case, the 1st and 2nd Defendants' obligation was only limited to posting the letters by registered mail to the address that was provided in the Charge Instrument and would not have been dragged into such a

dispute.

22. Be that as it may, of particular concern to this court is the letter addressed to the Plaintiff. The Certificate of Postage shows that there was a parcel that was sent to Post Office Box Number 71025-0622 Nairobi. The post code appeared erroneous as an extra "0" was missing.

23. However, copies of cards Nos 3502 and 349 from Postal Corporation of Kenya were stamped on 17th January 2013 and 20th April 2013 respectively. They both show that the parcels were received by Emrre Global Investors Limited P.O. Box 71025 00622 Nairobi Kenya. Card No 3502 was a reminder meaning that the Plaintiff had been notified of the parcel previously while Card No 349 was not.

24. The 1st Defendant's three (3) months' notice and forty (40) days' notice were dated 12th November 2012 and 15th April 2013. The sequence of the dates of the letters and the cards from Postal Corporation of Kenya lend this court to believe that the Plaintiff did receive whatever documents that were sent to it at that postal address on the aforesaid dates.

25. The court does not accept the Plaintiff's assertion that the postal address that was used to send the notices was not correct. The arguments that the 1st Defendant ought to have posted its notices to the address given in the Proposal for Life Protection (Mortgage Protection) would not hold water as the same contained different addresses in the United States of America.

26. Indeed, as was correctly submitted by the 1st Defendant, its obligation was to send any notices to the postal address that was given in the Charge Instrument and in the manner that was provided therein. The said Charge expressly provided as follows:-

"THIS CHARGE ("this Charge") is made on the 22nd day of March 2012 BETWEEN:-

I. EMREE GLOBAL INVESTORS LIMITED of Post Office Box Number 71025 00622 Nairobi (hereinafter called "the Chargor" which express includes its successors and assigns) of the one part; and...

II. That any notice or demand required or authorised by law or by this Charge to be served by the Chargee on the Chargor shall without prejudice to any other effective mode of making the same shall be deemed to have been properly served on the Chargor if served on the Chargor if served on the Chargor or the personal representative of the Chargor personally or if it is left for the Chargor's last known place of residence or if it sent by registered post in a stamped envelope to the Chargor at the Chargor's last known address in Kenya ...Where a notice or demand is sent by registered post it shall be sufficient to prove that the notice or demand was properly addressed and posted."

27. If the court were to believe the Plaintiff, it is of the considered view that a prudent person would have been expected to establish why its financier had sent it cards at Postal Corporation of Kenya, with no letters attached to it. In any event, a card is not sent by the person who posts a letter by way of registered mail but rather, it is issued by the Postal Corporation of Kenya to inform the addressee that there is a letter awaiting collection at its offices.

28. In the instant case, the 1st and 2nd Defendants relied upon the address that had been issued by the Plaintiff in the Charge Instrument to send all the statutory notices. The Plaintiff cannot now turn and claim the postal address used by the Defendants to have been the incorrect address. The burden was on it to prove that it did not receive the statutory notices due to some

omission by the 1st Defendant. This evidentiary burden was placed on the chargor in the case of **Kamunyori & Co. Advocates v Cannon Assurance (K) Ltd [2006] eKLR** that was relied upon by the 1st Defendant and which this court finds itself in agreement with.

29. The Statutory Notice dated 12th November 2012 adequately informed the Plaintiff of the nature and extent of its default, the amount that must be paid within three (3) months so as to rectify the default, the consequence of not rectifying the default and its right to apply to court for certain remedies.

30. While the Plaintiff denied of having been notified of being in arrears of the said amount, it is obvious to the court that its proposal was an implied admission that there were arrears. A borrower is at all material times presumed to be aware of its default so long as it does not effect payments and need not be notified of such a fact. The purpose of a notice is merely to give a reasonable opportunity to a borrower to regularise its financial position before the lender can commence recovery proceedings of the monies due and owing to it.

31. In the absence of any evidence to the contrary, and which the Plaintiff did not provide, the court was satisfied that the 1st Defendant issued the Plaintiff with the mandatory Statutory Notices that were properly addressed and posted to it. The court was thus not convinced that all the Plaintiff received were cards written “**return to sender**” because it ought to have taken the initiative to establish what parcels had been sent to it by the 1st Defendant. Indeed, equity does not aid the indolent.

32. In respect of the Notification of Sale, the Plaintiff argued that no notice was posted in a prominent place or as near as possible as may be to the charged land in accordance with Section 96 (3)(j) of the Land Act. The court finds the Plaintiff’s submissions as regarding where the Notice under Section 96 (3) of the Land Act was to be served as not having been relevant herein as the 1st and 2nd Defendants served the requisite notices upon the holder of the land, in this case being the Plaintiff herein as was required by Section 96(3) (b) of the Land Act at the address given in the Charge Instrument.

33. The Plaintiff did not provide any evidence to demonstrate that the 1st Defendant was required to serve any of the persons listed in Section 96 (3)(e) and (j) of the Land Act. It did not provide any evidence to show that there was any lessee or sub lessee in the subject property or demonstrate who the person as may be prescribed by regulations to have been served with a copy of the Notice under Section 96 (2) of the Land Act.

34. Having said so, it is the court’s view that failure to post a notice in a prominent place would only be a defence available to the category of person’s listed in Section 96 of the Land Act. They would essentially be entitled to seek remedies from the court to safeguard their interests in the property to be sold pursuant to a chargee’s statutory power of sale. The obligations of a chargee to a chargor is to post any notices to the address given in the charge instrument.

35. A chargor cannot fail to meet its obligations towards a chargee and purport to protect the interests of persons listed in Section 96 of the Land Act when they themselves had not sought such protection from the court. The Plaintiff’s contention that the 2nd Defendant did not post the notice in a prominent place therefore falls by the way side.

36. The court noted that the Plaintiff made some payment of Kshs 200,000/= but the same was received by the 1st Defendant at 11.35 am. This was over half an hour after the auction was scheduled. The auction was expected to take place at 11.00 am. Bearing in mind the contents of the last paragraph (3) of the 1st Defendant’s letter dated 12th November 2012, the Defendant was under no obligation to accept any payments from the Plaintiff as any payments that were made to it were paid without prejudice to its

rights. The position would have tilted in favour of the Plaintiff had the 1st Defendant committed itself in writing not to sell the subject property.

37. For all purposes and intent, the Plaintiff's right to redemption was therefore deemed to have lapsed at the fall of the hammer. However, the execution of the Memorandum of Sale would not obviously take effect unless all the provisions of the law had been complied with.

38. In the Certificate dated 14th June 2013 issued by the 2nd Defendant under Rule 15 (c) of the Auctioneers Rules, 1997, the 2nd Defendant stated he forwarded the Notification of Sale and Letter of Notice by way of registered mail to the owner of the subject property at Post Office Box Number 71025 00622 Nairobi which this court noted was the correct address.

39. The Plaintiff denied that it was served with the Notification of Sale and the fourteen (14) days' notice before the 2nd Defendant advertised the property for sale. In the Supporting Affidavit, the Plaintiff stated as follows:-

“Paragraph 24 -THAT I am also advised by my advocate on record, which advise I verily believe to be true that the advert placed in the newspapers by the 2nd Respondent was illegal for failure to comply with the mandatory provisions of the Auctioneers Act, which require immovable property to be advertised at least 14 days from the date of sale.

Paragraph 25- THAT the 2nd Respondent did not also serve the company with the mandatory notification of sale, neither did it affix it on the company's property or at least serve either of the two tenants at the property.”

40. Rule 15 of the Auctioneers Rules, 1997 provides as follows:-

“Upon receipt of a court warrant or letter of instruction the auctioneer shall in the case of immovable property –

(d) give in writing to the owner of the property a notice of not less than forty- five days within which the owner may redeem the property by payment of the amount set forth in the court warrant or letter of instruction.

(e) on expiry of the period of the notice without payment arrange sale of the sale not earlier than fourteen days after the first newspaper advertisement.”

41. A clear reading of Rule 15 (e) of the Auctioneers Rules shows that it is not mandatory for notice of fourteen (14) days to be issued by an auctioneer. It merely states that no sale may be arranged until fourteen (14) days have expired after the notice of forty five (45) days envisaged under Rule 15 (d) of the Auctioneers Rules have lapsed. Any notice notifying a chargor of intended sale after the mandatory forty five (45) days is only a courtesy notice giving such chargor notice of an auctioneer's intention. The Plaintiff's argument that the sale was illegal due to non-issuance of the said fourteen (14) days cannot therefore be sustained.

42. However, the forty five (45) days' notice by the 2nd Defendant was mandatory. The 1st Defendant did not annex a copy of the Certificate of Postage as proof of service of the said Notification of Sale under Rule 15 (d) of the Auctioneers Rules making it difficult for this court to ascertain that the same was served upon the Plaintiff.

43. While the court has not made a finding that the said Notification of Sale was not issued, the importance of such proof was critical to the 1st Defendant's case. The 1st Defendant had in fact annexed copies of a Certificate to prove that it had sent the mandatory notices by registered mail to make its case water tight. It was not sufficient for the 1st Defendant to have annexed a copy of its Certificate evidencing proper service of the mandatory Statutory Notices upon the Plaintiff but leave out the said Certificate of Postage from the 2nd Defendant forwarding the Notification of Sale to the Plaintiff.

44. While the court agrees with the 1st Defendant's submissions that an injunction could not be granted as there was money due and owing to it by the Plaintiff as had been held in the cases of Bii v Kenya Commercial Bank Ltd [2001] eKLR, Mrao Ltd v First American Bank (CA) [2003] KLR 125, and Shah v Shah [1965] EA 91), the court cannot turn a blind eye to the question of whether or not the 2nd Defendant served the Plaintiff with the mandatory forty five (45) days Notification of Sale.

45. As was reiterated in Zadrack Oyaro Achoki & Another v Consolidated Bank Ltd (supra) the realm of the Land Act has **"tightened what chargees are required to do when wishing to sell of charged property as a result of a chargor's default."**

46. In the absence of proof that the said Notification of Sale was sent to the Plaintiff by way of registered mail, the court finds that the subject property could not be sold at the public auction without the issuance of the said forty five (45) days Notification of Sale pursuant to Rule 15 (d) of the Auctioneers Rules. This is because the Plaintiff had a right to redemption before the hammer fell. On this ground, the sale was null and void.

47. The question that arises is whether or not the injunction should be granted pending the hearing and determination of the case herein. It is evident that the 1st Defendant had substantially complied with provisions of the law. The Plaintiff had not denied owing the 1st Defendant the monies that were due and owing. Interlocutory injunctions ought to be granted if there are triable issues to be determined at the full trial. From the facts of this case, there is nothing to be tried at trial.

48. It is the finding of this court that the fact that the 3rd Defendant purchased the subject property at the auction would not validate the purported sale of the same. Title had not passed to him as no transfer had been effected in accordance with Section 37 (2) of the Land Registration Act Cap 300 (laws of Kenya) which stipulates as follows:-

"A transfer shall be completed by-

a. filing the Instrument; and

b. registration of the transferee as proprietor of the land, lease or charge."

49. Accordingly, having considered the pleadings in this matter, the affidavit evidence and the written submissions and the case law in support of each parties' case the court is not satisfied that the Plaintiff was able to demonstrate that it had established a *prima facie* case with a probability of success or that it would suffer irreparable damages if the interlocutory judgment was not granted or that the court could grant it an interlocutory injunction on a balance of convenience as was contemplated in the case of Giella v Cassman Brown (1973) EA 358.

50. Interlocutory injunctions should not merely be granted because a chargee has omitted to do something which can be rectified, such as re-issuance of notices. All that the 1st Defendant ought to do is to regularise the issuance of the forty five (45) days' notices before it can proceed with the sale of the subject property in the event the Plaintiff does not redeem its property.

DISPOSTION

51. The upshot of this court's ruling is that the Plaintiff's Notice of Motion application dated and filed on 30th August 2013 was not merited and the same is hereby dismissed with costs in the cause.

52. However, the 1st and 2nd Defendants are hereby directed to fully comply with the provisions of the Land Act before the subject property can be sold by way of public auction. The effect of this ruling is that the purported sale by public auction of the suit property to the 3rd Defendant that was held on 13th August 2013 is hereby nullified.

53. It is so ordered.

DATED and DELIVERED at NAIROBI this 4th day of December, 2014

J. KAMAU

JUDGE



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