REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT ELDORET

CIVIL CASE NO. 67 OF 2018

ZAINABU AYUB MOHAMED.....1ST PLAINTIFF/APPLICANT

KASIM SHABAN KOMBO.....2ND PLAINTIFF/APPLICANT

VERSUS

RAFIKI MICROFINANCE LTD..... DEFENDANT/RESPONDENT

RULING

The applicant filed a plaint and an application dated 30th June 2016 simultaneously. What is before the court is the application. The application seeks an injunction against the defendant restraining it from selling/advertising/transferring the land parcel known as PIONEER/NGERIA BLOCK 1 (EATEC)/973 pending the hearing and determination of the suit.

It was based on the grounds that the applicant had a prima facie case, that damages shall not be an adequate remedy and that the balance of convenience lies in maintaining the status quo.

APPLICANT'S CASE

The applicant submitted that the defendant had advanced a business loan to the 1st plaintiff, of kshs. 1,500,000/- secured by a charge on 18th December

2013 with the suit land as collateral. The defendant approached the plaintiffs with the purposes of financing rental houses on the suit land. The applicants deponed in their supplementary affidavit that they were approached by the then loan officer and credit manager namely *Micah Chepkorir* and *Antony Munyao* about the development loan.

After planning, the bill of quantities showed the required sum to complete the houses was kshs. 5,879,618.92. the defendant agreed to finance and a loan contract was prepared on 28th April 2014 which was executed on the register of the land in the sum of kshs. 3,500,000/- on 8th may 2014.

The defendant submitted that there were various grievances relating to the transaction. That the defendant falsely indicated that a sum of kshs. 5,000,000/- was disbursed when only kshs. 2,000,000/- was disbursed. Further, that the defendant charged interests and different levies on the loan that had not been disbursed as from time of execution of the loan contract and registration of the charge. The defendant submitted that the statutory notice by the defendant did not specify the land parcel number and that it includes demands for amounts not disbursed on time. It fails to indicate the exact amount to be paid to rectify the default.

The plaintiffs further submitted that the defendant failed to inform them of their right to seek relief in court. Further, that the property has been undervalued and the defendant acted in breach by continuing to maintain the first charge on the register despite the loan agreement providing that the loan amounts to be disbursed under the further charge were to clear the outstanding debt. The defendant further deducted kshs. 1,500,000/- which was the subject of the 1st loan and was sneaked into the written agreement as it was not part of the oral agreement.

The applicants submitted that their application met the tenets set in *Giella v Cassman Brown* for interlocutory injunctions. They submitted that the notice annexed to the replying affidavit is undated thus the date of the demand is unclear. It does not specify the land parcel to be sold and it is captioned to rectify a default of kshs. 3,962,732.75. No rate of interest or amount of monthly repayment is specified. They stated that it is in breach of *Section 90(20)* of the *Land Act* and cited the cases of ***Davis Githome Kuhiguka v Equity Bank Ltd (20130 eKLR and Manasseh Denga v Eco bank Kenya Ltd 7 Anor (2015) eKLR*** on the point of notices under *Section 90.*

The applicant submitted that the defendant committed breach of the loan contract. The offer letter indicated that they were to be advanced kshs. 5,000,000/- while the further charge indicated that the amount advanced was kshs. 3,500,000/-. Further, the deduction of kshs. 1,500,000/-, which was subject of the 1st loan agreement was not part of the agreement and is supported by the bill of quantities presented to the defendant to finance the project.

The defendant despite deducting the kshs. 1,500,000/- has not discharged the 1st charge. Further, the defendant disbursed kshs. 2,000,000/- instead of the kshs. 3,500,000/- as indicated. The defendant charged interest for kshs. 500,000/- despite not having disbursed the full amount. The plaintiffs maintained that they received kshs. 3,000,000/- and had paid a total of kshs. 2,633,615.55 as at 16/5/2016. They are therefore not in arrears. The defendant charged kshs. 165,000/- as loan application fees which had already been paid earlier on the 1st loan.

The plaintiffs are at the risk of having the property sold while no indebtedness exists. No amount of money can remedy such a breach. They relied on the case of ***Elizabeth Wambui Njuguna v Housing Finance Company of Kenya Ltd (2006) eKLR*** on the point of failure to serve a valid statutory notice and its effect on the equity of redemption.

The balance of convenience tilts towards maintaining the status quo which is that the plaintiffs are still in occupation and control of the land. The court should adopt the lower risk.

In response to the replying affidavit filed by the respondents, the applicants filed a supplementary affidavit wherein they deponed that the affidavit offended order 18 Rule 2 of the Civil Procedure Rules. It was their contention that the deponent was not the credit manager at the time of the transaction and therefore he is not able to prove the matters not within his own knowledge.

RESPONDENTS' CASE

The respondent filed a replying affidavit and submissions in response to the application.

The respondent submitted that on request by the applicant, it advanced a loan facility of kshs. 1,500,000/- to the 1st Applicant vide a letter of offer dated 22nd November 2013. The loan was to be secured by a legal charge on the suit land and a personal guarantee and undertaking from the second applicant. There was a spousal consent and the charge was registered at the land office.

The 1st applicant approached the defendant for a further banking facility of kshs. 5,000,000/- which was granted. The loan was secured by a further charge on the suit land and a personal guarantee and undertaking from the second applicant.

The borrower failed to service the loan and the account was in arrears of kshs. 3,961,732.75 as at 7th April 2016. The defendant made demands for the payment to be made to no avail. All the necessary statutory notices were issued and all steps followed.

In its submissions the defendant contended that the following facts were not in dispute;

- The plaintiff was advanced a loan of kshs 1,500,000 by the defendant on and about December 2013.

- A further loan of kshs. 3,500,000/- was advanced to the 1st plaintiff on 15th may 2014
- The 2nd plaintiff executed a personal guarantee and undertakings on both loans.
- The plaintiffs used the land parcel L.R No. PIONEER/NGERIA BLOCK 1 (EATEC) 937 in the name of Kasim Shaban Kombo as collateral.
- There was spousal consent and the charge was lawfully and duly registered.
- The borrower failed to service the loan and the account is in arrears.
- Notices were issued upon default.

The respondent contended that the total amount disbursed over the 2 loans was kshs. 5,000,000/-. The applicants filed statements of accounts which confirm their default. Under the charge and the deed of guarantee and indemnity of payments, the terms of payment and the consequences of default are stated.

The applicants approached the court with unclean hands and are undeserving of the equitable remedy of injunction. They have admitted to being in default and have not taken any action in the last 12 months since the suit was filed to remedy the default.

Extending the time for compliance and rectification of the default will be prejudicial to the defendant since it will lead to the accruing of more interest which the applicants may not be able to pay therefore making it hard for the respondent to recover the full amount due.

The applicants have not demonstrated that there is a prima facie case and

that they stand to suffer irreparable harm which cannot be compensated by way of damages.

It is trite law that when a valid power of sale aborts, or notice is issued irregularly the only duty upon the chargee is to issue fresh notices or fresh advertisement. The respondent submitted that the case be dismissed with costs to the defendant.

ISSUES FOR DETERMIATION

a. Does the application meet the threshold for issuance of an injunction"

The principles for injunctions are found in the case of ***Giella vs Cassman Brown Co. Ltd 1973] EA 358*** where it was held that in order to grant the injunction as prayed the court must be satisfied that,

a. The applicant had established a prima facie case with probability of success;

b. The applicant stood to suffer irreparable loss which could not be compensated by an award of damages; and

c. If the court was in doubt, the application would be determined on a balance of convenience.

Whether the applicant has established a prima facie case with the probability of success

From the submissions of the parties, to determine whether there is a prima facie case the court will have to establish the following;-

- How much was disbursed to the applicant
- Whether the statutory power of sale complies with Section 90 of the Land Act

How much was disbursed to the applicant"

As per the letter of offer dated 22nd November 2013 the defendant issued a charge of kshs. 1,500,000/- over the title of the suit land. The 2nd letter of offer dated 28th April 2014 indicates that the defendant advanced a banking facility of kshs. 5,000,000/-. Upon perusing the official search annexed as annexure B in the supporting affidavit sworn on 30th June 2016, the 2nd charge was for kshs. 3,500,000/-. This corresponds with the amount in the charge document annexed as annexure HR2 in the replying affidavit filed by the respondent. However, the statement of accounts annexed as annexure A in the replying affidavit indicates that there was a disbursement of kshs. 5,000,000/- to the 1st applicant. This therefore brings into dispute the sum disbursed. It is an issue that need be determined during hearing of the main suit.

Whether the statutory power of sale complied with section 90 of the Land Act

Section 90 of the Land Act states;

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 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.

Section 96(2) of the *Land Act* states;

3. 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.

The respondents have provided proof that there was service of the requisite notices. However, with the discrepancy on the amount disbursed, it follows that the applicant has a prima facie case as the amount disbursed must be clearly determined before any action is taken to redeem it.

In ***Mrao Limited vs First American Bank of Kenya [2003] KLR 125*** it was held that:

"...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..."**

I find that the applicant has established a prima facie case**.**

Whether the applicant will suffer irreparable loss

The applicant has failed to demonstrate how he will suffer irreparable loss in his submissions. The respondents on their part have not submitted as to whether they will be in a position to compensate the applicant in damages. That notwithstanding, the burden to prove that there will be irreparable loss lies with the applicant, and he has failed to prove the same.

Balance of convenience.

In **Suleiman vs. Amboseli Resort Limited (2004) 2 KLR 589** Ojwang J (as he then was) rendered himself as follows:

…Traditionally on the well-accepted principle, the Court has had to consider the following question before granting Injunctive relief (i) is there a prima facie case with a probability of success (ii) does the Applicant stand to suffer irreparable harm if relief is denied (iii) on which side does the balance of convenience lie" Even as those must remain the basic tests, it is worth adopting a further, albeit rather special and more intrinsic test which is now in the nature of general principle. The Court in responding to prayers of Interlocutory Injunctive relief, should always opt for the lower rather than the higher risk of injustice. Although the Court is unable at this stage to find that the Applicant has a prima facie case with a probability of success, the Court is quite convinced that it will cause the Applicant irreparable harm if his prayers for injunctive relief are not granted …. and in those circumstances the balance of convenience lies in favour of the Applicant rather than the Respondent. There would be a much larger risk of injustice if the Court found favour of the defendant, than if it determined this application in favour of the Applicant".

I do find that it granting the stay in this matter would have a lower risk of injustice and I do grant the orders sought.

S. M GITHINJI

JUDGE

DATED, SIGNED and **DELIVERED** at **ELDORET** this **15th** day of **May,** 2019.

In the presence of:-

Mr. Kigamwa for 1st plaintiff/applicant and 2nd plaintiff/applicant

Mr. Too holding brief for Mr. Kamau for Defendant/Respondent

Ms Sarah - Court clerk