REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CIVIL CASE NO. 2 OF 2020

STEK COSMETICS LIMITED.....PLAINTIFF/APPLICANT

VERSUS

FAMILY BANK LIMITED.....1ST RESPONDENT

KVIEWLINE AUCTIONEERS.....2ND RESPONDENT

RULING

1. By a notice of motion dated 17th September 2019, brought under sections 1A, 1B, 3, 3A and 63 of the Civil Procedure Act, Cap 21 Laws of Kenya and Order 40 Rules 1, 2, 3 8 and 10 of the Civil Procedure Rules, 2010, the applicant seeks an injunction restraining the defendants/respondents by itself, its servants, agents and or employees or whomsoever is acting on their behalf from trespassing onto, advertising for sale, selling, transferring or disposing of parcels Numbers Embu/Municipality/1174 and Kajiado/Kaputiei/40268 pending the hearing and determination of the suit.

2. The applicant seeks a further order that the two parcels of land be valued by an independent valuer to ascertain their current market value owing to conflicting valuations on the respondents' instructions. The motion is supported by the grounds on its face and the affidavit of Stephen Kibugi Wariega the applicant's director.

3. According to both the grounds on the face of the motion and depositions in the affidavit in support, the applicant obtained a loan facility of Kshs. 20,811,000/= and Kshs. 2,895,000 working capital from the 1st respondent. The facility was secured by legal charges over the Embu and Kajiado properties.

4. It is stated and deposed that the applicant has diligently made repayments to the 1st respondent to the tune of Kshs. 9,272,569.49 despite the hard economic situation and is willing to continue servicing the loan facility. It is the applicant's case that the 1st respondent has instructed the 2nd respondent auctioneer who has issued a redemption notice of 45 days to pay Kshs. 24,164,470.08 purportedly owed to it.

5. It is further stated that the respondents have served the applicant with undated notification of sale of the properties scheduled for 2nd October and 3rd October 2019 respectively (now past); that there is a dispute on the loan amount and the amount in arrears and that although the loan advanced was Kshs. 20,811,000 and Kshs. 9,272,569.49 has been paid, outstanding amount cannot be Kshs. 24, 164,470.08.

6. The applicant further states that it has never been served with the three months' notice prior to notification of sale as required by section 90 of the Land Act; that the values of the two properties quoted, namely Kshs. 17,500,000 and 12,000,000 respectively are inordinately low and that if the properties are sold the applicant will suffer irreparable loss as the forced sale of Kshs. 13,125,000 and 9,000,000/= will not even fully repay pay the amount claimed.

7. The applicant also argues that a forced sale valuation was not conducted before exercising the statutory power of sale as required

under section 97(2) of the Act.

8. The respondents filed a replying affidavit by Sylvia Wambani a legal officer of the 1st respondent sworn on 22nd July 2020. She deposed that the application is defective and brought in bad faith; that the applicant has not come to court with clean hands and that the application is an attempt to stop the 1st respondent form recovering the arrears due.

9. According to Miss Wambani, the applicant and 1st respondent had entered into consent before the Commercial Division at Milimani on the settlement of the amount in arrears on 25th September 2019 thus substantially resolving the matter. The applicant has not complied with that consent.

10. The deponent states that the letter of offer dated 29th September 2018 was a culmination of previous financial arrangements between the applicant and the 1st respondent; that the applicant is a flagrant defaulter and that it was due to default that the 1st respondent has opted to exercise its statutory power. The deponent further states that the 1st respondent complied with the statutory provisions while exercising its statutory power of sale; that notice under section 96 was issued and dated 11th June 2019; that the redemption notice and notification of sale were also done by the 2nd respondent under the 1st respondent's instructions and served in full compliance with the law.

11. The deponent further states that valuation of the properties was done by the 1st respondent and any allegation of disparity in value is not supported by evidence from the applicant. She again states that the auction of the properties was advertised as required. The 1st respondent contends that the applicant has not shown that it has a prima facie case with a probability of success and prays that the application be dismissed.

Applicant's submissions

12. Parties agreed to dispose of the application by way of written submissions. The applicant has filed written submissions dated 1st September 2020 on 2nd September 2020. It submits that it has satisfied conditions to grant of temporary injunction as laid down in ***Giella v Cassman Brown & Company Limited*** [1973] EA 358 in that it has a prima facie case with a probability of success.

13. The applicant relies on ***Mrao v First American Bank of Kenya Limited & 2 Others*** [2003] eKLR on the definition of a prima facie case as one which on the material presented in court, a tribunal property 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 respondent.

14. The applicant argues that it is apprehensive that its right to property guaranteed under Article 40 of the Constitution risks being violated by the respondents through the intended sale and that residents in one of the properties who include children of tender ages risk being rendered homeless.

15. The applicant submits that the disputed outstanding amount and accounts need a thorough analysis by the court as the amount claimed is disproportionate to that lent and repaid. It is the applicant's further submission that the amount outstanding cannot be so high and therefore the 1st respondent should disclose the interest rate and illegal charges applied.

16. On whether it will suffer irreparable harm which cannot be adequately compensated by way of damages, it submits in the affirmative. It argues that its main prayer is temporary injunction to enable it exercise its right of redemption; that no amount of damages will compensate it if the properties are sold and that the sale will not only have financial but also social effects on the inhabitants in the properties as one is a matrimonial home and children's residence.

17. The applicant also argues that the harm likely to be suffered cannot be compensated by damages as livelihood of other dependants will be affected. It relies on ***Solomon Ngomo v Kenya Deposit Insurance Corporation Dalali Traders*** [2019] eKLR for the argument that it is only seeking to be allowed to exercise its right of redemption.

18. Regarding the balance of convenience, the applicant argues that the balance tilts in its favour. According to the applicant, since both parties will still have their day in court, the outstanding amount needs to be ascertained; that there is need for independent valuation of the properties and that it is ready to service the loan.

19. It relies on ***Stars & Garters Restaurant & Another v National Bank of Kenya Limited*** [2019] eKLR where a similar application

was allowed since the respondent still had security provided by the applicant. The applicant also relies on ***Nguruman Limited v Jan Bonde Nielsen & 2 Others*** [2014] eKLR for the submission that in determining whether a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely, except to see that the applicant has a right which has been or is threatened with violation.

20. On whether notices were properly served, the applicant submits that it was issued with undated notification of sale. According to the applicant, failure to indicate the date on the notice amounted to a material breach since time is of essence in such matters. It argues that the spirit of sections 90 and 96 of the Land Act is to accord a chargor adequate opportunity to seek a solution to his indebtedness. Failure to date the notice denied it an opportunity to know how much time it had to redeem its properties.

21. The applicant further argues that the notices for 90 and 40 days though alleged to have been sent by registered mail, the certificate of posting was not signed by the receiving officer where they were posted. The applicant takes issue with the redemption notice served by the 2nd respondent since it does not contain the name or signature of registered owner as required, thus raising the question of whether it was served on its directors. The applicant also contends that a notice for one of the properties was served on strangers not party to the charge against rule 15 of Auctioneers Rules 1997.

22. On whether there is need to independently value the properties, the applicant relies on ***Sussex Justices ex parte MCCathy*** [1924] *1KB* 256; [1923]All ER 233 for the submission that justice must not only be done, it must be seen to be done. It also relies on section 97 of the Land Act on the need for valuation before exercise of the statutory power of sale.

Respondents' submissions

23. The respondents have filed written submissions dated 13th August 2020 and filed on 17th August 2020. They submit that the principles on which an interlocutory injunction should be granted are clear as laid down in the ***Giella v Cassman brown case,*** and the burden is on the applicant to satisfy the court that it has a prima facie case with high chances of success.

24. According to the respondents, the applicant was served with statutory notices as required under section 90 of the Land Act. They argue that the notice dated 17th March 2019 was served through registered mail to the applicant and Mbuko Ndibuyu, the chargor in the further charge and was also copied to Elizabeth Muthoni Mbuko and other directors of the applicant. According to the respondents, the addresses used were those provided by parties under the charge instruments.

25. The respondents further submit that the 45 days redemption notice and the notification of sale were served. They argue that the applicant admitted in its supporting affidavit that the 45 days notice was received as well as the notification of sale.

26. Regarding valuation, the respondents argue that valuation of the properties was done in June 2019 and have attached valuation reports. According to the respondents, the applicant's argument that the valuation reports are inaccurate and inordinately low is not supported by evidence. They rely on ***Fatuma Osman Abdi v Kenya Industrial Estates Limited & Another*** [2017] eKLR, for the submission that the sale will be by public auction and subject to a reserve price. They argue that since the two properties will be sold by public auction and subject to reserve prices, they have no intention of selling the properties at throw away prices. They contend that the applicant's argument that the valuations are low has no basis.

27. The respondents again rely on ***Zum Zum Investment Limited v Habib Bank Limited*** [2014] eKLR, for the submission that a plaintiff must satisfactorily demonstrate why the valuation the respondent intends to use does not give the best price obtainable at the material time.

28. On the alleged dispute over the amount, the respondents submit that the applicant has always been aware of the amount due and the fact that interest accrues on default and was receiving statements of account. They argue that they complied with the procedure required by law. They rely on ***Kenya Commercial Bank Limited v Pamela Akinyi Ochieng*** CA No. 114 of 1991 for the argument that a mortgagee/chargee will not be restrained from exercising his power of sale because the amount due is disputed or because the mortgagor/chargor has begun a redemption action or because the mortgagor/chargor objects to the manner in which the sale is being arranged.

29. On whether the applicant will suffer irreparable loss that cannot be compensated by way of damages, the respondents submit that the applicant does not stand to suffer any harm that cannot be compensated by way of damages. They rely on ***Nguruman v Jan***

Bonde Nielsen & 2 Others (supra) for the proposition that an applicant must show that he might otherwise suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction and that speculative injury will not do nor will unfounded fear or apprehension.

30. Regarding the balance of convenience, the respondents' take is that the balance of convenience tilts in the 1st respondent's favour. They rely on ***Andrew Muriuki Wanjohi v Equity Building Society Limited & 2 Others*** [2006] eKLR for the argument that if the 1st respondent is restrained from selling the property until the suit is heard and determined, there is a real risk that the debt may outstrip the value of the charged property. They also argue that the applicant has not come to court with clean hands. According to them, the applicant is guilty of non-compliance with the consent order recorded on 25th September 2019.

Determination

31. I have considered the application, the response and submissions. I have also considered the authorities relied on by respective parties. What is before this court is a motion seeking an interlocutory injunction to restrain the 1st respondent from exercising its statutory power of sale over parcel Nos Kajiado/KaputieiNorth/40268 and Embu/ Municipality/1174, pending the hearing and determination of this suit.

32. The grounds for seeking injunction are well stated in the applicant's affidavit namely, that the outstanding amount is disputed; that the valuations are disputed and that statutory notices were not served or that the notification of sale was not dated. The applicant argues that if the auction is allowed to go on, it will suffer irreparable loss which cannot be adequately compensated by way of damages.

33. The respondents on their part argue that the application is unmeritorious; that they complied with the law before exercising the statutory power sale; that the applicant is in default and that the applicant has not shown that it has a prima facie case with probability of success or that it will suffer irreparable loss that cannot be adequately compensated by way of damages. They also argue that the applicant has not come to court with clean hands and continues to disregard a consent order.

34. This being an application for interlocutory injunction, the law is settled that an applicant must demonstrate that he has a prima facie case with probability of success, that he will suffer irreparable loss that cannot be adequately compensated by damages or that the balance of convenience is in his favour. In that regard, it is the applicant's duty to demonstrate that it meets the test set in various decisions, leading among them, ***Giella V Cassman Brown & Company Limited*** (supra).

35. The applicant obtained a financial facility from the 1st respondent which was secured by legal charges over a property in Embu and Kajiado. The applicant states that it dutifully repaid the loan facility despite hard economic times. It does not openly admit that it is in default, but states that it was served with 45 days redemption notice to pay Kshs. 24,164,470.08 said to be outstanding. The applicant further argues that it was served with undated notification of sale of the properties scheduled for 2nd October and 3rd October 2019 respectively. In the applicant's view, the undated 45 days notice denied it the opportunity to know how much time he had to redeem the properties.

36. The applicant also argues that it was not served with statutory notices prior to service of the notification of sale and that there is a dispute on the outstanding amount. It further argues that the properties have been undervalued and that if sold for the amount valued, they may not repay the outstanding amount.

37. The 1st respondent contends that statutory notices were served; that all notices were dated and that the properties were not undervalued. It also argues that a dispute on the loan outstanding is not a ground for restraining it from exercising its statutory power of sale. The 1st respondent again contends that the applicant has not come to court with clean hands. It argues that parties recorded consent on 25th September 2019 which the applicant has not complied with and, therefore, its application is tainted with bad faith.

38. The law allows the 1st respondent, as chargee, to exercise its statutory power of sale in the event of default by applicant, as the borrower, to repay the loan. Section 90(1) of the Land Act, provided that if a chargor is in default of any obligation and fails to pay interest or any other periodic payment or any part thereof due under a charge or in the performance or observation of any covenant, express or implied, in a charge, and continues to be in default for one month, the chargee may serve a notice in writing on the chargor requiring him to pay the money owing, or to perform and observe the terms of the agreement.

39. Section 90(2) requires that the notice to be served adequately inform the chargor the nature and extent of the default; 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 default must have been rectified. The notice should also inform the borrower consequences to follow if he fails to comply.

40. Subsection (3) provides the options available to the 1st respondent if the applicant does not rectify the situation within the period given. One of the options the 1st respondent has is to sell the charged property. That is the option the 1st respondent has chosen in the present situation. It instructed the 2nd respondent to advertise the applicant's properties for sale giving rise to the present application.

41. As seen from section 90 above, the 1st respondent was required to serve the applicant with a notice calling on it to rectify the default. The applicant argues that the statutory notice required under section 90(1) was not served while the 1st respondent maintains that the applicant was served with all statutory notices.

42. I have gone through the application and the response as well as the documents annexed to the affidavits filed by both parties in support of their respective positions. The 1st respondent has attached notices issued under section 90(1) and 96(2) dated 7th March and 11 June 2019 respectively, and sent to the applicant by registered post. The 2nd respondent issued the 45 days notice which they say was served on the applicant on 27th July 2019. The notification of sale was also served. The applicant does not dispute service of these notices by the 2nd respondent. The notices issued by the 1st respondent have the applicant's address which it does not dispute.

43. The law requires the applicant to show that it has a prima facie case with a probability of success in order to persuade the court to grant an interlocutory injunction in its favour. In ***Mrao Ltd v First American Bank of Kenya Ltd & 2 others*** (supra), the Court of Appeal stated:

"The principles which guide the Court in deciding whether or not to grant an interlocutory injunction are well settled. In Giella v Cassman Brown to refer to a case which shifts the evidential burden of proof, rather than as giving rise to a legal burden of proof in the manner he was considering, which was in relation to the pleadings that had been put forward in that case….So what is a prima facie case" I would say that in civil cases it is a case in 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."

44. In ***Nguruman Limited v Jan Bonde Nielsen & 2 others*** (supra), the Court of Appeal agreed with the definition of a prima facie case in the ***Mrao case*** and stated:

"We adopt that definition save to add the following conditions by way of explaining it. The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed."

45. In the present application, the applicant was required to show that its right is being violated or is likely to be violated by the respondents which would shift the burden onto the respondents to explain or rebut the applicant's claim. It is not enough for the applicant to merely state that it has a prima facie case. That alone will not bring it within the meaning of a prima facie case as required by law.

46. I have considered the material placed before this court, the basis of which the applicant seeks a temporary injunction. As it is, this court is not conducting a mini trial of the applicant's case. Its task at this stage is to determine on the material placed before it, whether the applicant has put forward a case requiring the court to intervene and restrain the 1st respondent from exercising its statutory power of sale; that it will suffer irreparable injury that cannot otherwise be compensated by way of damages or that the balance of convenience tilts in its favour.

47. The applicant argues that statutory notices were not served by the 1st respondent as required by sections 90(1) and 96(2) of the Land Act. The 1st respondent on its part has attached notices addressed to the applicant and the chargors which are shown to have been sent to the applicant and the chargors by registered mail. Notices issued by the 2nd respondent are admitted to have been served. The applicant's grievance is with regard to the 45 days notice which it argues was not dated. A perusal of the notice as well as the replying affidavit of the 1st respondent shows that the notice was served on 27th July 2019. The applicant further argues that the properties were undervalued and that if they were sold, they would not even clear the outstanding amount and urged the court to intervene.

48. On the basis of these facts, I am not persuaded that the applicant has satisfied the test for granting a temporary injunction. That is to say the applicant has not demonstrated that he has a prima facie case with a probability of success. The applicant has not denied that it is in default. The 1st respondent issued notices as required by statute and the 2nd respondent served the 45 days notice and the notification of sale, thus complying with the law.

49. On whether the applicant will suffer irreparable injury which cannot be compensated by damages unless temporary injunction is granted, I am not also persuaded that this will be the case. The 1st respondent is a financial institution that will easily compensate the applicant were its suit to eventually succeed. The charged properties values are known or can be ascertained and, therefore, the applicant can recoup the value of the properties if the suit succeeds.

50. What about the balance of convenience" The loan amount continues to attract interest and the amount could easily outstrip the value of the properties. This means that if the respondent is restrained from exercising its statutory power of sale until the suit is determined, it may not be able to recover the outstanding loan amount and interest by the time the suit will be determined since the value of the properties cannot be guaranteed to be sufficient to cover the amount outstanding then. In that regard, I find the balance of convenience to tilt in favour of the 1st respondent which can pay the value of the properties if it loses the suit.

51. Finally, the respondents have argued that the applicant has not come to court with clean hands. They contend that parties recorded consent on 25th September 2019 but the applicant has not complied with the consent. The applicant has not said anything about this contention.

52. I have perused the proceedings for 25th September 2019. It is true that parties recorded consent requiring the applicant to pay the outstanding amount. Whereas the respondents have argued that the applicant breached that consent order, the applicant remains silent about the consent leaving the court to conclude that it has not paid as agreed. This removes any doubt that the applicant was given an opportunity to redeem the properties but failed to do so and, therefore, cannot persuade the court that it deserves the court's discretion.

53. As the Court of Appeal stated In ***Giro Commercial Bank Limited v Halid Hamad Mutesi*** **[2002] eKLR**, *it has been held time and again that a mortgagee cannot be restrained from exercising his power of sale because the amount due is in dispute or that the mortgagee has commenced a redemption action* **or because the mortgagor objects to the manner in which the sale is being arranged. In that case, where** *the debt is admitted as due and the loan is not being serviced, the court should not grant an injunction.*

54. It is clear to this court that the applicant is in default which it admitted and that was why it entered into the consent to pay and regularize that default. Having failed to do so, it cannot turn to this court for an injunction to restrain the chargee from exercising its statutory power of sale.

55. In the circumstances therefore, having considered the application, the response and submissions as well as the decisions relied on, I am not satisfied that the applicant has made a case for grant of the interlocutory injunction it seeks. Consequently, the application dated 17th September 2019 is declined and dismissed. Costs in the cause.

Dated, Signed and Delivered at Kajiado this 27th day of November, 2020

E. C. MWITA

JUDGE