REPUBLIC OF KENYA

HIGH COURT OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT KAPSABET

ELC CASE NO. E 005 OF 2021

GILBERT KIPTOO CHERUIYOT T/A GILCHERY LTD.....PLAINTIFF

VERSUS

FAMILY BANK LTD.....1ST DEFENDANT/RESPONDENT

KALYA AUCTIONEERS.....2ND DEFENDANT/RESPONDENT

RULING

1. By Notice of Motion Application dated 26th November, 2021, the Plaintiff/Applicant seeks the following orders;

a) Spent

b) Spent

c) This Honourable Court be pleased to issue a temporary injunction restraining the 1st and 2nd Respondents either by themselves, their agents, employees and or servants from advertising to sale by public auction, selling, entering, taking possession of or in any way interfering with the current ownership of title numbers NANDI/KOYO/563, NANDI/KOYO/566 and NANDI/KOYO/567 pending hearing of and final determination of this suit.

d) That a declaration be issued, that the notification for sale issued to the Plaintiff/Applicant by the 2nd Defendant/Respondent is a nullity for being defective and for failure to detail the amount that the Plaintiff/Applicant must pay to rectify the default and for failure on the part of the 1st Defendant/Respondent to follow the laid process as required by Section 90 (2) (b) of the Land Act NO. 6 of 2012.

e) That a declaration be issued, that the issue of 45 days Auctioneer's Notice to sell, served upon the Plaintiff/Applicant is a nullity, the 1st Defendant/Respondent have never and/ or not served upon the Plaintiff/Applicant a 40 days Notice to Sell as required by Section 96(2) of the Land Act No. 6 of 2012.

f) Costs of this application.

2. The application is based on the following grounds: -

i) That the Plaintiff/Applicant is the absolute registered owner of the suit properties and has made major developments thereon.

ii) That the 2nd Defendant/Respondent has issued a 45 days redemption Notice intending to advertise, sell and transfer suit parcels by way of public auction.

iii) That the Redemption Notice is a nullity as the Respondents failed to follow the laid down procedural law required under the Land Act.

3. The application is supported by sworn affidavit of Gilbert Kiptoo Cheruiyot where he states as follows;-

i) That he is one of the Directors of Gilchery Limited and the absolute registered owner of land parcel numbers NANDI/KOYO/563, NANDI/KOYO/566 and NANDI/KOYO/657.

ii) That in 2019, the 1st Defendant/Respondent advanced to Gilchery Limited, the borrowers, loan amounting to kshs. 15,000,000/= which was secured by his properties aforementioned as well as guaranteed by him.

iii) That the borrower has been servicing the loan however, its business and operations were disabled due to a challenge they encountered thereby rendering it difficult to make monthly repayments of the loan as required.

iv) That the borrower is willing to pay the loan, even requested for restricting of the loan and move time to pay but the 1st Defendant/Respondent failed to respond to the request.

v) That despite making substantial repayment of the loan, the 1st Respondent instructed the 2nd Respondent to sell the suit properties thereby issuing 45 days Redemption Notice which is a nullity for not conforming with Section 90 (2) of the Land Act.

vi) That the sale of the suit properties would amount to a loss that would not be adequately compensated hence it in the interest of justice and fairness that the application be allowed.

4. The 1st Defendant/Respondent contested the application vide Replying Affidavit deponed by Sylvia Wambani a legal officer. She avers that;

i) Prayers (4) and (5) sought in the application are final orders in nature which ought not be granted at this stage.

ii) That at the request of the Plaintiff/Applicant the 1st Defendant/Respondent advanced a loan facility of kshs. 15,000,000/= and a further credit facility was secured by the suit properties herein registered in the name of the Plaintiff/Applicant.

iii) That the Plaintiff/Applicant defaulted in repaying the loan facility as a result he approached the bank for restructuring of the loan which request was accepted and the loan restructured to allow Plaintiff/Applicant pay interest only.

iv) That despite the restructure, the Plaintiff/Applicants loan account was not performing, consequently they issued the 90 days statutory notice followed by a 40 days notice of intention to sell. The Notices were served vide registered post.

v) That the 2nd Defendant/Respondent through instructions of 1st Defendant/Respondent issued a notification of sale and 45 days redemption notice to the Plaintiff/Applicant thereby prompting the Plaintiff/Applicant to rush to Court for reliefs herein.

vi) That the Plaintiff/Applicant has admitted to being indebted to the 1st Defendant/Respondent and are acting in bad faith by seeking to prevent the 1st Defendant/Respondent from exercising their statutory power of sale.

vii) That the applicant does not meet the condition set out in the celebrated case Cassman Brown for granting temporary injunction.

viii) That the instant application be dismissed as a result.

5. This application was canvassed by way of written submissions wherein both counsels filed their submissions.

6. It was submitted by the Applicant that it is not disputed that the Plaintiff is the absolute registered owner of land parcels NANDI/KOYO/563, NANDI/KOYO/566 and NANDI/KOYO/563. Further that is not in dispute that the 1st Defendant/Respondent advanced a loan facility of kshs 15,000,000/= to the Plaintiff/Applicant, which facility was secured by the properties aforementioned. That this relationship created a contractual obligation and a duty of communication and service of notices.

8. The Applicant further submitted that the 1st Respondent failed to adhere to the provisions of Section 96 (2) of the Land Act that require that a 40 days notice be served by the charge upon the charger.

9. It was also submitted that the default in repayment of the loan balance was occasioned by the effects of Covid 2019 which adversely. That the Applicant is willing to repay the loan balance upon restructure of the same and extension of time to clear the outstanding arrears.

10. The Court was urged to allow the Plaintiff/Applicant's application as prayed.

11. The 1st Defendant/Respondent through their advocates filed written submissions in response to Applicant's submissions. It was submitted that prayers (4) and (5) sought in the application are declarations that cannot issue at interlocutory stage. On this they relied on the case of Salim Lemuta Konyokie and Another vs Erick Konchella and 2 others (2006) eKLR.

12. The 1st Defendant/Respondent identified the issues to be determined and relied on various decided cases and provisions of the law. The issues framed by the 1st Defendant/Respondent include; whether applicant has proved a prima facie case with high chances of success, whether the Applicant has demonstrated that if orders are not granted, he will suffer irreparable damage and cannot adequately be compensated by damages and lastly in whose favour the balance of convenience tilts.

13. On the first issue, whether the Applicant has proved a prima facie case with high chances of success, the 1st Defendant/Respondent relied on the case of Mrao Ltd vs First Americal Bank of Kenya Ltd and 2 others (2003) Eklr where the Court set out what constituted a prima facie case. It was submitted that the 1st Defendant/Respondent complied with its contractual obligation by advancing loan amount to the Plaintiff/Applicant and served upon the Applicant all the statutory notices in conformity with Sections 90 and 96 (2) of the Land Act. On this they relied on the case of Gieni Plains Company Limited and 2 others -vs- Eco Bank Kenya Limited (2017) eKLR.

14. As regards the second issue, whether the Applicant has demonstrated if orders sought are not granted, he will suffer irreparable damage that cannot be adequately compensated by damages, the 1st Defendant/Respondent submitted that the Court need to consider, these two remaining issues for the reason that the Applicant had failed to prove a prima facie case. On this they relied on Kenya Commercial Finance Company Ltd -vs- Afraha Education Society (2001) Vol. 1 E. A. 86 and Joseph Otura Allaii -vs- China Overseas Engineering Group (2013) eKLR where the Courts essentially held that an applicant must satisfy the first condition for granting temporary injunction for the Court to consider the other conditions.

15. Nevertheless, the 1st Defendant/Respondent submitted that the applicant has also failed to demonstrated that the damage it is likely to suffer cannot be adequately compensated by damages. That the Applicant has not shown that the 1st Defendant/Respondent is not capable of settling an award damages. On this they relied on Joseph Otura Allaii –vs- China Overseas Engineering Group (2013) eKLR.

16. On the third issue, in whose favour does the balance of convenience tilts, the 1st Defendant/Respondent submitted that the balance of convenience tilts in their favour since the Plaintiff/Applicant benefits from the loan advanced by the 1st Defendant/Respondent and failed to male monthly repayments as required. That a grant of the orders sought in the application will prejudice and affect negatively the 1st Defendant's business of asset financing. On this they relied on the case of Stephen Sonto Sipala –vs- Co-operative Bank of Kenya Ltd and Another (2018) eKLR. The Court was urged to dismiss the instant Application with costs.

ANALYSIS AND DETERMINATION

17. The Court has carefully considered the application, the affidavits tendered by parties in support and rebuttal as well as submissions filed herein. The main issue for determination is whether or not the Plaintiff/Applicant has met the threshold for granting interlocutory injunction restraining the respondents from exercising the statutory power of sale.

18. The principles for granting of temporary injunctions were settled in the case of Giella -vs- Cassman Brown and Company Limited (1973) EA 358 as follows: -

"First an applicant must show a prima facie case with a probability of success. Secondly an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience."

19. The Court of Appeal in the case of Nguruman Limited –vs- Jan Bonde Nielsen and 2 others (2014) eKLR echoed the three principles as set out in Giella vs- Cassman Brown and Company Ltd (1973) E A 358 and clarified that they are to be applied as separate, distinct and logical hurdles which an applicant ought to prove sequentially. Majanja J in the case of Khan and Another -vs- Habi Bank A.G. Zurich and Another (2022) eKLR interpreted this to mean if an applicant does not establish a prima facie case then irreparable injury and balance of convenience do not require consideration. On the other hand, if a prima facie case is established, then Court will consider the other conditions. This rightly so submitted by the 1st Defendant/Respondent counsel.

20. In Mrao Ltd. –vs- First Americal Bank of Kenya Limited and 2 others (2003) Eklr, the Court of Appeal explained what constitutes a prima facie case. The Court held that;

"In civil cases, a prima facie is a case in which on the material presented to the 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 latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard, which is higher than an arguable case."

21. With these principles in mind, I wish to interrogate whether the Plaintiff/Applicant has made out a prima facie case with a probability of success at the trail of this suit. Firstly, it is not in dispute that the Plaintiff/Applicant obtained a secured loan facility from the 1st Defendant/Respondent amounting to kshs 15,000,000/=. It is also not in dispute that the Plaintiff/Applicant defaulted in repaying the loan, and sought the 1st Defendant/Respondent indulgence by requesting for restructure of the loan. What is in dispute is whether the Bank granted the request or not. The Plaintiff/Applicant submits that the 1st Defendant/Respondent refused and/or failed to respond to their request for deponed in their Replying Affidavit that the Bank accepted the Plaintiff/Applicants request and issued a vide letter dated 29th 2020 addressed to the Plaintiff/applicant. This is correctly proved in annexure FBL – 5.

22. The other disputed fact is whether or not statutory notices were issued and served upon the Plaintiff/Applicant. The Plaintiff/Applicant's allegation is that no statutory notices were issued by the 1st Defendant/Respondent and served upon them. On this, the 1st Defendant/Respondent annexed two notices it issued to the Plaintiff in this replying affidavit. The said notices are annexures FBL – 6 and FBL – 7. From these annextures, my answer to this issue is that indeed the statutory notices were issued worth noting that the two statutory notices were posted via registered post to the Plaintiff's address on the letter of offer and the charge document. The Plaintiff/Applicant contends that the agreed mode of service e3as through emails only as per paragraph 13 of letter dated 8th July 2019, annexture GKC 2. However a cursory perusal of the said letter, it does not contain paragraph 13 as alleged by the Plaintiff/Applicant. I have gone ahead to peruse a copy annexed to 1st Defendant's/Respondent's replying affidavit, it states;

"13. Notice by E-mail: The Borrower and the Guarantor hereby acknowledge that where a notice or demand under this letter of offer or any security created pursuant hereto is sent by electronic mail, it shall be sufficient proof that the notice or demand was sent to the borrower or Guarantor if sent to the email address set out below info@gilchery.com."

23. My interpretation of this clause is that is simply provided an email address that would sufficiently prove service upon the Plaintiff/Applicant. He did not in any way limit mode of service. The applicable clause regarding service of Notices is clause 15 on General Terms and conditions annexed to the letter of offer, annexture FBL – 1. This clause provides that: -

"15. Notices

Any notice or communication requiring to be served on the borrower and/or the Guarantor may be served on it or on army of its officers personally by hand delivery, by e-mail, by fax or by post……service by post shall be to the postal address on this letter or to the borrowers/Guarantor's registered address or at some address as notified from time to time by the

borrower/guarantor, and shall be deemed to have been effected five business days after posting……. where a notice or demand is sent by registered [art, it shall be sufficient to prove that the notice or demand was properly addressed and posted."

24. In view of this clause 15, it is not true that the parties agreed mode of service was by email only as alleged by the Plaintiff/Applicant. The same letter of offer referred to by the Plaintiff/Applicant provided other modes of service such as registered post to the Borrower's address on the first page of letter of offer. The 1st Defendant/Respondent served all the requisite notices via registered post to the Plaintiff's address as proved in annexture, FBL – 6 and 7. Nowhere in the supporting affidavit is the postal address disputed. According to annextures FBL – 6 and 7, the Plaintiff/Applicant was issued with Statutory Notice dated 10th March 2021 pursuant to Section 90(1) of the Land Act and Section 56 (2) of the Land Registration Act as well as Statutory Notice dated 10th July 2021 pursuant to Section 96(2) of the Land Act, 2012.

25. Another disputed fact that I wish to address my mind to is whether or not the Statutory Notice served upon the Plaintiff/Applicant conformed to the form provided under section 90(2) of the Land Act. Section 90 (2) of the Land Act provide as follows;

"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 charger

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 charger must do or desist from doing so as to rectify the default and the time, not being less than two months, by the end of which the default must be rectified.

d) the consequences if the default is not rectified within the time specified in the notice, the charged 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 charger in respect of certain remedies to apply to the Court for relief against those remedies.

28. It is important that statutory notices comply with all the aspects provided in Section 90 (2) of the Land Act. I wish to associate myself with the decision of the Court in Gieni Plains Company Limited and 2 others –vs- Ecobank Kenya Limited (2017) eKLR where the Honourable Judge emphasized this.

29. Applying the said provision of the law to the matter at hand, I have perused Statutory Notices dated 10th March 2021 and 10th July 2021 and note that both notices contain the nature and extent of default, indicate the amount the Plaintiff/Applicant ought to pay to rectify the default. Consequences of non-rectification and the rights available to the Plaintiff/Applicant, into the premises I cannot fault the contents of the Statutory Notices dated 10th March 2021 and 10th July 2021 issued by the 1st Defendant/Respondent.

30. As far as the contents of the 45 days Redemption Notice issued by the 2nd Defendant/Respondent it concerned, the same is not contemplated by the Land Act, rather it is provided for under Rule 15 (d) of the Auctioneers Act. It states that;

"15. Upon receipt of a Court warrant of letter of instruction he auctioneers shall in the case of immovable property.

d) Give in writing to the owner of the property a notice of not less that 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."

31. I have perused the said Redemption Notice admittedly served upon the Plaintiff/Applicant and annexed as GKC – 4 and note that the same contains the amount the Plaintiff/Applicant ought to pay to stop the intended sale by public auction. This is in line with Rule 15 (d) of the Auctioneers Act. In the premises, I cannot fault the 45 days Redemption Notice as well.

32. Consequently, the court is not convinced that a prima facie case with a probability of success has been established by the Plaintiff/Applicant to warrant issuance of temporary injunctive order sought. In view of this find and the Court of appeal decision in Nguruman Limited -vs- Jan Bonde Nielsen and 2 others cited herein, **"there is no need to give consideration to the question as to whether the Plaintiff stands to suffer irreparable harm or in whose favour the balance of convenience tilts."**

33. In light of the above, the Plaintiff's Notice of Motion dated 26th November 2021 fails and is hereby dismissed with costs. I also proceed to discharge the interim orders being enjoyed by the Plaintiff/Applicant that were issued on 16th December 2021.

34. It is so ordered.

DATED AND DELIVERED VIRTUALLY IN KAPSABET THIS 24TH DAY OF MARCH, 2022.

HON. M. N. MWANYALE,

JUDGE

IN THE PRESENCE OF:

MR. KAZUNGU FOR 1ST DEFENDANT/RESPONDENT

MR. MELLY HOLDING BRIEF FOR PLAINTIFF/APPLICANT