



REPUBLIC OF KENYA



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George t/a Blooming Agencies v Letshego Kenya Limited & another (Commercial Case E001 of 2022) [2023] KEHC 1749 (KLR) (23 February 2023) (Ruling)

Neutral citation: [2023] KEHC 1749 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
COMMERCIAL CASE E001 OF 2022
JN KAMAU, J
FEBRUARY 23, 2023**

BETWEEN

JESSICAH ATIENO GEORGE T/A BLOOMING AGENCIES PLAINTIFF

AND

LETSHEGO KENYA LIMITED 1ST DEFENDANT

REGENT AUCTIONEERS 2ND DEFENDANT

RULING

1. In her Notice of Motion application dated 18th May 2021 and filed on 20th May 2021, the Plaintiff herein sought that the Defendants herein be restrained from advertising in any local daily the public auction of her property namely, LR No Kisumu/Bar/2734 (hereinafter referred to as “the subject property”). Prayers Nos (1) and (2) of the said application were spent.
2. She swore her Affidavit in support of the said application on 18th May 2021. She stated that at her request, the 1st Defendant advanced to her a loan facility in the sum of Kshs 4,000,000/= which was secured by a charge over the subject property.
3. She averred that she used to service the said loan and had paid a sum of Kshs 700,000/= by the time the county was hit by the Covid-19 pandemic in March 2020. She stated that she pleaded with the 1st Defendant to allow her to repay the balance of Kshs 3,300,000/= by way of instalments of Kshs 60,000/= which it rejected. She added that she had even offered to have the loan taken over by another bank but that the 1st Defendant had insisted on selling the subject property thus clogging her right of redemption. She asserted that the subject property was undervalued as she had invested Kshs 12,000,000/= in it.
4. She contended that she had not refused to pay the loan but that she should be allowed to pay the same in instalments because if the subject property was sold by public auction, she would suffer irreparable loss. She termed the process of the sale of the subject property unlawful and irregular execution proceedings.



5. It was her averment that the 1st Defendant would not suffer any prejudice if the prayers she had sought were granted.
6. In opposition to the said application, on 24th June 2021, the 1st Defendant's Legal Officer, Winnierohi Wafula swore a Replying Affidavit on behalf of the 1st Defendant herein. The same was filed on 2nd July 2021.
7. The 1st Defendant confirmed that the Plaintiff took a loan facility of Kshs 4,000,000/= . It averred that the loan attracted interest at fourteen (14%) per cent flat rate and was to be repaid in forty eight (48) monthly instalments of Kshs 128,425.14. It stated that a duly executed Legal Charge dated 13th May 2019 was registered over the subject property.
8. It was its contention that the Plaintiff defaulted in payment of the loan whereupon it issued her with all the statutory notices requiring her to clear the sum of Kshs 3,833,654.66, which sum continued to accrue interest until payment in full. It pointed out that the instalments of Kshs 60,000/= per month were too low.
9. It averred that it agreed to suspend the public auction on condition that the Plaintiff paid a sum of Kshs 700,000/= and the 2nd Defendant's fees instead of paying the entire debt of Kshs 3,376,269.13 but that she did not redeem the subject property. It pointed out that the outstanding balance as at 16th June 2021 was Kshs 3,797,269.13.
10. It was its assertion that it had fully complied with the Land Act and hence its right to recover the outstanding sum had crystallised as the Plaintiff had not disputed the indebtedness and/or the validity of the Charge. It thus urged this court to dismiss the present application whose aim was to frustrate it from recovering monies that were due to it.
11. The Plaintiff's Written Submissions and Bundle of Authorities were dated 31st May 2021 and filed on 25th June 2021 while the 1st Defendant's Written Submissions and Bundle of Authorities were dated and filed on 23rd July 2021.

Legal Analysis

12. The Plaintiff submitted that she had demonstrated that she had a prima facie case with a probability of success, that if the interlocutory injunction was not granted, she would suffer irreparable injury which could not be compensated by way of damages. She asserted that she was not indolent and had every intention of repaying the loan.
13. She further pointed out that the 1st Defendants had not complied with Section 96(2) of the Land Act that stipulates that the charge shall not exercise the power of sale until it has served upon the charger a notice to sell in the prescribed form and until forty (40) days had elapsed from the date of service of the notice to sell. She placed reliance on the cases of Yusuf Abdi Ali v Family Bank Limited [2015] eKLR and David Ngugi Ngaari v Kenya Commercial Bank Limited [2015] eKLR where the courts emphasised the said requirement in Section 96(2) of the Land Act.
14. She submitted that the sale of the subject property would destroy the equity of redemption and constituted the 1st Defendant misusing the power of sale as a trustee of the subject property that was charged to it. In this regard, she relied on the case of Kamulu Academy Limited & Another v British American Insurance (K) Limited & 2 Others [2018] eKLR where it was held that the sale by public auction extinguishes the equity of redemption at the fall of the hammer whether the property was transferred to a purchaser or not.



15. She was emphatic that the sale of the subject property by public auction was malicious and it was in the interests of justice that she be allowed to pay in instalments due to the effects of Covid- 19.
16. On its part, the 1st Defendant emphasised that the Plaintiff was served with the Statutory Notices of Sale. It submitted that this was a clear case of default and hence the Plaintiff had not demonstrated a prima facie case as was contemplated in the case of *Mrao Limited v First Assurance Bank of Kenya Limited* [2003] KLR 125.
17. It added that the value of the subject property could be ascertained. It pointed out that it had been valued at Kshs 8,000,000/= with a forced sale value of Kshs 6,000,000/= and hence any damages suffered could be compensated. It placed reliance on the case of *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR where the Court of Appeal held that a temporary injunction should not be granted when an action for an award of damages could be adequately compensated.
18. It also referred this court to the cases of *Thomas Ratemo Oira v Equity Bank Limited* [2012] eKLR, *Woodcraft Industries Limited & 3 Others v East African Building Society* (eKLR citation not given) and *Thatby v Middle East Bank (K) Limited* (2002) 1 KLR to argue that the balance of convenience lay in the injunction not being granted.
19. Notably, the Plaintiff did not raise the issue of the Notice to Sell under Section 96(2) of the *Land Act* No 6 of 2012 in her Supporting Affidavit. She only raised the same in her Written Submissions. This amounted to ambush as she had not set out her case in full in the said Affidavit at the first instance. Be that as it may, the 1st Defendant spent considerable time detailing which Statutory Notices it served the Plaintiff with.
20. The court perused the 1st Defendant's Replying Affidavit and noted that there was a Statutory Notice under Section 90 of the *Land Act* dated 18th December 2019. The same was marked as Exhibit WW 5(a). The same was sent to the Plaintiff, as a Chargor and Borrower.
21. The said letter stated in part:-

“You have breached various express and/or implied covenants under the Charge through defaulting in payment of instalment and you are now indebted to the Chargee in the sum of...(Kshs 3,833,654.66) as at 18th December 2019 being the amount required to rectify the default in respect of the financial accommodation granted to you by the Chargee and which sum continues to accrue interest at the contractual rates until payment in full....

Take notice that you are required to rectify the aforementioned default and that if the said sum of Kshs 3,833,654.66 being the total outstanding as at 18th December 2019 together with accruing interest thereon and attendant charges are not paid by yourself within three (3) months from the date of service of this notice... proceed to sell the above mentioned property by way of private contract at market value or public auction...”

22. Section 90 of the said *Land Act* Cap 280 (Laws of Kenya) provides as follows:-

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 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 at to rectify the default and the time, not being less than two months, by the end of which the default must have been rectified;
 - d. the consequence 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.
23. It was evident that the Statutory Notice dated 18th December 2019 indicated the nature and extent of default and the amount of monies that were to be paid to rectify the default. The ninety (90) days’ notice was to lapse on 18th March 2020. It appeared that the Plaintiff did not rectify the default leading to the 1st Defendant issuing a forty (40) days’ notice pursuant to Section 90 (2) of the [Land Act](#).
24. A perusal of the said 40 day’s Notice to Sell dated 13th October 2020 was also addressed to the Plaintiff. It stated in part:-

“.. which amount continues to accrue interest at the contractual rate until payment in full.
We thus hereby issue a 40 Days’ Notice To Sell the above Charged property”
25. The 2nd Defendant also issued the Plaintiff the forty five (45) days’ Redemption Notice dated 18th January 2021 giving notice of the advertisement of the sale on 8th March 2021 and the sale of the subject property by way of public auction on 25th March 2021 at Kisumu Town outside the main Post Office at 12.00 pm.
26. The said Redemption Notice was issued pursuant to Rule 15(d) of the [Auctioneers Rules](#), 1997 that stipulates that:-

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



27. Notably, the Plaintiff did not aver that the postal address where all the Statutory Notices were sent was not hers or that it was incorrect. Her postal address in the Loan Application Form, Legal Charge and her Supporting Affidavit was given as P.O. Box Number 102264 00100 Nairobi. This court was thus satisfied that the Plaintiff was duly served with all the Statutory Notices by the 1st Defendant and that the same complied with the provisions of the law.
28. This court had due regard to the case of *Giella v Cassman Brown* (1973) EA 360 that set out the conditions that must be met before an applicant could be granted an interlocutory injunction. These were as follows that an applicant must show:-
- a. That he had demonstrated a prima facie case with a probability of success.
 - b. That he would suffer irreparable injury, which could not adequately be compensated by an award of damages if the interlocutory injunction is not granted.
 - c. That if the court was in doubt, it would decide an application on the balance of convenience.”
29. This court noted that once the 1st Defendant served the Plaintiff with valid and competent Statutory Notices, its right of statutory power of sale had crystallised and it could sell the subject property. The Plaintiff could not purport that she would suffer irreparable loss and damage merely because her right of redemption was extinguished. The 1st Defendant had a right to foreclose the subject property, which action was not malicious. It was its right under the contract it entered into with the Plaintiff herein.
30. It is worthy of note that the Plaintiff was not disputing the debt. She was merely seeking that the court grants her application to pay the loan facility through monthly instalments of KShs 60,000/=. The court could not grant such an order as that would amount to re-writing the contract between her and the 1st Defendant herein.
31. This court found and held that the Plaintiff had therefore not demonstrated that she had a prima facie case with probability of success. The question of her suffering irreparable loss in the event the interlocutory evidence was not granted was immaterial as she had admitted owing the 1st Defendant the outstanding sum.
32. The balance of convenience lay in this court not granting an interlocutory injunction to allow the 1st Defendant realise its security which the Plaintiff had willingly and voluntarily given to secure the loan. The subject property was a commodity for sale and hence this court could not restrain the 1st Defendant from exercising its right under the contract between it and the Plaintiff herein.
33. It had taken about one (1) year nine (9) months before this matter could be concluded. The matter was transferred from the Environment and Land Court where it was initially filed and took a considerable length of time before it was placed before this court for the writing of the Ruling herein. It is hoped that the Plaintiff has taken advantage of the length of time the present application has taken to be determined to re-organise herself to repay the loan as that appeared to have been the basis of said application. Beyond that, this court could not be of assistance to her as this court’s hands were tied by her contract with the 1st Defendant herein.



Disposition

34. For the foregoing reasons, the upshot of this court's ruling was that the Plaintiff's Notice of Motion application dated 18th May 2021 and filed on 20th May 2021 was not merited and the same be and is hereby dismissed with costs to the 1st Defendant.
35. For the avoidance of doubt, the orders that were issued by Olao J on 8th June 2021 be and are hereby discharged and/or vacated.
36. It is so ordered.

DATED AND SIGNED AT KISUMU THIS 23RD DAY OF FEBRUARY 2023.

J. KAMAU

JUDGE

