



REPUBLIC OF KENYA



KENYA LAW
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Heshimart Enterprises v Rafiki Microfinance Bank & another (Civil Case 59 of 2018) [2023] KEHC 27070 (KLR) (20 December 2023) (Judgment)

Neutral citation: [2023] KEHC 27070 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL CASE 59 OF 2018
RN NYAKUNDI, J
DECEMBER 20, 2023**

BETWEEN

HESHIMART ENTERPRISES PLAINTIFF

AND

RAFIKI MICROFINANCE BANK 1ST DEFENDANT

IMMEDIATE AUCTIONEERS 2ND DEFENDANT

JUDGMENT

Coram: Before Justice R. Nyakundi

Mathai Maina & Co Advocates

Odhiambo for the Respondent

1. The Plaintiff instituted this suit vide a plaint dated 16th November 2016 seeking the following orders;
 - a. A declaration that the acts of the Defendant in seeking to exercise the chargee statutory power of sale are unlawful.
 - b. A permanent injunction restraining the Defendant whether by itself or its servants and or agents from alienating, advertising for sale, offering for sale, selling, taking possession of, leasing, transferring, or otherwise disposing off the whole of land parcel known as Sergoit/ koiwotai Block 11/371.
 - c. Costs of this suit.
 - d. Any other relief this Honourable Court may deem fit and just to grant.



2. This suit had initially been filed in the Environment and Land Court as ELC Case no. 340 of 2016 before being transferred to the High Court as the ELC court did not have jurisdiction to entertain the suit.

Plaintiff' Case

3. The Plaintiff's case is that it is the registered owner of that parcel of land known as Sergoit/koiwotai Block 11/371. It had guaranteed a loan advanced to Robert Karanja trading as Smarty Enterprises By Rafiki Micro Finance Bank, and as a result charged land parcel No Sergoit/koiwoptai Block 11/371. The principal borrower defaulted in repayment of the loan and the 1st Defendant engaged the 2nd Defendant, Immediate Auctioneers in advertising the Plaintiff's property for sale through a public auction which was to be held on 29th November. The Plaintiff's issue before this court is whether the Defendants properly exercised the chargee statutory power of sale.
4. The Plaintiff urged that before exercising the statutory power of sale, the bank is required to issue a 90-day notice in writing under section 90(1) of the Land Act. The notice must state the nature and extent of the default by the chargor and if the default consists of the non-payment of any money due under the charge, it must state 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. The notice must also state 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 the section, including sale of the property, in accordance with the procedures provided. The notice must also state the right of the chargor to apply to the court for relief in respect of certain remedies.
5. Counsel for the Plaintiff cited the case of *Martha Khayanga Simiyu v Housing Finance Co. of Kenya & 2 others* and urged that it is clear that 90-days' notice is a prerequisite for the exercise of the Chargee's remedies including the power of sale and, it must be served on the chargor in order to give him or her the opportunity to remedy the breach or otherwise redeem the property as security. The Bank herein issued no statutory notice to the Plaintiff and therefore its right of statutory power of sale has not accrued since it did not comply with section 90 of the Land Act. Further, that it also did not issue a 40-day notification of sale under section 96 of the Land Act. During cross examination, it was agreed by the Defendant's witness that it was not possible to ascertain that the Plaintiff was served with the statutory notice under section 90 since the certificate of postage was very faint and the address of the recipient was not visible.
6. It is the Plaintiff's case that it is therefore not enough for the 1st Defendant to claim that he issued the notice yet there is nothing to show that indeed the notice was issued and to which address it was sent to. Apart from issuing a statutory notice of sale, the chargee has to advertise the property at the end of the statutory period for redemption of the property. Counsel cited the provisions of section 98 of the land Act and submitted that the chargee had the duty to serve upon the chargor with 90 days statutory notice before exercising the right to statutory power of sale. In the present case, the chargee did not comply with this requirement making his actions to exercise the right to sale improper.
7. The Plaintiff urged that if we were to proceed under the presumption that the above stated notice was served, the chargee was still under the obligation to issue to the chargor a redemption notice as per the provisions of Section 96(2) of the Land Act. He urged that the Defendants failed to comply with the provisions of Rule 15 of the Auctioneers Act in that the 1st Defendant failed to issue the notice required under section 96 of the Land Act and, the 2nd Defendant proceeded to advertise the suit property for public auction prematurely before the end of the statutory period for redemption.



8. It is the Plaintiff's case that that a chargor must, at all times have the right to redeem the property and in the absence of notices informing the chargor of default, it would be much easier for an unscrupulous chargee to rid the chargor of the equity of redemption. The Plaintiff was denied the opportunity to redeem the property because of the failure to issue and serve her with the statutory notices and furthermore, the chargee did not inform the Plaintiff the amount it required to remedy the default. Counsel cited Section 102 of the Land Act and submitted that under section 97(2) of the Land Act, the Defendant ought to have ensured that a forced sale valuation is undertaken by a valuer before exercising the right of sale but they failed to do so. Should the forced sale proceed without having valuation done, the Plaintiff will suffer irreparably because the forced sale value will not be reflective of the actual value of the property and will only benefit the Defendant bank and the auctioneers to the Plaintiff's detriment. He urged the court to allow the prayers of the Plaintiff.

1st Defendant's case

9. Learned counsel for the Defendant submitted that on its part it produced the 40 days' notice which was addressed to the Borrower and copied to the Plaintiff. Although the 1st Defendant attached the certificate of postage as Exhibit 7, it admitted that the same is faint. Counsel invited this court to note that the said notice was addressed to the Plaintiff's postal address provided by the Plaintiff in the charge documents. The Plaintiff also confirmed that the said address belonged to the company and it was the same address to which the 90 days' notice was sent. Counsel cited the case of Emrre Global Investors Ltd v Housing Finance Company of Kenya Ltd & 2 others [2014] eKLR and submitted that even though the 1st Defendant did not issue the Plaintiff and the Borrower with all the requisite notices, this should not be a reason to deny the 1st Defendant its right of recovery of the loan arrears. Further, that this court has the discretion to direct the 1st Defendant to follow procedure; issue the requisite notices and value the property then proceed with the recovery process, if the loan is not serviced.
10. The 1st Defendant submitted that the Plaintiff testified that after receipt of the 90 days' notice he wrote a letter dated 16th September, 2022 stating his commitment to repay the loan on behalf of the Borrower. In the said letter he informed the 1st Defendant that he had a parcel of land known as Uasin-Gishu Kimumu Scheme 1695 which he intended to sell and that he would settle the loan owed to the 1st Defendant by the Borrower using the proceeds of that sale. The property was never sold. Instead, the Plaintiff moved to court and filed this suit. He obtained an order of temporary injunction vide a ruling delivered on 11th May 2018 and since then no attempt was made by him as guarantor or by the Borrower at servicing the loan. It is therefore evident that the Plaintiff and the Borrower were in breach of the loan agreement by failing to service the loan and rather than settling what is duly owed to the 1st Defendant, the Plaintiff moved to this court in an attempt to gain an advantage over the 1st Defendant while relying on this breach. The Plaintiff is evidently relying on his own wrong and omissions to try and invalidate the 1st Defendant's right to recover what is rightfully owing to it. The Plaintiff has come before this court with unclean hands and he is undeserving of the orders he seeks. In support of these submissions, the Defendant cited the case of Alghussein Establishment v Eton College (1991) 1AII HR 267 quoted in Imperial Health Sciences Kenya Limited v Wiseway Freighters Limited [2018] eKLR.
11. The Defendant submitted that the failure to issue all the requisite notice should not be the reason why it is denied the right of recover the loan arrears. The Plaintiff was aware of the default and the letter he wrote to the 1st Defendant on 16th September, 2016 confirms that he was aware of the default. Save for issuing the 45 days' redemption notice and the Notification of sale, there was no other default on the part of the 1st Defendant. The justice of this case demands that the 1st Defendant be allowed to rectify the anomaly and proceed with the sale if the loan continues to be in arrears. The Plaintiff will suffer no prejudice if the suit property is sold as he was aware that in the event of default by the Borrower, the



property would be sold to recover the loan arrears. Clause 10 of the Charge expressly stated that in the event of default, the 1st Defendant would sell the suit property to recover the amount due.

12. The Defendant urged that the Plaintiff has not denied that he executed the charge documents. He therefore voluntarily executed the same and he agreed to be bound by the terms thereof. It is thus clear that the Plaintiff understood the terms of the documents and his obligations thereunder. It cited the case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* (2003) eKLR in support of this submission. It is evident that the Plaintiff and the Borrower are in breach of the Letter of Offer and the Charge documents. The Plaintiff is therefore not entitled to the orders he seeks as he continues to be on breach of the letter of offer. The 1st Defendant granted the loan facility to the Borrower in 2014 and 8 years later the loan has not been repaid yet the lifetime of the loan was for a period of 3 years. No effort has been made towards servicing of the loan since this suit was filed in 2016 and the 1st Defendant continues to suffer loss. The loan continues to accrue interest and unless the 1st Defendant is allowed to recover the amount due, the loan amount might outstrip the value of the property exposing the 1st Defendant to further irrecoverable loss.
13. The 1st Defendant urged this court not to grant the orders sought by the Plaintiff at the expense of the 1st Defendant. The 1st Defendant had sufficient reason to commence the process of sale of the suit property as the right to sell had crystallized but only fell short of issuing all the requisite notices. It therefore prays that the 1st Defendant be allowed to proceed with the process of sale upon issuance of all the notices and conducting a valuation of the property.

Analysis & Determination

14. Upon considering the pleadings, responses thereto and the submissions tendered by the parties, the following issues arise for determination;
 - a. Whether the 1st Defendant's Statutory Power of Sale was exercised legally
 - b. Whether the prayers issued should be granted

Whether the 1st Defendant's Statutory Power of Sale was exercised legally

15. In order to determine whether the 1st defendant's statutory power of sale was exercised legally, it must first be determined that it accrued. Statutory power of sale is a remedy to a chargee when a chargor defaults on an obligation arising from a charge. The defendant produced, as exhibit 1, the letter of offer dated 10th November 2014 wherein the 1st defendant advanced a loan of Kshs. 7,000,000/- to Robert Karanja Mwaura who was trading as Smarty enterprises. The loan was secured by a legal charge over property title no. Sergoit/Koiwoptai Block 11/ wherein the chargor was to pay instalments of Kshs. 263,726/ in thirty-six months. By virtue of the charge and the deed of guarantee and indemnity both dated 24th December 2014, the Plaintiff agreed to be the guarantor to the chargor.
16. The 1st defendant produced bank statements on the loan account and urged that there were arrears pending which the plaintiff has not settled to date. From the plaintiff's submissions, I note that the existence of the debt is not disputed, what is disputed is the exercise of statutory power of sale. Section 90 of the *Land Act*, 2012 provides that:
 - (1) If a Chargor is in default of an obligation, fails to pay interests 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 sub-section(1) shall adequately inform the recipient of the following matters:-
- a) The nature and extent of 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 payments 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 Chargee, 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 consequences 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.
17. Upon issuing a notice under section 90(1) of the *Land Act* and upon the expiry of the statutory period, the chargee can exercise power of sale under section 96(1) of the *Land Act* which provides;
- (1) Where a chargor is in default of the obligations under a charge and remains in default at the expiry of the time provided for the rectification of that default in the notice served on the chargor under section 90 (1), a chargee may exercise the power to sell the charged land.
 - (2) 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.
18. In its list of documents, the 1st defendant produced a notice dated 4th may 2015 to the plaintiff demanding payment of the arrears of Kshs. 195,000/-. It then issued a notice dated 17th may 2016 to the chargor seeking payment of arrears amounting to Kshs. 4,811,137.20. The 1st defendant then issued a notice under section 96 on 23rd September 2016 to the chargor. By virtue of the deed of indemnity, the guarantor has obligations towards settlement of arrears by the chargor.
19. It is not in doubt that the Plaintiff is a guarantor to the borrower. The guarantee was in a form of a charge over the suit property. In my understanding, the law is that a guarantee is a separate and distinct contract from the borrower's contract. The guarantee is, therefore, enforceable as such. Except, however, the guarantor who has given its land as guarantee and a charge has been registered also enjoys the protections offered to a chargor under the Land Act. The principal debtor should be served with the requisite statutory notice to remedy any default within 90 days, and he should be fully informed of the acts needed to remedy the default and his right to apply for relief. The notice must fully comply with section 90(1) of the *Land Act*. The legal obligation of the guarantor to a mortgagee and mortgagor



contract is well stated in the case of *Ebony Development Company Ltd v Standard Chartered Bank Ltd* (2008) eKLR where the court held:

“The obligation of a guarantor is clear. It (*sic*) becomes liable upon default by principal debt it is not guarantor to see to it that the borrower complies with his contractual obligation but to pay on demand the guaranteed sum.”

20. It is on the basis of the foregoing principles that learned Authors in *Halsbury's Laws of England* 4th Edition Vo.20 Paragraph 194 puts the obligation of a Guarantor clearly and succinctly as follows:

“On the default of the principal debtor causing loss to the creditors, the guarantor is a part from special stipulation immediately liable to the full extent to his obligation, without being entitled to require either notice of the default or previous recourse against the principal.”

21. The 1st defendant produced certificates of postage in their list of documents which certificates indicative of service within the requirements of the law. There is no prima facie rebuttal evidence as to the instruments variedly generated to effectuate procedural protocols under the *land Act*. It is not the duty of the court to undertake a forensic audit of the certificate of postage as alluded to by the Plaintiff. Consequently, prove of service of the requisite notices is not on a standard of beyond reasonable doubt. I am satisfied that the 1st defendant has brought himself within the principles enunciated by the court of appeal. The Court of Appeal in the case of *Obel Omuom v Kenya Commercial Bank Ltd*, Court of Appeal at Kisumu, Civil Appeal No. 148 of 1995 (1996) eKLR when confronted with a similar issue, opined that:

That burden is not in any manner on the chargor. Once the chargor alleges non-receipt of the statutory notice it is for the chargee to prove that such notice was in fact sent..... It would have been a very simple exercise for the bank to produce a slip or slips showing proof of posting of the registered letter or letters containing statutory notice or notices.

22. The plaintiff's main dispute is on the exercise of statutory power of sale and not the crystallization. In the circumstances, The legal effect of a guarantee is provided for in the text *Legal problems of Credit and Security* London Sweet & Mawel 1982, Professor, R.MGoode at pages 62 to 63, which reads as follows :

“[A]n accessory contract, not a primary contract. That is to say, the surety's obligations are coterminous with those of the principal debtor, his liability does not arise until the principal debtor has made default, and anything which nullifies, reduces or extinguishes the liability of the principal debtor has the same effect on the liability of the surety... The typical guarantee is a unilateral contract, i.e. there is a promise by one party only, the surety. The creditor does not usually undertake to the surety that he will make an advance to the debtor; it is merely agreed that if the creditor makes an advance, the surety guarantees repayment.”

23. What do I make of all these arguments and the evidence as presented by the parties. In my opinion the authorities which we have been able to examine establish that for the purposes of any suit or application to restrain the exercise of the mortgagees statutory powers of sale, generally nothing short of actual payment of the debt is ever regarded a sufficient to extinguish a mortgagee debt. If the loan amount has not been settled together with the agreed interests the court will not at any rate purport to exercise discretion to deprive the mortgagee of the benefit of its security. The only condition precedents are those set out in the *land Act* of 2012 as to the various legal procedures to be adhered to by the mortgagee in realising the security. The only exceptions to this rule include the following:



1. Where the amount claimed by the mortgagee is plainly wrong
 2. Where there is doubt as to the existence of the power of sale of doubt as to whether it has become exercisable at all
 3. Where the validity of the mortgage is being challenged
24. There is always a distinction between what I call an ordinary case which basically shows prima facie evidence that the statutory power of sale had ripened and that which the power of sale exercisable by the mortgagee is in question. The present case before me as canvassed by the plaintiff seems to challenge the 1st defendant on the validity of the instruments generated to realise the security. This being the case I have discussed the emerging issues as they relate to the mortgagor and mortgagee contract as between the plaintiff and the 1st defendant. The proceedings involve an attack upon the enforceability of the security documents of title conveyed to the first defendant to secure the debt in question. In my opinion, there may be lapses here and there in meeting the threshold of the requirements of the statutory power of sale. But it all boils down to one central question whether the amount of the mortgage debt is due and owing and is not disputed as claimed by the mortgagee. This is what is at the heart of the mortgagor mortgagee contract. It is essential that the principal debtor and the guarantor don't dwell on the tension between them to challenge the mortgagees power of sale unless the justiciable issue falls within the exception described above. I think it's fair to state that the obligations of the guarantor falls squarely due and owing to the mortgagee upon default of the loan amount. However the facts before me and on conceiving the interlocking issues as between the plaintiff and the 1st defendant I find nothing which constitutes bad faith. I echo the dicta in *Downsview Nominees Ltd v First City Corporation* (Corporation (1993) AC 295 instructive. At Page 312 Lord Templeman stated:

“Several centuries ago equity evolved principles for the enforcement of mortgages and the protection of borrowers. The most basic principles were, first, that a mortgage is security for the repayment of a debt and, secondly, that a security for repayment of a debt is only a mortgage. From these principles flowed two rules, first, that powers conferred on a mortgagee must be exercised in good faith for the purpose of obtaining repayment and secondly that, subject to the first rule, powers conferred on a mortgagee may be exercised although the consequences may be disadvantageous to the borrower. These principles and rules apply also to a receiver and manager appointed by the mortgagee.” [my emphasis] [49]

His lordship went further at page 315: - - 15 -

“If a mortgagee exercises his power of sale in good faith for the purpose of protecting his security, he is not liable to the mortgagor even though he might have obtained a higher price and even though the terms might be regarded as disadvantageous to the mortgagor. *Cuckmere Brick Co. Ltd. v. Mutual Finance Ltd.* [1971] Ch. 949 is Court of Appeal authority for the proposition that, if the mortgagee decides to sell, he must take reasonable care to obtain a proper price but is no authority for any wider proposition.”

25. In my judgement the documents before me contain unchallenged evidence of the plaintiff's relationship and dealings with the 1st Defendant. I have also on record substantial evidence to support that the mortgage amount is outstanding and due the default notice issued within the requirements of the [land Act](#). However, on this procedural issues I take the position that the governing principle be that of exercising discretion to the effect of having the 1st Defendant re-issue all the instrument in the measure of invoking the statutory power of sale to realize the security herein by virtue of the terms in the mortgage contract. The costs of this suit be awarded in favour of the 1st Defendant.



DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 20TH DAY OF DECEMBER 2023
IN THE PRESENCE OF
R. NYAKUNDI
JUDGE

