



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT VOI

CIVIL APPEAL NO.E022 OF 2021

WILSTONE MDINDI MWAWUGUNGA.....APPELLANT/APPLICANT

VERSUS

KENYA WOMEN MICROFINACE BANK PLC.....RESPONDENT

(Being an appeal from the ruling of hon. C. Kithinji (PM) Delivered on the 7th April 2021 in Voi PM's Court Civil Case No. E063 of 2020)

RULING

1. On 18th October 2017, the applicant herein with the consent of his wife took a loan facility to the tune of kshs 3,668.339.20 from the respondent upon depositing their title deed in respect of L.R.NumberWerugha/Werugha/1656 as security. They duly executed a charge in favour of the respondent as the chargee. After paying part of the loan, the applicant started defaulting in repayment sometime 2019. As a consequence, the respondent decided to realize the amount due by exercising their statutory right of sale after various notices for repayment were ignored on grounds of inability to pay owing to poor economic conditions occasioned by covid-19.

2. Consequently, the respondent instructed auctioneers to commence the process of advertisement. The auctioneers proceeded as instructed by serving the mandatory sale notice upon the applicant's son. Before the said sale could be executed, the applicant on 21st December 2020 filed a suit challenging the said sale on grounds that the mandatory notice was not served on him personally; that the consequences of defaulting in repayment of the loan were not explained to him before an advocate and that the property in question constitutes matrimonial property which cannot be sold pursuant to Sections 105 and 106 of the Land Act.

3. Contemporaneously filed with the said suit was an application for injunction seeking an order restraining the said sale pending the hearing and determination of the pending suit. After hearing the said application, the trial court dismissed the same on grounds that; the applicant had not established a prima facie case; there was no proof of irreparable damage likely to be suffered if the order sought was not granted and, that on a balance of convenience, justice did tilt in favour of the respondent.

4. Aggrieved by the said ruling, the appellant filed an appeal before this court citing eight grounds. Further, the applicant filed a notice of motion dated 9th June 2021 expressed to be filed under Section 1A&3A of the Civil Procedure Act and Order 42 rule 6 of the Civil Procedure rules seeking;

a) Spent

b) That pending the inter partes hearing of the application filed, this hon.court do exercise of its appellate jurisdiction issue an order restraining the respondent by itself, agents or otherwise howsoever from processing and/or in any way disposing by public auction property Werugha/werugha/1656.

c) That this honourable court issue an order of injunction restraining the respondent by itself, agents, or otherwise howsoever from selling and /or in any way disposing by public auction property Werugha/Werugha/1656 pending hearing and disposal of the appeal intended from the order of the magistrate's court dated 7th April 2021

d) That there be an order for costs of this application

5. The application is premised upon grounds stated on the face of it and averments contained in the affidavit in support sworn by the applicant in which he reiterated grounds that; he was not served with the statutory notice of sale of the subject security; the subject property constitutes matrimonial property and that the charge was not executed before an independent advocate. That the appeal raises arguable grounds of appeal with high chances of success hence likely to be rendered nugatory should the court refuse to grant the orders sought.

6. In response, the respondent filed a replying affidavit on 14th June 2021 stating that auctioneer's notice was duly issued and served through his son a process recognized in law and that the sale process complied with all provisions of the law. It was further averred that if matrimonial property is offered as security, it becomes a commodity of trade capable of sale and transfer hence the applicant cannot evade paying the loan while hiding behind the reference of security as matrimonial property. That the applicant's attempt to re-open and rewrite the contract is untenable in law as the existing contract is binding.

7. The respondent further stated that the appeal lacks merit and that there is no proof that the respondent a reputable lending institution will not be able to compensate the applicant should his appeal or suit before the lower court succeed.

8. In his rejoinder, the applicant filed a further affidavit sworn on 22nd June 2021 stating that a contract can be re-opened and re-written if there are good grounds just like in this case. He insisted that it is unlawful to subject matrimonial property to statutory right of sale. He further averred that his attempt to secure a loan from KCB to off-set the respondent's loan has been thwarted by the respondent's refusal to release the title deed to be deposited with KCB. When the matter came up for hearing, parties agreed to dispose the same by way of written submissions

Appellant's submissions

9. In his submission for the applicant, Moses Mwakisha and Company Advocates filed their submissions on 23rd July 2021 reiterating the grounds and averments contained in the affidavit in support of the application. The applicant went ahead to argue his application seeking stay of execution under order 42 rule 6 of the CPRS. Learned counsel submitted that the applicant is likely to suffer substantial loss should an order for stay be denied. He further submitted that the applicant is desirous of furnishing security for the due performance of the decree or order.

10. It was counsel's submission that the prayer for injunction under the court of appeal rule 5(2)(b) is intended to maintain the status quo so as to preserve the property in question. It was contended that failure to serve the statutory notice of sale at the applicant's residence was contrary to the Auctioneer's rules of 2007. That service upon his son was unlawful hence irregular. To support that position, counsel referred to the holding in the case of **Laban Toni Mbololo v First community bank Mombasa High Court civil case no. 22 of 2016** where the court found improper service of notice of sale as a ground to halt sale of security charged hence a prima facie case to stop the said sale.

11. The court was further referred to the case of **Aikman v Muchoki(1982)e KLR and Joseph Gichanga v Cooperative bank limited(2006) e KLR** where both courts held that courts have a duty to intervene where there was clear breach of the law and it matters not whether monetary compensation is available. As to deposition of security, counsel contended that the deposited security is sufficient.

Respondent's submissions

12. Through the firm of Onyango Ameyo and company advocates, the respondent filed their submissions on 23rd June 2021 thus adopting averments alluded to in their replying affidavit. Counsel submitted on three issues namely; whether the honourable court can grant an injunction as sought; whether there are good grounds to re-draw the parties' contract and re-open the charge, and, whether the applicant should deposit security.

13. It was counsel's contention that the application is brought under wrong provisions of the law given that order 42 rule 6 of the CPRS deals with stay of execution which is not one of the prayers in the application.

14. As regards the prayer for injunction, counsel submitted that the principles set out in **Giella v Casman Brown (1973) E.A 358 and Mrao Ltd v First American Bank of Kenya & 2others(2003)KLR** have not been satisfied to the extent that; there was no proof of a prima facie case with probability of success; the possibility of suffering irreparable damage which is not capable of monetary compensation has not been established and, that on a balance of convenience, justice tilts in his favour.

15. On service of requisite statutory notices, counsel submitted that three notices were served as evidenced in the respondent's replying affidavit to the application before the trial court and marked as annexures BK5i-Bk5iii, BK6i-BK6iii and BK6. That service of notice of sale by the auctioneer was served upon his son as a family member pursuant to rule 15 of the auctioneer's rules 2007.

16. Counsel contended that service of the initial two notices through the known given address was sufficient as was held in the case of **Emmre Global investors Ltd vs Housing Finance Company of Kenya Ltd & 2others (2014)e KLR**. As regards execution of the charge before an advocate, it was argued that the applicant duly presented a charge(BK3) as an exhibit showing that he had appeared before an independent advocate hence a legal and valid charge in conformity with the holding in the case of **Jopa Villa LLC v Overseas Private investment&2others(2009)e KLR**.

17. Learned counsel opined that the applicant is not honest having admitted defaulting repayment but lied on the reasons for defaulting hence not entitled to an equitable remedy. In support of that proposition, counsel referred to the holding in the case of **Kyangaro vs Kenya Commercial Bank Ltd & another (2004)1KLR126** where the court held that he who seeks equity must come to court with clean hands.

18. Concerning irreparable loss, counsel contended that the respondent is capable of compensating the applicant in case he succeeds as the property is quantifiable and has a known value after it was valued before being deposited as security. To buttress this proposition, the court was referred to the decision in the case of **Andrew Muruiki Wanjohi v Equity Building Society Ltd & 2others(2006)e KLR** where the court held that security deposited as a charge is quantifiable and can adequately be compensated in monetary terms

19. On the aspect of the subject property being a matrimonial home, counsel urged that, by furnishing that property as security, he converted it into a commercial commodity capable of being sold. The court was referred to several authorities where various courts dismissed the

allegation that matrimonial property deposited as security cannot be sold in realization of the outstanding loan. Among such cases is the case of **Jimmy Wafula Simiyu vs Fidelity Bank LTD (2014)e KLR and Julius Mainye Anyega vs Eco Bank Limited(2014)e KLR.**

20. Regarding the balance of convenience, counsel opined that it tilts in favour of the respondent. On the question of re-opening the charge and re-drawing the same under Section 1005 and 106 of the Land Act, counsel submitted that there is a legal contract which is binding hence enforceable. On depositing security, counsel opined that it was not necessary, as the applicant does not deny the amount due and owing. That in the event the court is inclined to allow the application, then the full outstanding amount should be deposited.

Analysis and determination

21. I have considered the application herein, response thereto and submissions by both counsel. The only issue that emerge for determination is whether the applicant has met the threshold for grant of injunction pending appeal. Before I endeavour to address the key issue, I would like to comment on two aspects. Firstly, there is the question raised by the respondent concerning the applicability of Order 42 rule 6 of the CPRS which relates to stay of execution pending appeal. It is clear from the pleadings that there is no prayer for stay.

22. The aspect of stay has been introduced through submissions by the applicant. It is trite that a case cannot be pleaded through submissions. See **Galaxy Paints Ltd v Falcon guards Ltd (2000)2E.A. 385** for the proposition that issues for determination generally flow from the pleadings. Equally, in the case of **Anthony Francis Wareham and others v Kenya Post office Savings Bank CA5 &48 of 2002(UR)** the court held that a court cannot make a finding or order or issue a relief which is not pleaded. Since no prayer for stay was pleaded nor sought, the same cannot issue.

23. The second aspect is the question raised by the respondent that the applicant sought an injunction under O42 rule 6 of the CPRS which is a wrong provision dealing with stay of execution. Basically, what is being challenged is want of form. However, from the prayers sought and generally the pleadings, the substantive prayer is an injunction pending appeal. Failure to specify the correct provision or rather citing the wrong provision is not perse fatal. See **Boyes vs Gathure(169)E.A 385** where it was held that the issue of wrong procedure did not invalidate the proceedings because it did not go to the jurisdiction of the court and no prejudice was suffered as a result. To that extent, it is my finding that a mere procedural technicality which does not substantially affect the core of the suit is not aground to dismiss the application

24. I will now turn to the real issue in controversy that is; whether the learned magistrate properly dismissed the application for injunction and whether the applicant was prejudiced as a consequence. In the celebrated case of **Giella v Cassman Brown (supra)**, the principles governing issuance of injunctive orders were settled as; proof of a prima facie case with a probability of success; likelihood that the applicant will suffer irreparable damage which cannot be compensated in monetary terms; balance of convenience with the scales of justice tilting in favour of the applicant and, for any other sufficient cause.

25. The burden therefore lies with the applicant to establish existence of those ingredients. However, the court has the discretion to grant such orders or refuse after due consideration. It is therefore not automatic that by merely filing a suit the orders must issue as of right. I am nevertheless alive to the fact that a court seized of those powers must act judicially and not arbitrarily. This position was held **in Madhupaper international limited v Kerr (1985) KLR**

26. In the instant case, the applicant pegged his case on four substantive grounds namely; necessary statutory notices before sale were not issued and in particular, the auctioneer's notice of sale; the charge was not signed before an independent advocate; Matrimonial property cannot be sold and, that the contract can be re-opened and be drawn afresh under section 105 and 106 of the Land Act.

27. Concerning service of mandatory statutory notices of sale, the applicant annexed three notices in his replying affidavit before the lower court. The first two notices were served through the address provided by the applicant. This fact was not disputed. The main objection is service of auctioneer's notice upon his son instead of him contrary to Auctioneer's rules of 2007. However, it is the same auctioneer's rules at rule 15 which recognizes service on the registered owner of the property or an adult member of his family. In this case the applicant admits service of notice was effected through his son. Accordingly, the notice was effectively and properly served in accordance with the law.

28. As to whether the applicant signed the subject charge before an independent advocate, the charge submitted by himself is clear that he did appear before an advocate and executed a charge. I don't understand the prejudice suffered by the applicant appearing voluntarily before an advocate for attestation of the charge. Why now and not before notice for sale was issued or before receiving the loan. He was not coerced to execute the charge which after due execution and registration is legal and binding hence cannot be withdrawn at his whims. See **Eric Jean Daniel Stolz & Another vs Mohamed Jaffer H.C.C.No. 26 of 2004 (Milimani)**. For those reasons, I find this to be an afterthought hence aground lacking merit.

29. As Concerns sale of matrimonial property, the appellant quoted various authorities hereinabove referred to in his submissions all of which were determined before the enactment of the land Act. The position then was that matrimonial property could not be sold for lack of consent of a spouse. With the Land Act in place consent of a spouse was made mandatory. In this case spousal consent was sought and duly granted with his wife signing the charge document a fact that is not disputed. What was the objective of the applicant in knowingly subjecting his matrimonial property to the risk of sale in case of defaulting? was it a case of trying to obtain funds from the bank through false pretences? I dare add that choices have consequences. By charging their matrimonial property willingly, the applicant and his family in this case the wife lifted the protection veil and therefore converted the property into a trading commodity.

30. If courts were to entertain defaulters to escape liability on ground that matrimonial property cannot be sold after defaulting, banks will have to close down shop. There is no free man in the bank. Money in the banks belong to investors who are in business the same way the applicant obtained a loan to enhance his school business. He cannot purport to have the title deed first released to him to deposit to KCB Bank to secure another loan to repay the respondent. This is bad trading business at the expense of innocent people.

31. In the case of **Julius MainyeAnyega vs Eco Bank limited (supra)**, the court dismissed the claim that the subject security was

matrimonial property after confirming that necessary spousal consents were obtained and requisite notices of sale properly issued. The court went on to state;

“...The true position of the law on matrimonial properties is that a mortgage will not be created on such property without first obtaining the consent of the spouse. Similarly, no sale of the matrimonial property will be carried through without giving the necessary notices to the spouse or spouses of the mortgagor. These protections once availed will not prevent sale of a matrimonial home where the necessary consents have been obtained and all notices given to all parties with an interest in the matrimonial home, which is given as security for a loan or credit facility”

32. Similar position was held in the case of **Maltex Commercial Supplies Limited & Another vs Euro Bank Limited H.C.C.C. No.82 of 2006** where the court stated that, any property whether it is matrimonial or spiritual house, which is offered as security for loan/overdraft is made on the understanding that the same stands the risk of being sold by the lender if default is made on the payment of the debt secured”.

33. In view of the above quoted authorities or judicial pronouncements, it is clear that matrimonial property is no longer sacred from being sold if necessary spousal consent/s is or are obtained and mandatory notices properly issued. In the circumstances of this case, all those conditions were met hence sale of matrimonial property is not an issue any more. That ground is therefore not tenable.

34. The fourth ground is that of re-opening the Charge pursuant to section 105 and 106 of the land Act. Under Section 105 a court can re-open a charge of whatever amount secured on matrimonial property in the interest of doing justice between parties. Section 106 goes further to give guidelines for consideration in reopening or modifying the charge as follows; age , gender, experience, understanding of the commercial transaction, health of the chargor at the time when the charge was created, financial standing and the resources of the chargor relative to those of the chargee at the time of creation of the charge and the degree of risk accepted by the chargee having regard to the value of the land and the financial standing and other resources of the chargor.

35. The applicant does not deny the amount due and owing. He is even ready to deposit security if need be. The legality of the contract has not been challenged. No good reason has been given for defaulting in repayment. None of the grounds to justify re-opening of the charge has been substantiated. In my view, the discretion conferred upon the court to consider re-opening of a charge is not in the interest of justice in this case. To do so will amount to rewriting the contract a fresh yet its validity is not in question.

36. It is only in extreme cases that a court would re-open a charge if one party will suffer an injustice in execution of the contract in its current form. For those reasons I do not find any justification for re-opening the charge. Having dismissed the four grounds, it is apparent that, there is no prima facie case established with a probability of success to warrant an injunction.

37. On the question whether the applicant is likely to suffer irreparable loss which cannot be compensated in monetary terms, one can ask the question whether the property was valued and then quantified in monetary terms. There is no dispute that the property has a known and ascertainable value which is capable of monetary compensation by the respondent which is a reputable institution. In case of any possible damage caused, the same is capable of monetary compensation. This position was upheld in the case of **Andrew Muriuki Wanjohi vs Equity Building Society Ltd & 20 others (supra)**. For those reasons, that ground fails.

38. As to whether on a balance of convenience justice tilts in the applicant's favour, I do not think so. The only remedy or cure in the treatment of a debt is, repayment. It will not be in the interest of justice for a lending institution which has discharged its obligation in a contract to keep begging for its money which is a key tool in trade. Courts should not be summoned to cover the guilt where such coverage will be at the detriment of the other party. On a balance of convenience justice tilts in the respondent's favour.

39. Regarding any other sufficient cause, I see none. As to whether the appeal is arguable, the court is mindful of the fact that a party should as much as possible be allowed to pursue his appeal to its logical conclusion unless it is frivolous or hopeless. In this case I do not find any good reason to find the appeal arguable. At its best I will say the appeal is frivolous and basically seeking to delay recovery. It is intended to create more time to enable the applicant look for alternative means in this case seek a loan from another bank (KCB Bank) to repay the debt in this case. This court cannot validate this kind of game to the detriment of the respondent.

40. On the subject of depositing security, there is no decree yet in place. My advice is, let the applicant use the same money to pay the loan. Having held as above, the application for injunction is hereby dismissed and the interim orders in place lifted. I do award costs to the respondent.

Dated, signed and delivered in open court at Voi this 26th day of January 2022.

J.N.ONYIEGO

JUDGE