



**Kamanthe v SBM Bank (K) Limited & another (Environment & Land
Case E066 of 2022) [2023] KEELC 17804 (KLR) (29 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17804 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE E066 OF 2022**

CA OCHIENG, J

MAY 29, 2023

BETWEEN

MARIA KAMANTHE PLAINTIFF

AND

SBM BANK (K) LIMITED 1ST DEFENDANT

DALALI TRADERS AUCTIONEERS 2ND DEFENDANT

RULING

1. What is before Court for determination is the Plaintiff's Notice of Motion Application dated the August 23, 2022 where she sought for the following orders:-
 1. Spent.
 2. Spent.
 3. That this Honourable Court do grant a temporary injunction orders restraining the Defendants/Respondents by themselves or their agents from offering for sale or selling all that parcel of land known as Mavoko Town Block 3/30764, Kinanie Area Machakos County (hereinafter referred to as the 'suit property') by public auction on August 25, 2022 pending the hearing and determination of the application herein.
 4. That this Honourable Court do grant another similar order pending the hearing and determination of this suit independently.
 5. That the 1st Defendant be restrained whether by themselves or through their servants or agents or anybody claiming through them whatsoever from selling, transferring or dealing in any manner whatsoever with the suit properties until the determination of the Application and suit herein.



6. That this Honourable Court do order that the 1st Defendant do supply the Plaintiff with a Statement of Account on the financial facility/the loan granted to the Plaintiff from September, 2013 to December 2016 and from January, 2017 to date respectively.
7. That the cost of this Application be in the cause.
2. The Application is premised on the grounds on the face of it and the Supporting Affidavit of Maria Kamanthe. She confirms being the registered owner of land parcel number Mavoko Town Block 3/30764 hereinafter referred to as the 'suit land'. She avers that she took an asset loan with the 1st Defendant in 2013 for the purchase of two trucks KBW 310T and KBW 302T respectively. Further, the said trucks were an asset loan advanced to Magenex Investment Ltd where she was one of the Directors and they were to be used for purposes of carrying out transport business. She claims she repaid the loan faithfully without fail as per the contract until 2016 when without her knowledge the 1st Defendant (formerly Chase Bank) repossessed the trucks yet she had not defaulted in repayment. Further, that the trucks were later sold but she was not informed of the sale. She contends that she never heard from the 1st Defendant until June 2022 when she was served with a notification of sale of the suit land, by the 2nd Defendant. She explains that the suit land being auctioned is her matrimonial home and the amount claimed is an afterthought. Further, that the amount claimed is excessive with varying and unjustified interest rates, yet she has already paid the loan arrears to a tune of Kshs 10,000,000. She reiterates that the suit land being Mavoko Town Block 3/30764 was not offered as collateral for the asset loan.
3. The 1st Defendant opposed the instant Application by filing a Replying Affidavit sworn by Peter K. Chege who is its Assistant Manager, Debt Recovery. He deposes that the instant Application is frivolous, vexatious, is an abuse of court process, lacks merit and ought to be dismissed. He contends that the Applicant is a Director of Magenex Investment Company Limited that sought a hire purchase finance from the 1st Respondent to purchase trucks and the principal sum was Kshs 17,865,000 which was disbursed on the 30th October, 2013. Further, the Applicant being the legal and registered proprietor of the suit land was also granted a short term loan facility where the borrower Magenex Investment Company Limited secured a loan of Kshs 3,500,000 and used the said used land as security. He explains that as at November 7, 2022, the Applicant was in arrears of Kshs 22,614,214 which continues to attract interest. Further, that due to default the 1st Respondent repossessed two trucks and incurred expenses amounting to Kshs 966,758.45. He explains that the Applicant instituted Nairobi High Court Commercial and Admiralty Division Civil Case No 583 of 2015 Magenex Investment Ltd v Chase Bank Kenya Limited seeking to challenge the repossession of the motor vehicles. Further, during the pending of the said suit, the Applicant acknowledged the indebtedness of said Company to the 1st Respondent and parties agreed on a consent in terms of settling the debt which was Kshs 12,041,886.30 as at December 5, 2016. He reiterates that the Applicant herein and the borrower failed to settle the amount and on October 5, 2018, the aforesaid suit was dismissed for want of prosecution. He reaffirms that the Plaintiff being the registered proprietor of the suit land approached the Bank to use the Title Deed of the said land as security for a loan to be granted to a third party known as Magenex Investments Limited. Further, that a legal Charge dated March 30, 2015 was drawn to that effect for Kshs 3,500,000. He insists that interest rates were stipulated within the Charge document and failure by the Applicant to service the loan culminated in the issuance of various notices as stipulated within the law *moreso* Section 90 of the *Land Act*. Further, despite issuance of various notices including a redemption notice by the 2nd Respondent, the Applicant failed to settle the outstanding debt culminating in the issuance of the Notification of Sale indicating that the suit land would be sold by public auction on the August 25, 2022. He confirms that the notices were sent by post which the Applicant acknowledged receipt of. He avers that the suit land has been valued and the total amount of loan due is Kshs 6,658, 824.10 as at November 8, 2022. Further, the outstanding loan



for the three accounts is Kshs 29,518,098.55 which remains unpaid with interest until payment in full. He reaffirms that all due procedures and processes were duly complied with by the 1st Respondent in attempting to exercise its statutory power of sale over the charged property.

4. The Application was canvassed by way of written submissions, although the Applicant opted not file hers.

Analysis and Determination

5. Upon consideration of the instant Notice of Motion Application including the respective Affidavits, annexures and 1st Defendant's submissions, the only issue for determination is whether the Plaintiff is entitled to an interlocutory injunction restraining the 1st Defendant from selling the suit land, pending the outcome of this suit.
6. The 1st Defendant in its submissions, reiterated its averments in the Supporting Affidavit and contended that the Plaintiff had not established a prima facie case to warrant the orders of injunction as sought. It made reference to certain clauses in the Charge Document and insisted that the Directors to the Company executed the said Charge Document. Further, that various correspondence were sent to the Plaintiff informing her of the outstanding loan balance and requesting her to repay. It argued that statutory notices had been issued to the Plaintiff as required by law. To buttress its averments, it relied on the following decisions: *Naftali Ruthi Kinyua v Thuita Gachure & another* (2015) eKLR; *Giella v Cassman Brown Co. Ltd* (1973) EA 358; *American Cynamid v Ethicon Limited* (1975) AC 396; *Giro Commercial Bank Limited v Halid Hamad Mutesi* (2002) eKLR and *Humphrey Kilambo Mcharo v Kenya Commercial Bank Ltd* Civil Application No Nai 51 of 2005.
7. The principles for consideration in determining whether interim injunction can be granted or not is well settled in the case of *Giella v Cassman Brown & Co. Ltd* (1973) EA 358. In line with this principle, the Court will proceed to interrogate whether the Applicant has established a prima facie case with a probability of success at the trial.
8. The Plaintiff confirms she took an asset loan with the 1st Defendant in 2013 for the purchase of two trucks. Further, the said trucks were an asset loan advanced to Magenex Investment Ltd, where she was one of the Directors. She claims she repaid the loan faithfully without fail as per the contract until 2016 when without her knowledge the 1st Defendant (formerly Chase Bank) repossessed the trucks yet she had not defaulted in repayment. Further, that the trucks were later sold but she was not informed of the sale. She contends that the 2nd Defendant served her with a notification of sale of the suit land which is her matrimonial home. She argues that the amount claimed is excessive with varying and unjustified interest rates, yet she has already paid the loan arrears to a tune of Kshs 10,000,000.
9. The 1st Defendant explained that the Plaintiff through a company called Magenex Investment Ltd had taken out loans in three accounts and charged the suit land. Further, that she had failed to repay the loan culminating in the issuance of various notices including statutory notices.
10. Looking at the documents presented by the respective parties, I note the Plaintiff who is the registered proprietor of the suit land used her Title Deed as security for a loan to be granted to a third party known as Magenex Investment Limited. Further, a Legal Charge dated the March 30, 2015 was drawn to that effect for Kshs 3,500,000 to secure a loan with the 1st Defendant. On perusal of the contents of the Charge Document, the Plaintiff covenanted to pay the loan including the interest. At Clause 9 and 10 of the Charge Document, the Plaintiff committed that in case of default the 1st Defendant could proceed to realize the security to recover the debt. The Plaintiff claims she has repaid the loan but from the statements of accounts annexed to the Replying Affidavit, it is evident she is still in arrears of her



loan repayment. The Plaintiff has further not denied that through the company Magenex Investment Ltd in which she is a director, they instituted Nairobi High Court Commercial and Admiralty Division Civil Case No 583 of 2015 Magenex Investment Ltd v Chase Bank Kenya Limited seeking to challenge the repossession of the aforementioned motor vehicles. Further, during the pendency of the said suit, the Company, acknowledged their indebtedness, agreed to settle it but failed to do so, culminating in the suit being dismissed for want of prosecution on October 5, 2018.

11. In the case of *Andrew Muriuki Wanjobi v Equity Building Society Ltd & 2 others* [2006] eKLR, the Court held that:-

...if the 1st and 2nd Defendants were restrained from selling off the suit property, there is a very real risk that the debt may outstrip the value of the suit property as the borrower has never made any repayments. ...the stoppage of the intended sale by the chargee would result in the continued growth of the debt and thus exposing them to potentially substantial irrecoverable loss.”

See also the decisions of *Naftali Rutbi Kinyua v Thuita Gachure & another* (2015) eKLR and *Giro Commercial Bank Limited v Halid Hamad Mutesi* (2002) eKLR.

12. Based on the facts as presented while associating myself with the decisions cited above, since it has emerged that the Plaintiff is indeed in default of the loan, noting that the 1st Defendant holds the suit land as security, I opine that she failed to honour her contractual obligations as per the Charge Document and hence cannot cry foul when the 1st Defendant’s statutory power of sale has crystallized. I note she was served with the requisite notices including a Notification of Sale and to my mind nothing can stand in the way of the 1st Defendant from realizing its security. Further, once the suit land was offered as security for the Charge, it became a commodity and no amount of argument that it is matrimonial property can stop a Chargee from realizing the security in case of default.
13. In the circumstances, I find that the Plaintiff has not established a *prima facie* case to warrant the orders as sought.
14. In the foregoing, I find the notice of motion application dated the August 23, 2022 unmerited and will dismiss it with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 29TH DAY OF MAY, 2023

CHRISTINE OCHIENG

JUDGE

