



REPUBLIC OF KENYA



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**Kiplagat & another v Consolidated Bank (Civil Case 73 of 2018)  
[2022] KEHC 15470 (KLR) (18 November 2022) (Judgment)**

Neutral citation: [2022] KEHC 15470 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CIVIL CASE 73 OF 2018  
RN NYAKUNDI, J  
NOVEMBER 18, 2022**

**BETWEEN**

**ELIZABETH JEBET JERUTICH ..... 1<sup>ST</sup> PLAINTIFF**

**JAMES KIPRUTO KIPLAGAT ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**CONSOLIDATED BANK ..... DEFENDANT**

**JUDGMENT**

1. The applicants approached this court by way of Plaint dated September 10, 2015 seeking the following orders;
  - a) A permanent injunction restraining the Defendant, their agents or servants from selling or in any other manner disposing the Plaintiffs land being land parcel LR NO BARINGO/SABATIA/103/155.
  - b) Costs of this suit.
  - c) Any other relief this court may deem necessary to grant.
2. The brief facts underlying this case are that the Plaintiffs approached by one of the directors of Glory Chemist Limited, David Tanui, to guarantee a loan facility in February 2014. They acceded to the request and guaranteed the principal borrower a loan facility of Kshs 15,000,000/- using the parcel of land known as LR NO BARINGO/SABATIA/103/155 as security.
3. The Plaintiffs later came to learn that the suit land had been advertised for sale in the daily nation newspaper of September 3, 2015. They proceeded to file the present suit to protect said property.



## Plaintiffs's Case

4. The Plaintiffs' case is that they were never served with statutory notice as provided Under Section 90 of the Land Act 2012, they were also not served with the 45 days redemption notices and the notification of sale.
5. They submitted that at page 6 of the dated April 15, 2016 delivered by Justice Ombwayo, the court found as follows;  

' On the issue of notification of sale and the 45 days redemption notice, the same were sent to the address of the principle debtor not the applicants address'
6. Further, that since said ruling nothing has changed as the certificate of postage by Nyaluoyo Auctioneers the two notices above were posted to box 2133 Eldoret which address is given as the postal address of Glory Chemist Limited on the charge instrument. The Defendant did not address the issue of copies of the same documents which were left with the Plaintiffs' employees, and this is for good reason because the auctioneers knew that they had not effected good service and opted for leaving the documents with the Plaintiffs employees as an afterthought. D W1 admitted in court that the certificate of postage did not show what items were sent on October 1, 2014, the statutory notice itself is dated 24th September 2014. It will be difficult therefore to relate the statutory notice written on September 24, 2014 with the certificate of postage dated October 1, 2014. Even in the list of registered postal service packets, other than the amount charged and the postal address, there is no indication of what item was sent.
7. The Plaintiffs submitted that it would have been easier on the part of the Defendant if they effected physical service on them. The Defendant having done valuation of the land in issue and as at 2014 was an age of mobile telephone communication, nothing would have been easier on other Defendant than doing physical service on the Plaintiffs.
8. The Plaintiffs contended that even though they signed personal guarantee documents in which they have indicated their addresses as PO Box 2133 – 30100, it was upon the Defendant/the chargors to clear this issue with them on why they would indicate two addresses on the same transaction. Further, it is the Defendant's personnel who were preparing this personal guarantee documents and if they exercised due diligence they would have noticed that they had indicated a wrong address for the guarantors (the Plaintiffs), the onus cannot now shift to the Plaintiffs to explain how that mistake happened.
9. They submitted that they had proved their case on a balance of probabilities and judgment should be entered in their favour.

## Defendant's Case

10. The Defendant filed a defence dated September 28, 2015. They also filed and produced as exhibits all documents in its List of documents dated October 21, 2015 and Supplementary List of Documents dated January 28, 2020. They had a witness who testified in court and relied on his witness statement dated February 15, 2022.
11. The Defendant referred to the 90-day statutory notice dated September 25, 2014 and its Certificate of postage dated October 1, 2014. They also referred to the 40 days statutory notice dated May 18, 2016 and its certificate of postage dated May 23, 2016 as contained in the Supplementary List of Documents dated January 28, 2020 and produced as Defence exhibit 14 & 15. The said notices were addressed to the Plaintiffs' Postal address contained in the charge instrument being PO Box 827 -30100 Eldoret.



At the hearing of the suit and in their submissions, the Plaintiffs indicated that the Postal address belonged to the 1<sup>st</sup> Plaintiffs former employer and that the Defendant ought not to have served to notice through that postal address. This matter had not been Pleaded specifically in the Plaint and therefore the testimony and submissions on this issue offend the basic principle of Law that parties are bound b their Pleadings.

12. The Defendant submitted that it was right in sending the statutory notices to the said address as the Plaintiffs had not notified the Defendant of any change of his address. The purpose of the postal address being indicated in the charge instrument and the letter of guarantee was to provide parties the notice of address of each party. It therefore remained each party's duty to ensure that they complied with their obligations with regards to maintenance of the mail boxes and the Plaintiffs could not expect the Defendant to know that he had used his employers address and that he was no longer an employee as submitted. It referred the court to clause 30.5 of the charge instrument.

13. In response to the submission that there was nothing in the charge that indicated that the Defendant was to be notified of any change of postal address the Defendant relied on the case of *Peter Kinuthia Wathuo v Co-Operative Bank (K) Ltd [2013] eKLR* where Kimaru J while addressing a dispute on the address of service used to send the statutory notices stated;

' Thirdly, the Plaintiff argued that he had not been served with the requisite statutory notices. In response to this claim, the Defendant annexed copies of the statutory notices it alleged to have served the Plaintiffs before it sought to exercise its statutory power of sale. In the instrument of charge, the Plaintiffs indicated that his postal address as c/o PO Box 666, Busia. Under Clause 14 of the instrument of charge, it was agreed that any service upon the chargor would be through his last known postal address. There is no evidence that the Plaintiffs informed the Defendant of any change of postal address. This court is satisfied that the Plaintiffs was issued with the statutory notice by registered post through the above postal address in a letter dated February 6, 2006.'

14. The Defendant submitted that the Certificate of postage showing the notice was forwarded to the Plaintiffs whose names and postal addresses are duly indicated cannot be impeached as the Plaintiffs did not plead or prove there was fraud regarding the items sent to that postal address. There is nothing in the charge or in law that states a letter must be posted on the same day it's written.

15. With regard to the auctioneers' notices, the Defendant contended that the Plaintiffs were not strangers to the postal address the notices were sent to as this is the address contained in their deeds of guarantees meaning that at the time of execution of the guarantees which is not disputed, the Plaintiffs were deemed to have been aware of and understood all its contents including the postal address.

16. During Cross Examination admitting that the notices were served physically and though the same were served upon his employees, he duly received them hence the reason he used them as part of his supporting documents. The submissions also contain this admission that the Auctioneers notices were served upon his employees. Clause 30.5 of the charge instrument provides as follows on service;

' That any notice required or authorized by law or by this charge shall be deemed to have been properly served by the Bank on the Chargor if left at the charged property or at the principal place of business of the chargor or sent by registered post to his last known postal address '

17. Therefore, the Auctioneer leaving the notices at the property with the Plaintiffs employees constituted good service and was complementary to the postal service.



18. The Defendant urged the court not to be tied by submissions regarding the earlier Ruling made by Justice Ombwayo on this notice as that ruling was made on the application stage before the judge had the benefit of hearing the matter in full and listening to the Plaintiffs admission on the physical service made by the auctioneers.
19. It is the Defendant's case that a guarantor's duty is to pay a loan on demand. Having admitted that they voluntarily guaranteed the loan facility and with clear evidence that there is default in repayment, the Plaintiffs cannot be heard to state that the Defendant was at fault in seeking sale of the property before seeking to realize the Borrowers directors guarantees. It relied on the case of *Ebony Development Company Ltd V Standard Chartered Bank Ltd [2008] eKLR* to buttress this submission.
20. As it is not in contention that the loan is in arrears and that it has maximized its limit under the in duplum rule, the Defendant submitted that being in default of their obligations as guarantors, the Plaintiffs cannot be entitled to the equitable relief of injunction prayed for in the suit. Further, in the unlikely event the statutory notices were to be found not to have been properly served due to any error/lapse; the said error/lapse cannot be a basis for the grant of a blanket injunction as sought in the suit as the same error can be remedied through re-issuance of fresh statutory notices. The Defendant cited *David Ngugi Ngaari v Kenya commercial Bank Limited [2015] eKLR* in support of this submission.
21. The Defendant contended that a permanent injunction cannot be issued against the exercise of a statutory power of sale as such an injunction will defeat the purpose of the security and make a Chargor unable to exercise and enjoy a statutory power of sale while at the same time expose financial lenders to irreparable losses. Further, that interfering with the Defendant's right to exercise its statutory power of sale would be tantamount to rewriting the contract between the parties which is not allowed in law.
22. Having admitted that the loan is in arrears and no payments have been made towards the outstanding payment since the initiation of the suit, the Plaintiffs have come to the court with unclean hands contrary to the maxim of equity that he who comes into equity must come with clean hands.
23. The Defendant urged the court to dismiss the suit with costs to enable the Defendant realise the security.

### **Analysis & Determination**

24. Upon considering the submissions and pleadings, the following issues arise for determination;

#### **Whether a permanent injunction can issue in the circumstances**

25. The Plaintiffs seek to have a permanent injunction against the Defendant who seek to realise their security by exercising their statutory power of sale over the security the Plaintiffs provided as guarantors to a loan by the principal borrower. Before delving into the validity of the exercising of the statutory power of sale, this court must address whether a permanent injunction is tenable in the circumstances.
26. In *Showind Industries v Guardian Bank Limited & another [2002] 1 EA 284*. The learned judge stated as follows:

' An injunction is granted very sparingly and only in exceptional circumstances such as where the applicant's case is very strong and straight forward. Moreover, as the remedy is an equitable one, it may be denied where the applicant's conduct does not meet the approval of court of equity or his equity has been defeated by laches'



27. In *Joseph Okoth Waudi v National Bank of Kenya, Civil Application No 77 of 2004*, where the court of appeal in dismissing an appeal quoted from Halsbury's Laws of England Vol 32, 4th Edition page 752, stated that:
- ' It is trite law that the court will not restrain a mortgagee from exercising its power of sale merely because the amount due is in dispute or because the mortgagor has begun a redemption action or because the mortgagor objects to the manner in which the sale is being arranged. It will be restrained however, if the mortgagor pays the amount claimed in court, that is, the amount which the mortgagee claims to be due to it unless on the terms of the mortgage, the claim is excessive'
28. In *Ambient Construction v National Bank of Kenya Limited [2019] eKLR* when discussing whether a permanent injunction can issue on an unpaid debt, the court held that;
- Under Section 90 of the *Land Act* once the Bank established default it's entitled to exercise the statutory power of sale. I do not think that the facts of the present case are of a kind to which this court can exercise discretion to grant a permanent injunction because there is an amount which remains unpaid together with interest.
29. The Plaintiffs have not proved that the statutory power of sale did not accrue on default of the principal borrower. They have instead disputed the exercise of the statutory power of sale on the basis that there was improper service of the relevant notices. It is my strong view that this cannot be a ground to deny the Plaintiffs their rights to realize the security. Further, there has been no effort made to settle the outstanding sums yet the Plaintiffs seek an equitable remedy. It is trite that he who comes to equity must come with clean hands as the orders sought are discretionary and equitable. The court cannot deprive the Defendant of its rights under the law, it can only seek to regularise the process in the event that the same has not been conducted accordingly.
30. In my view the standards to be applied in considering the merits of this matter should be on the basis of the following principles in *Downsview Nominees Ltd v First City Corporation [1993] AC 295* instructive as follows: '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] '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.'
31. Similarly, in Fisher and Lightwood's, Law of Mortgage it was stated: 'The mortgagee will not be restrained from exercising his power of sale because the mortgagor has commenced a redemption action or because he objects to the arrangement for sale or because the amount due is in dispute. But he will be restrained, if before there is a contract for sale or the mortgaged property the mortgagor pays into court, the amount claimed to be due, that is the amount the mortgagee swears to be due to him for principal, interest and costs.



32. In banking contracts, it is trite that the terms of the loan agreement is to recover back the money or the property deposited as security. Liability for breach of the obligation arising from such contracts are construed by the court within the four corners of the loan agreement and endorsed by the parties. It is long established that no injunction should be granted to restrain a mortgagee from exercising the power of sale conferred by the statute unless the amount in question has been paid to the lender or to the court or as the case may be. In my considered view even award of damages cannot be a set off of the debt amount.
33. That being said, the Plaintiffs herein are not in pursuit of settling the mortgage debt or allowing the defendant to exercise its statutory power of sale. What they seek is to deny the Defendant an opportunity to realise the security, something this court is not the business of depriving the defendant its rights under the law. The court is incapable of granting the orders as sought as they will amount to rewriting the terms of the charge. In *Pius Kimaiyo Langat vs Co-operative Bank of Kenya Ltd (2017) eKLR* the Court of Appeal further stated that: -
- We are alive to the hallowed legal maxim that it is not the business of Courts to rewrite contracts between parties, they are bound by the terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved.
34. The upshot of the foregoing is that the suit is dismissed with costs to the Defendant.

**DATED, SIGNED AND DELIVERED VIA EMAIL AT ELDORET THIS 18<sup>TH</sup> DAY OF NOVEMBER, 2022.**

.....

**R. NYAKUNDI**

**JUDGE**

