



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**

**HCCC NO. 49 OF 2018**

**HESHIMART ENTERPRISES.....PLAINTIFF**

**VERSUS**

**KENYA WOMEN MICROFINANCE BANK LIMITED.....DEFENDANT**

**JUDGMENT**

The plaintiff instituted this suit vide a plaint dated 25<sup>th</sup> September 2018 seeking the following reliefs;

- 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, its servants and/or agents from alienating, advertising for sale, taking possession of or otherwise disposing off the whole of that parcel of land known as ELDORET MUNICIPALITY/BLOCK 6/251
- c) Costs of this suit.
- d) Any other relief that the court may deem fit to grant.

The defendant filed its defence and the parties complied with **Order 11**. The matter was set down for hearing and the parties called witnesses and closed their respective cases.

**PLAINTIFF'S CASE**

The plaintiff filed its submissions on 6<sup>th</sup> December 2020.

They submit that there was an advertisement in the daily nation of 8<sup>th</sup> august 2018 that auctioneers were to sell the plaintiff's parcel of land by way of public auction on 9<sup>th</sup> august 2018 in exercise of the defendant's statutory power of sale.

The plaintiff averred that the process of seeking to exercise the defendants' statutory power of sale was improper for the following reasons;

- i. No statutory notice of sale was issued to the plaintiff pursuant to section 90 and 96(2) of the Land Act 2012.
- ii. No statutory notice of sale was issued to the plaintiff pursuant to section 90 and 96(2) of the act.
- iii. No valuation of the property has been carried out.
- iv. The equity of redemption is being clogged.
- v. The defendant had not exhausted alternative remedies available before resorting to sale of the collateral.

The plaintiff cites section 56 of the Land Registration Act and Section 79(5) of the Land Act and submits that the charge was never registered hence it cannot be enforced against the chargee.

The statutory notices were never served. The submission cites **section 90(1) of the Land Act** in support of this submission. Further, it cites **section 96(2) of the Land Act** and the case of Act *Fast Security Limited Vs Equity Bank (2014) eKLR*. It submits that failure to serve notices by itself, is enough to support the fact that a process was unlawful. Another cited case is of *Malindi ELC Court Case No. '1B' of*

2014 – *Josiah Kamanjo Njenga vs Housing Finance Corporation of Kenya & Another* in support of this submission.

The plaintiff submits that the defendant did not serve the 3 months' notice as provided for under **section 90 of the Land Act No. 6 of 2012**. It cites the case of ***Kenya Commercial Bank Limited vs Pamela Akinyi Ochieng – Civil Appeal No. 114 of 1991*** in support of this submission.

Statutory notice must be served and where there is failure the process is null and void. The defendant in an attempt to prove service of statutory notice produced exhibit 8 but looking at the said certificate of postage does not show it emanates from the defendant hence it does not qualify as a document under the Evidence Act.

From the foregoing it was submitted that the process undertaken by the defendant to exercise its statutory power of sale was unlawful and the honourable court should be pleased to allow the suit as prayed.

#### **DEFENDANT'S CASE**

The defendant submits that he took a loan for kshs. 12,000,000/- in 2015. He acknowledges having offered **ELDORET MUNICIPALITY/BLOCK 6/251** registered in the name of Heshimart Enterprise. He produced the letter of offer for the loan as DEX1. The loan was secured by a charge and the same was marked as GO1(b) in the defendants' replying affidavit dated 25<sup>th</sup> October 2018.

The defendant produced the certificate of lease as DEX2 under which there is an entry dated 15<sup>th</sup> May 2015 where the property was charged to the defendant for kshs. 12,000,000/-. The charge was registered at the lands office on the same date and the loan disbursed to the plaintiff herein.

The plaintiff failed to make repayments and thus the defendant exercised its statutory power of sale. The statutory notice dated 8<sup>th</sup> March 2017 was produced as DEX5 and the statutory notice dated 7<sup>th</sup> July 2017 was produced as DEX6, the redemption notice dated 14<sup>th</sup> September 2017 was produced as DEX8 a, b and c.

DW1 instructed Shelter (M) Valuers Ltd to carry out a valuation and the letter of instructions dated 8<sup>th</sup> September 2017 was produced as DEX9. The valuation report was produced as DEX10. The defendant instructed Agunja auctioneers who issued a notification of sale dated 13<sup>th</sup> November 2017 and the same was produced as DEX11 together with certificates of postage. The auctioneers issued a second notification of sale dated 13<sup>th</sup> July 2018 and the same was produced as DEX12 and it was received by Naftali Kami who is the brother to one of the directors.

The plaintiff has not explained why he has delayed in making any payment from 2017.

The defendant complied with the statutory provisions of **sections 96-100 of the Land Act** to realize the security. The defendant has cited the case of ***Boaz Omondi Ongoro v Cooperative bank of Kenya Limited (2020) eKLR*** in support of his submissions.

The defendant cites the cases of ***Elijah Kipng'eno Arap Bii v Kenya Commercial Bank Limited (2001) eKLR*** and the case of ***Andrew. M Wanjohi v Equity Building Society & 7 others*** and submits that the plaintiff should not be granted an injunction as he has admitted being indebted to the defendant and having made no effort to pay the debt should not be allowed to enjoy the protection of a permanent injunction order.

In the letter of offer produced as DEX1 the term of the loan was 60 months. The term has lapsed and the plaintiff has failed to make payments which is proof of default. The defendant cites the case of ***National Bank of Kenya Limited v Pipelastik Samkolit & another (2001) KLR 112*** and submits that the defendant should be allowed to proceed and exercise of statutory power of sale in accordance to the charge entered into.

The defendant would face real danger of not being able to recover the amounts due by virtue of the accruing amounts outstripping the value of the suit property if the plaintiff is allowed more time to make repayments. The plaintiff has been given ample time and has failed to make any payments for the last 3 years and as such the defendant should be allowed to recover his rightful dues.

The defendant cites **Sections 107,108 and 109 of the Evidence Act** and submits that it is incumbent upon the plaintiff to prove his case and the defendant's testimony remains uncontroverted.

The defendant cites **Section 27(1) of the Civil Procedure Act** and submits that the plaintiff be condemned to pay costs.

#### **ISSUES FOR DETERMINATION**

1. Whether the acts of the defendant in seeking to exercise the chargee statutory power of sale are unlawful
2. Whether the plaintiff is entitled to the orders sought.

#### **1. WHETHER THE ACTS OF THE DEFENDANT IN SEEKING TO EXERCISE THE CHARGE STATUTORY POWER OF SALE ARE UNLAWFUL**

Section 90 of the Land Act states;

**(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 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 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 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 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 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.**

Section 92(2) of the Land Act states;

**(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.**

The defendant issued a statutory notice of sale that was produced as DEX 5 in accordance with section 90 of the land act dated 8<sup>th</sup> march 2017 (90 days). The defendant also issued a statutory notice dated 7<sup>th</sup> July 2017 to the plaintiff pursuant to section 96(2) of the Land Act (40 days). The defendant also issued a redemption notice dated 14<sup>th</sup> September 2017(45 days). The same was produced as DEX7. The defendant also produced a valuation report as DEX10.

The notices were dispatched in conformity of clause 38 of the Charge and The certificates of postage were produced as DEX8 to prove that the notices were issued by registered post. The same were annexed as GO8, GO9 and G10. A perusal of the same indicates that they contained the name of the plaintiff as contained in the charge document. The acts of the chargee were lawful.

## **2. WHETHER THE PLAINTIFF IS ENTITLED TO THE ORDERS SOUGHT**

The plaintiff seeks a permanent injunction against the defendant on the suit land. the plaintiff has admitted to being indebted to the defendant. he made no effort to repay the debt. He breached the terms of the letter of offer and the term of the loan has lapsed without any payment having been made by the plaintiff.

In the case of **Showind Industries Vs Guardian Bank Limited & Another (2002) 1 EA 284** the court held 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”**

The conduct of the plaintiff is such that he has not even paid a single cent of the debt and therefore has come to the Court with unclean hands. In the premises he is not entitled to an injunction.

The suit fails in its entirety and should be dismissed with costs.

**Judgment read and signed on this 16<sup>th</sup> day of March, 2021** in absence of Miss Karuga for the Defendant and Mr. Mathai for the Plaintiff.

Both advocates be notified.

**S. M. GITHINJI -JUDGE**

**16<sup>TH</sup> MARCH, 2021**