



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO. 105 OF 2018

ANDREW MKISA WANYONYI.....PLAINTIFF/APPLICANT

VERSUS

- 1. EQUITY BANK KENYA LIMITED**
- 2. FIVE ELEVEN (511) AUCTIONEERS**
- 3. JOSEPH KASEMBELI**
- 4. SAMUEL NDERITU MATHENJU.....DEFENDANTS/RESPONDENTS**

RULING

1. The Plaintiff/Applicant has filed a **Plaint** together with a **Notice of Motion** application dated **21st November, 2018** brought under **Sections 1A, B, 3A, 4, 5, 63(e)** all of the **Civil Procedure Act, Order 40 Rules 1, 4(1) and (2)** of the **Civil Procedure Rules of the Laws of Kenya** and any other enabling provisions of the Laws of Kenya. In the application, the Applicant prays for the following orders: -

1. Spent;

2. Spent;

3. Spent;

4. THAT pending the hearing and determination of this suit an

injunction be issued restraining the Defendants/Respondents by themselves, their servants, agents and/or employees or whomsoever is acting on their behalf from trespassing onto, continuing with auction due on 30th November, 2018, selling transferring or disposing off Land known as Mombasa Title No. Mainland North/1/6985 (C.R 20841).

5. THAT the costs of this application be awarded to the Applicant.

2. The **Notice of Motion** is as supported by an **Affidavit** sworn on **21st November, 2018** by **Andrew Mkhisa Wanyonyi**. The motion is premised on the grounds that 1st and 2nd Respondents are purported to have unlawfully and illegally offered for sale, the sale Four Storey Apartment Block and Two Storey Office Block within Bamburi Beach area of Mombasa **Title No. Mainland North/1/6985 (C.R 20841) Bamburi** that is owned by the Applicant through a newspaper advertisement in the Daily Nation on the **21st November, 2018**.

3. The Applicant avers that the said advertisement was done without any notification being given to the applicant who is the rightful and legal owner of the said property.

4. The applicant contends that the offer to sell his property on the **30th November, 2018** is unlawful, illegal and irregular since the applicant is only a guarantor for a loan advanced by the 1st Respondent to the 3rd and 4th Respondents. The Applicant states that he was not aware of the principle debtors' default in repayment of the loan.

5. It is the applicant's averment that he has not been made aware of any efforts that the 1st Respondent has taken in recovering the loan from the Principal debtors. He has further stated that the offering for sale of his property is premised on the strength that he was a guarantor for the loan

facility that was advanced by the 1st Respondent to the 3rd and 4th Respondents whereas the loan agreement was substantively varied, and as a guarantor, he was never informed.

The Response

6. The 1st Respondent filed a **Replying Affidavit** sworn on **16th January, 2019** by **Jane Katei**, the **Assistant Relationship Manager-Credit**. She has deponed that the 3rd and 4th Respondents trading as **Nakaj Services** and the Applicant approached the 1st Respondent for a bank facility and the Bank approved the first charge debt of Kshs.29,655,000/= and a further charge debt of Kshs.2,345,000/=. The facilities were secured by a first legal charge dated **24th December, 2013** and a further charge dated **27th January, 2015** over property **Subdivision Number 6985 (Original Number 4877/12) Section I Mainland North**. That following issuance of offer letters, the 1st Respondent approved the facilities.

7. The 1st Respondent goes on to state that the Applicant signed the charge, further charge, deed of assignment and Guarantee and indemnity to secure the charge with his property known as **Subdivision Number 6985 (Original Number 4877/12) Section I Mainland North**.

8. The 1st Respondent has contended that when the 3rd and 4th Respondents failed to pay the loan as had been agreed, it issued various reminders via letters as well as made phone calls to the principal debtors and ensured that the Applicant herein as a guarantor, was copied the same, but to date no single cent has been paid to the 1st Respondent.

9. On the **14th February, 2018**, the 1st Respondent issued a three (3) months' notice of exercise of statutory power of sale to the Applicant which was copied to the 3rd and 4th Respondents. The said notice was issued pursuant to **Section 90(1) and (2) of the Land Act No.6 of 2012 Laws of Kenya**.

10. It has been stated that the 3rd, and 4th Respondents and the Applicant never heeded the **Notice** dated **14th February, 2018** forcing the 1st Respondent to issue a further notice further and upon non-compliance, it issued a forty (40) days notification of sale on **10th July, 2018** pursuant to **Section 96 (2) of the Land Act, 2012** to exercise its statutory power of sale over the charged property unless the 3rd, and 4th Respondents and Applicant rectified the default by paying the outstanding amounts.

11. The 1st Respondent has averred that all communications to the principal debtors and the Applicant were channeled through their last known addresses as they appeared in the recital and **Clause 42** of the **Legal Charge document**.

12. The 1st Respondent has stated that all the requisite notices were issued to the principal debtors and the Applicant but they still declined to repay the loan and 1st Respondent was left with no choice but to commence recovery proceedings as provided for under the law.

13. The 1st Respondent has acknowledged having engaged the services of **Antique Auctions Agencies** to commence the sale of the secured properties pursuant to the provisions of the **Land Act, 2012**.

14. It has been averred by the 1st Respondent that Antique Auctions Agencies duly served the notices to the 3rd, and 4th Respondents and Applicant via their addresses as were provided and recorded in the Charge documents. The Applicant was served with a forty-five (45) days redemption notice on the **1st October, 2018** as required under the law.

15. After the expiry of forty-five (45) days, the 3rd, and 4th Respondents and Applicant not having made any payments, Antique Auctions Agencies, published a notice of sale of the charged properties in the **Daily Nation Newspaper** on **26th November, 2018** for a sale scheduled for the **30th November, 2018**.

16. The 1st Respondent has stated that the Applicant lawfully, validly and willingly signed the legal charge fully understanding its contents and implications. It has further stated that once there is default, the 1st Respondent is entitled to exercise its statutory power of sale over the Chargor's property.

Directions of the Court

17. The parties took directions on canvassing the application by way of written submissions whereby the Applicant filed his submissions on the **24th March, 2021** while the Respondent filed their submissions on the **25th April, 2019**. Parties highlighted and relied on their submissions as presented to court.

Analysis and determination

18. Having considered all the pleadings and written submissions of the parties, I find the only issue that arises for determination being whether the Applicant has met the conditions set to entitle him to the injunctive relief as sought.

19. The Applicant has sought an injunctive relief to stop the 1st Respondent from trespassing, auctioning, selling, transferring or disposing off land known as **Mombasa Title No. Mainland North/1/6985 (C.R 20841)**.

20. It is not in contention that the 3rd and 4th Respondents were advanced Kshs.29,655,000/= and a further charge debt of Kshs.2,345,000/= which was guaranteed by the Applicant using **Mombasa Title No. Mainland North/1/6985 (C.R 20841)** by the 1st Respondent.

21. The Applicant acknowledges that he signed a guarantee on behalf of the principal debtors (3rd and 4th Respondents) but states that it was presented to him that the principal debtors were capable of paying the monies advanced.

22. The Applicant has stated that he was not accorded his legal right by being explained to, the import of the documents that he signed. He has also stated that he was not given an opportunity to seek separate legal advice, and neither did he read nor did he understand the import of the documents that he was handed by the 1st Respondent to sign. The documents that have been complained about are a charge, further charge, deed of assignment and Guarantee as signed by the Applicant.

23. The Applicant has further averred that he was also not given a proper Statutory Notice by the 1st Respondent as required by the law. He stated that he was not aware that the 3rd and 4th Respondents had defaulted in the repayment of the monies advanced and neither was he notified before the 1st Respondent placed his property **Mombasa Title No. Mainland North/1/6985 (C.R 20841)** for sale via auction.

24. The applicant's concerns can be summarized as being that the whole transaction underlying the charge was based on misrepresentation; the applicant did not receive independent legal advice before signing the guarantee, deed and charge; the charge documents are fatally defective and prepared illegally; that no notice was ever served on the applicant and that the bank has selectively chosen to sell the applicant's land despite other less drastic options being available.

25. The conditions for consideration in granting an injunction are well settled in the case of **Giella –vs- Cassman Brown & Company Limited (1973) EA 358**, where the court expressed itself as follows: -

"First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience."

26. On the issue of whether the applicant has shown a *prima facie* case, the Applicant has agreed that he signed a guarantee, deed of assignment over the rental income of the suit property, a first legal charge and a further charge over the suit property on behalf of the 3rd and 4th respondents to secure an advancement of a loan.

27. The Applicant has claimed not to have understood the import of what he was signing and that he was not accorded separate legal advice with respect to the guarantee, deed of assignment, first legal charge and a further charge.

28. I have read through all the documents signed by the Applicant and established that they were all signed before an Advocate. To that extent, it is my view that if the Applicant did not understand anything, it was upon him to ensure he understood the contents of the guarantee, deed of assignment, first legal charge and a further charge before signing and ought to have raised or indicated this to the advocate. Nonetheless, the law presumes that every person understands the contents to a document which he appends his/her signature.

29. In the case of **Mrao Ltd –vs- First American Bank of Kenya Limited & 2 Others [2003] eKLR** Kwach, JA (as he then was) stated that:

"...it is the duty of any person entering into a commercial transaction particularly one in which a large amount of money is involved to obtain the best possible legal advice so that he can better understand his obligations under the documents to which he appends his signature or seal. If courts are going to allow debtors to avoid paying their just debts by taking some of the defences I have seen in recent times for instance challenging contractual interest rate, banks will be crippled if not driven out of business altogether and no serious investors will bring their capital into a country whose courts are a haven for defaulters..."

30. The applicant cannot now claim misrepresentation by the 1st Respondent to be a guarantor and it is presumed that willingly and voluntarily together with the 3rd and 4th Respondents approached the bank for an advancement of the loan. There is also no evidence of any coercion or duress to show that he was misled or induced to sign the instruments. He knew perfectly well that his property was to be charged as security for loan. And if he was apprehensive of his predicament, he was at liberty to seek for independent legal counsel, which he did not.

31. The Applicant herein executed the Deed of Guarantee and Indemnity, by affixing his thumb print on each and every page at the execution part thereof. This was witnessed by **Justus Kaburu Advocate**. The Applicant similarly executed a Charge and further charge in favour of the 1st Respondent for the facility granted to the 3rd and 4th Respondent. More importantly, the Applicant did execute an acknowledgement of the effect of **Section 56 and 90 of the Land Act**. (See pages 27 of the 1st Respondent's supplementary Affidavit and 49 and 50 of the 1st Respondent's Replying Affidavit).

32. The Applicant further claimed that he was never served with any notices that his property was up for sale and that he received a phone call from a friend informing him of an advertisement of the same in the **Daily Nation Newspaper**.

33. In its reply, the 1st Respondent has showed that the Applicant was copied on **Demand Letters** dated the **7th August, 2017, 14th February, 2018** and **10th July, 2018** as required under **Section 90** of the **Land Act** for the payment of the arrears. The 1st Respondent stated

that the letters were sent to the Applicant's registered post as was recorded and had been provided in the guarantee by him.

34. The letter sent by the 1st Respondent on the **14th February, 2018** issuing a three (3) months' notice for exercise of statutory power of sale was specifically sent to the Applicant and copied to the 3rd and 4th Respondents.

35. Further on the **10th July, 2018**, the 1st Respondent sent the Applicant a notification of sale as required under **Section 96(2)** of the **Land Act**, that the Bank intended to exercise its statutory power of sale over the charged property on expiry of forty (40) days from the date of service.

36. The Applicant has not refuted that the address as indicated in the letters of demand as being his official address. The 1st Respondent has maintained that all communication to the Applicant was channeled through the address he had provided. The notices were addressed to the very address that was provided by the Applicant in guarantee, deed of assignment, first legal charge and a further charge. It is also noteworthy that the demand notices were specifically addressed to the 3rd and 4th Respondents as the Principal Debtors and to the Applicant as Guarantor. The Court is therefore in no doubt at all that the notices were duly issued and accordingly served by the 1st Respondent.

37. The charge document shows the Applicant's address as **P. O. Box 3111-80100 Mombasa**. A copy of the demand notice as under **Section 90** of the **Land Act** was sent to the principal debtors and copied to the Applicant and sent to address **No.311-80100 Mombasa**. The statutory notice as well as the notice to sell were also sent to the same address and copied to both the principal debtors and the Applicant.

38. For the respective demands and the letters sent, the 1st Respondent has attached certificate of postage as proof of service to both the principal debtor and the guarantor/Applicant herein. The burden then shifts to Applicant to show that he never received the statutory notices due to either some omissions by the 1st Respondent.

39. I have scrutinized the certificates of postage attached and they do show a long list of names and addresses to which postage was done and the Applicant's name and address is one of them. However, the charge documents shows that the principal borrowers and the Applicant shared the same postal address. There is a possibility that the notices were only delivered to the principal debtors and did not reach the guarantor. While it is true that a guarantor bears the same obligation as the principal debtor in case of default, it is imperative that the chargee specifically serves the guarantor and the court is satisfied that the guarantor received the statutory notices. Whether or not the guarantor received the statutory notices goes to the core of the validity of the issuance and service of the same, as is a way of protecting the equity of redemption provided for under **Section 89** of the **Land Act, 2012**.

40. In the circumstances of this case, whereas I do acknowledge that the 1st Respondent should not be prevented from exercising its statutory power of sale, to realize the charged securities, and whereas this Court has found that the guarantor might not have received the statutory notices since the address through which he was served is the same address the principal debtors were served, that state of affairs call for relief which is appropriate to safeguarding the rights of both parties. And this would be directing the chargee to effectively serve the guarantor so that he might be availed the opportunity to exercise the right of redemption.

41. Lastly, the Applicant has averred that the 1st Respondent decided to execute his property as a guarantor as compared to that of the 3rd and 4th Respondents as the principal debtors.

42. As a guarantor, the Applicant's obligation to the 1st Respondent is activated once there is a demand and/or notice of default on the part of the principal debtor. In the case of **Robert Njoka Muthara & Another –vs- Barclays Bank of Kenya Limited & Another [2017]eKLR**, the court defined a guarantee as follows: -

“...A guarantee by definition is a pledge by a person (guarantor), other than a party upon whom the contractual or other legal obligation is imposed, to the effect that if the party so bound (principal) fails to perform the act in question, the guarantor, will either perform or make good any loss or claim arising from the non-performance. The pledge is ordinarily made to a creditor. The essence is that the guarantor agrees not to discharge the liability in any event, but to do so only if the principal debtor fails to honour his duty...”

43. As a matter of the law, a Guarantor's liability cannot arise before the default by the principal debtor in paying the debt. In the case herein, the 1st Respondent has stated that the 3rd and 4th Respondents have defaulted in their obligation to repay their loan. Once the principal debtors have defaulted, the Applicant's liability as a guarantor arises to the 1st Respondent.

44. It is thus a misinterpretation that once the principal debtors have defaulted, the 1st Respondent is bound first to attach the properties of the defaulters. The 1st Respondent as Bank is bound by the guarantor and Charge agreements to ensure that their debts have been repaid.

45. The next question is whether the Applicant has established that he will suffer irreparable harm/injury which cannot be adequately compensated by an award of damages. He has averred that the property being offered for sale is his only source of income and his matrimonial home. On this, I agree with the Respondent's submission that once the suit property was offered as security, the possibility of its sale in case of default in servicing the advanced monies was a fact within the knowledge of the Applicant hence the fact that the property is the only income earning asset and matrimonial home is not a ground for stopping the sale.

46. The Applicant has not brought any cogent proof before the court to show that this is his matrimonial home and that spousal consent was not acquired as required by law. In his Application, the Applicant has mostly raised aspersions but not brought any proof at all that he will suffer irreparable loss that cannot be compensated without an award of damages.

47. It is worth noting that the 1st Respondent has indicated that it is capable of compensating the Applicant if it were found that the sale of the suit property was erroneous. The Court takes notice that the 1st Respondent is a financial institution licensed by the regulatory authorities to carry out functions of a bank and therefore capable of meeting damages that may be awarded to the Applicant.

48. In light of the foregoing discussion and with relevant regard to **paragraph (40)** above, the following orders accordingly do and hereby issue;-

a) That the 1st Respondent bank is directed to specifically serve the guarantor with fresh statutory notices prerequisite to exercise of its statutory power of sale, through the provided address as well as through his advocates on record.

b) That a temporary injunction be and is hereby issued restraining the 1st and 2nd Respondents from interfering or otherwise disposing the subject property pending compliance with order (a) above.

c) The Applicant is at liberty to exercise his right of liberty pending compliance with Order (a) above.

d) Costs to abide by the outcome of the suit.

It is hereby so ordered.

DELIVERED, DATED AND SIGNED VIRTUALLY AT MOMBASA THIS 26TH DAY OF MAY, 2021.

D. O. CHEPKWONY

JUDGE

In the presence of:

Mr. Macharia counsel holding brief Mr. Charles Wamwoba for the Plaintiff

Mr. Kagiri for the 1st and 3rd Defendants

Court Assistant - Winnie