



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CIVIL CASE NO. E418 OF 2020

HANNINGTON ONYANGO OSODO.....1ST PLAINTIFF

BETH WANGARI OSODO.....2ND PLAINTIFF

VERSUS

HOUSING FINANCE COMPANY OF KENYA LIMITED.....1ST RESPONDENT

SAMUEL GATHOGO T/A VALLEY AUCTIONEERS.....2ND RESPONDENT

RULING

NOTICE OF MOTION

The Applicants filed Certificate of Urgency & Notice of Motion Application dated **16th October 2020** for orders that;

1. A temporary injunction restraining the Defendants by themselves, servants, agents, employees or assigns or any of them acting on their behalf from completing any sale pursuant to an auction conducted on **26th August 2020** or in any way taking possession, transferring, evicting or dispossessing, trespassing or interfering with the Applicants' quiet possession use and proprietary interest in the suit property known as **Property Land Reference Number 12778/202, Karen Nairobi**.

2. An order compelling the 1st Defendant to render to the Plaintiffs a true and accurate account for the **Loan Account No. 600-0011305** with the 1st Respondent for the entire loan period and further furnish the Plaintiffs with all statements of account thereof to date to enable the Plaintiffs carry out scrutiny and/or recalculation or verification thereof in strict compliance with the provisions of the Banking Act and the Land Act 2012.

Which application is supported by the sworn affidavit of **Hannington Onyango Osodo** and **Beth Wangari Osodo** dated **16th October 2020** on the following grounds that;

1. The Applicants are under imminent and real threat of losing their ownership, possession and being evicted from their matrimonial home known as **LR No. 12778/202, Nairobi** pursuant to an illegal exercise of a Chargee's statutory power of sale by the 1st Respondent acting in concert with the 2nd Respondent.

2. The basis upon which the 1st Respondent purported to exercise its statutory power is based on the 1st Respondent **illegally and solely participating in an auction wherein the 1st Respondent allowed the 2nd Respondent to place a bid in and participate in a sham auction held on 26th August 2020 without leave of the court** contrary to the provisions of **Section 100 of the Land Act** as read together with **Section 97(1) of the Land Act**.

3. The said auction conducted by the Respondents was an illegality *ab initio* in that the **1st Respondent Bank was not allowed to participate in the purported auction without leave of the court but that the entire proceedings were choreographed and only staff members of the 1st Respondent attended to prop up what was essentially an illegally convened private treaty sale**.

4. In allowing the 1st Respondent to bid in and thereafter purport to declare the 1st Respondent as the highest bidder in the impugned auction, the 2nd Respondent violated the provisions of the Auctioneers rules 1997 in that as an Interested Party the 1st Respondent was conflicted by dint of Section 100 of the Land Act to so participate without leave of the court.

5. Further, failure by the 1st Respondent Bank to obtain leave of court to participate in the illegal auction is malicious and an attempt to circumvent the 1st Respondent chargee's duty of care enshrined in Section 97(1) of the Land Act.

6. The convening of the said sham and illegal auction is malicious, irrational, illegal and a clever stratagem by the 1st Respondent to illegally divest the Applicants their matrimonial property for a bargain price in order to avoid complying with the strict and mandatory requirements imposed on it as Chargee under the Land Act 2012.

7. The Applicants' loan statement is inexplicably littered with not less than ten (10) entries of excessive interest reversals by the 1st Respondent which were belatedly effected in preparation for the sham auction once an illegal statutory notice had been issued rendering it impossible to tell the actual figures complained of as due by the 1st Respondent.

8. Further, out of the initial maximum available loan of Kshs.27, 500, 000 taken out between year 2012 and 2014 at an interest rate of 16% per annum and the capping of rates in year 2017 the Plaintiffs have to date repaid off Kshs.10, 000, 000 but despite this the 1st Respondent is still demanding a further outrageous sum of Kshs.67, 018, 450.90 contrary to Section 44 of the Banking Act (the *In Duplum Rule*) which prohibits charging interest amounts twice the principal.

REPLYING AFFIDAVIT

The Application was opposed vide a sworn affidavit of **Joseph Lule** dated **30th October 2020** who stated as follows; -

1. The Bank vide a letter of offer dated **6th December 2011** agreed to advance to the Plaintiffs facilities not exceeding the aggregate sum of **Kshs.22, 365, 000** to be used in the construction of a 5 bedroomed townhouse in Karen. The first facility was secured by a charge dated **30th January 2012** over **L.R No. 12778/202 Karen Nairobi**.

2. The Plaintiffs faced financial challenge in servicing the loan and at the Plaintiffs request, the first facility was restructured vide a letter of offer dated **16th October 2014** and a top-up loan of **Kshs.6, 549, 632 (Second facility)** approved and disbursed to the Plaintiffs subject to the expected rental income of **Kshs.290, 000** being assigned to service the loan.

3. The Plaintiffs were unable to complete construction of the townhouse. Consequently, the 1st Defendant issued the Plaintiffs with a 90-day statutory notice and a 40-day notification of sale dated 22nd February 2016.

4. In a meeting held on 24th December 2015 between the Plaintiffs and the 1st Defendant's representatives, the 1st Plaintiff informed the persons in attendance that he was still having problems repatriating large sums of money from Nigeria and therefore, his cash flow was inadequate to even service the loan. He further stated that he would sell the townhouse in its incomplete state and requested the Bank's assistance in marketing the suit property.

5. In March 2016, the suit property was displayed at Property Point quoting the asking price of Kshs.100, 000, 000 but no serious offers to purchase the property were forthcoming given that the townhouse was incomplete.

6. The 1st Defendant wrote to the Plaintiffs on 27th May 2016 informing them that the property was being offered for above market value and that the Bank would progress with recovery if the Plaintiffs did not present an executed agreement for sale of the property as well as proof of payment of deposit of the purchase price by 7th June 2016.

7. The Plaintiffs did not manage to find a buyer for the property by 7th June 2016. Accordingly, the 1st Defendant Bank informed the 1st Plaintiff that the Bank shall proceed to issue the 7 days Auctioneers Notice but allow the Plaintiffs time till 15th June 2016 to finalize on a sale of the charged property by private treaty before engaging the auctioneer.

8. On 7th June 2016, the 1st Defendant Bank proceeded to instruct Auckland Auctioneers to commence realization of the Bank's security via Public Auction after expiry of seven days from the date of the letter. Unless and until the Bank says otherwise.

9. Vide a letter dated 14th November 2016, the Plaintiffs requested the 1st Defendant Bank to grant them more time to sell the suit property via private treaty or complete construction and rent the said property.

10. It is against the backdrop of the Plaintiffs clear and succinct demonstration of its unreliability, inconsistency and evidenced inability to service its loans that the 1st Defendant Bank lawfully forwarded to the Plaintiffs a 90-day statutory demand Notice dated **12th July 2013** and **13th November 2015**; 40-day notices dated **25th November 2013** and **22nd February 2016**; and 45-day redemption notice and notification of sale prepared by Legacy Auctioneering Services and duly served on the Plaintiffs on **19th July 2018**.

11. In that regard, the suit property was sold to the 1st Defendant Bank by way of Public Auction on **26th August 2020** at a purchase price of **Kshs.58, 500, 000**. The auction was carried out with strict observance of the law with the advertisement thereon explicitly indicating the Conditions of Sale.

APPLICANTS' WRITTEN SUBMISSIONS

It was the Applicants' submission that the 1st Respondent's actions were to curtail and deliberately thwart the Applicants equity of redemption. The 1st Respondent opted to first release the contested funds and belatedly notify the Applicants after the fact. The 1st Respondent ought to have known its duty of care to the Applicants and ought to have informed them well in advance before releasing the contested funds which it ought to have known the Applicants have a legal interest in given that they were in possession of the sale agreement with the third party private buyer.

Further, the 2nd Respondent on instructions by the 1st Respondent conducted a sham auction wherein the suit property was purportedly sold to the 1st Respondent at a ludicrous amount. The Applicants submitted that the said auction was a private sale disguised as a public auction. The 1st Respondent was the sole bidder at the auction contrary to the Auctioneers rules 1997 and as such it is not in dispute who the purchaser of the subject property is. This is a fact not controverted by the Respondents in their Replying Affidavit.

Section 100 (1) and (2) of the Land Act 2012 provides that for a Chargee to take part in their own auction, the permission of court must be sought. The Respondents had not demonstrated in their Replying Affidavit under what circumstances they dispensed with the requirement for leave of court.

It is trite law that a Chargee should seek leave of the court in order to bid at its auction. To safeguard property owners from illegal bidding by the Chargee it should be demonstrated to the Court that the participation by the Chargee would result in securing a most favorable price for the charged property. This principle was restated by Kasango J. in the case of **Eco Bank Kenya Limited –versus- Orion East Africa Limited [2019] eKLR**. Where the Chargor sought leave of the Court to bid for the suit property.

The Applicants submitted that the 1st Respondent is in breach of **Section 44(a) of the Banking Act**. The Respondents admitted that they were required to give the Applicants notice prior to any variation on the interest rates. However, the 1st Respondent failed to do the same. **Section 84 (1) of the Land Act** states that even though the parties have contractually agreed that the rate of interest is variable, notice should be given.

The Applicants submitted that they have established a prima facie with the probability of success especially as defined by the Court of Appeal in **Mrao Ltd versus First American Bank of Kenya & 2 others [2003] KLR 125** which defined the same as; -

“A genuine and arguable case a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later.”

The Applicants further submitted that they will suffer irreparable damage and the same cannot be compensated by an award of damages. The suit property is the Applicants' home and no amount of money can compensate this.

The balance of inconvenience lies in favour of the Applicants and the Respondents are not likely to suffer any damage if the injunction is upheld.

RESPONDENT'S SUBMISSIONS

Section 100 (3) of the Land Act permits a chargee, without leave of the court to bid for and purchase land at a public auction so long as the price bid for the charged land by the charge is inter alia higher than the reserve price. The reserve price was **Kshs.57, 750, 000** yet the property was bought at **Kshs.58, 500, 000**.

The Applicants' right of redemption was extinguished upon the fall of the auctioneer's hammer. The Applicants let the auction proceed, they acted inequitably. The Applicants did not acknowledge or explain their delay and thus, have not made out a prima facie case.

There was a debt, it had not been paid, it was secured by a charge and the Applicants were willing to sell the property they cannot therefore say that they will suffer irreparably if the property is sold. The court in **Jimmy Wafula Simiyu –versus- Fidelity Bank Ltd [2014] eKLR** held as follows; -

“It is quite arrogant for the applicant to think that conversion of a mortgaged property into matrimonial home will provide some form of indomitable shield from realization of a security given in a mortgage under the law. The law on creating mortgage on and sale of matrimonial home only aims at ensuring the consent of the spouse or spouses is sought before such property is mortgaged, and relevant notices are served on the spouse who had given consent to the mortgage before the exercise of mortgage's statutory power of sale.”

Based on the foregoing, no premium on the claim made by the Applicants that the suit property is a matrimonial home.

DETERMINATION

After considering the Application, the Reply to the Application and the submissions by the parties, the issue for determination is whether a temporary injunction should be granted to the Applicants.

The law on granting of interlocutory injunction is set out under **Order 40(1) (a) and (b) of the Civil Procedure Rules 2010** which provides:

Where in any suit it is proved by affidavit or otherwise—

(a) That any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or [Rev. 2012] Civil Procedure CAP. 21 [Subsidiary] C17 – 165;

b) That the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further.

The conditions for consideration further in granting an injunction is now well settled in the case of Giella –versus- Cassman Brown & Company Limited (1973) E A 358, where the court expressed itself on the condition's that a party must satisfy for the court to grant an interlocutory injunction: -

"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."

The test for granting of an interlocutory injunction was also considered in the American Cyanamid Co. -versus Ethicom Limited (1975) A AER 504 where three elements were noted to be of great importance namely:

"i. There must be a serious/fair issue to be tried,

ii. Damages are not an adequate remedy,

iii. The balance of convenience lies in favour of granting or refusing the application."

Whether plaintiff has established a prima facie case with a probability of success?

The Applicants' position is that the 1st Respondent purported to exercise its statutory power which is based on the 1st Respondent illegally and solely participating in an auction wherein the 2nd Respondent allowed the 1st Respondent to place a bid in and participate in a sham auction held on 26th August 2020.

It is the Applicants' case that they are under imminent and real threat of losing ownership and possession of their matrimonial home known as LR No. 12778/202 Nairobi, through eviction, pursuant to an illegal exercise of a Chargee's statutory power of sale by the 1st Respondent acting in concert with the 2nd Respondent.

The Applicants also contend that were not given any notice prior to any variation on the interest rates as required under **Section 44(a) of the Banking Act**.

In light of the above, the Applicants have demonstrated that they have established a prima facie case with probability of success.

Whether the Applicants will suffer irreparable injury/loss that cannot be compensated by an award of damages if the application for temporary injunction is not allowed?

The Applicants submit that they will suffer irreparable damage and the loss of their matrimonial home known as LR No. 12778/202 Nairobi cannot be compensated by an award of damages. The suit property is the Applicants' home and no amount of money can compensate this.

Where does the balance of convenience lie?

In the case of Paul Gitonga Wanjau -versus- Gathuthis Tea Factor Company Ltd & 2 others (2016) eKLR, the court dealing with the issue on balance of convenience expressed itself thus: -

"Where any doubt exists as to the applicants' right, or if the right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which injury the applicant, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right... Thus, the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction. The court will seek to maintain the status quo in determining where the balance on convenience lies. "

Each of the parties have raised a myriad of issues that cannot be determined conclusively to enable the court form an informed determination on the matter. The Plaintiffs claim that the Defendant conducted an illegal and irregular auction in the process of exercising statutory power of sale due to the Plaintiffs non service of the loan facility.

The Applicants allege exorbitant interest and fluctuations/variations without notices to the Applicants and exacerbated the debt with no possibility of redemption. Further, Applicants claim that the auction was not in compliance with **Section 97 & 100 of the Land Act**. The 1st Respondent purchased the property without leave of Court.

The Respondents deposed detailed chronology of events of default by the Applicants to settle the outstanding debt despite restructuring, grace period, grant of sale by private treaty and the 1st Respondent had close to five auction sales halted.

In view of the above, the Applicants stand to suffer greater harm if the Application for injunction is dismissed. The 1st Respondent on the other hand will suffer no harm if the injunction is granted, it still has the suit property. The suit property, is not likely to lose its value either.

There are compelling arguments raised by both parties and raise triable issues to be determined at the full hearing of the Application interpartes. There will be substantial loss to the Plaintiffs if evicted before the validity of auction/sale is interrogated at the hearing.

DISPOSITION

- 1. Interim injunction is granted pending the hearing of the Application/suit interpartes.**
- 2. Transfer/registration of the suit property is halted/stopped/prevented until hearing and determination of the suit/Application**
- 3. Plaintiffs to continue servicing the loan the loan facility.**
- 4. The Defendants to engage with Plaintiffs in reconciliation of accounts.**

DELIVERED SIGNED & DATED IN OPEN COURT ON 30TH JUNE 2021

(VIRTUAL CONFERENCE)

M.W. MUIGAI

JUDGE

IN THE PRESENCE OF:

M/S ONYANGO & AMEYO ADVOCATES FOR THE PLAINTIFFS/APPLICANTS.

M/S WALKER KONTOS ADVOCATES FOR THE DEFENDANTS/RESPONDENTS.

COURT ASSISTANT: TUPET