



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL APPEAL NO 104 OF 2019

SUSAN ADOYO.....APPELLANT

VERSUS

EQUITY BANK (K) LIMITED.....RESPONDENT

(Being an Appeal from the Ruling of Hon W. K Onkunya, Senior Resident Magistrate

at Kisumu Law Courts delivered on the 7th day of August 2019

in Kisumu Chief Magistrate's Court ELC No 21 of 2019)

RULING

1. In her Notice of Motion dated 2nd September 2019, the Appellant herein sought an order of temporary injunction restraining the Respondent herein, its agents, employees, servants or whoever acting and/or claiming through it from selling and/or auctioning her properties namely, Kisumu/Dago/3445 and Kisumu/Dago/1224 (hereinafter referred to as "the subject premises") which she charged as security for a loan that was advanced to one Pius Olima Oloo Okello t/a Guumba Contractors (hereinafter called the "Borrower") pending the hearing and determination of the Appeal herein. The Appellant swore an affidavit in support of her application on even date.

2. She averred that by a Ruling dated 7th August 2019 that was delivered in **Kisumu Chief Magistrate's Court ELC No 21 of 2019**, the subject of the Appeal herein, the Trial Court, dismissed her application dated 12th February 2019 in which she had sought similar orders as in the present application as a result of which the Respondent herein was at liberty to sell, dispose and or auction the subject premises which would disentitle her from the rightful interest in the land.

3. She averred that the procedure that the Respondent adopted in realising the security did not meet the statutory requirements of Section 90(2) of the Land Act, 2012 as far as contents of the statutory notice were concerned. She also stated that the Auctioneer's Notification for Sale breached Rule 15 (d) and (e) of the Auctioneers Rules, 1997.

4. She particularised the Respondent's breaches and illegalities as follows:-

a. That the Notice did not disclose the exact nature and extent of the default by the Chargor or Borrower but actually called for the whole outstanding sum of Kshs 17,021,261,27;

b. That the Notice did not disclose the amount that had to be paid to rectify the default and the time by which the payment in default must have been paid;

c. That the Notice did not inform the Chargor that she had a right to apply to court for relief;

d. That the Respondent blatantly took away her statutory rights bestowed under Section 90(2) of the Land Act;

e. That the Respondent did not comply with the demand notice under Section 56(2) of the Land Registration Act;

f. That the Respondent's agent placed an advertisement for sale on 4th February 2019 before the lapse of forty five (45) days contrary to Rule 15(d) and (e) of the Auctioneers Rules 1997;

g. That the advertisement was placed in the newspaper on 4th February 2019 which was ten (10) days after the advertisement instead of fourteen (14) days after the first newspaper advertisement as provided in Rule 15 (e) of the Auctioneers Rules 1997.

5. It was her further contention that her Memorandum of Appeal dated 2nd September 2019 showed that she had a good probability of success. She pointed out that unless the orders she had sought were granted, her Appeal would be rendered nugatory. She was emphatic that she had a *prima facie* case against the Respondent herein and the balance of convenience thus tilted in her favor.

6. In response to the said application, on 4th November 2019, Steve Biko, the Respondent's Credit Manager swore a Replying Affidavit on behalf of the Respondent herein. On 2nd December 2019, he swore a Further Affidavit. The same was filed on 9th December 2019.

7. The Respondent averred that the Appellant was bound by the contractual obligations they had agreed upon and she could not run away from the same. It stated that it was her obligation to repay the loan due which at the time of swearing the Replying Affidavit stood at Kshs 17,021,261.27, which loan continued to attract interest and penalty on account of her default in repaying the same.

8. It added that according to the Charge documents dated 11th December 2014 in respect of Kisumu/Dago/3445 and Kisumu/Dago/1224 that she duly executed, it was expressly provided that if there any arrears accrued, it was at liberty to demand the entire loan amount that was outstanding. It pointed out that it was after she defaulted in repaying a sum of Kshs 4,500,000/= that was secured by a Further Charge in March 2016 that it opted to sell the subject properties.

9. It further asserted the Statutory notices that were issued herein fully complied with the provisions of Section 90 of the Land Act and Section 15 of the Auctioneers Rules. It added that the subject premises had been advertised for auction on four (4) different occasions to wit 21st January 2019, 4th February 2019, 15th August 2019 and 3rd September 2019 before they were put up for sale.

10. It was emphatic that the Appellant had not shown any *prima facie* case with chances of success and hence, the balance of convenience did not favour granting of the orders sought. It urged this court to order fresh notices be issued in the event it found default in any notice as it would be imprudent to hear a whole suit on issue of whether a notice was properly issued or not.

11. On 10th December 2019, the Appellant swore a Supplementary Affidavit on 6th December 2019. She reiterated that the procedure that was followed by the Respondent and its agents in realisation of the subject premises was irregular and unlawful.

LEGAL ANALYSIS

12. In support of her submissions that the Respondent failed to comply with the Statutory provisions under Section 90(2) of the Land Act, 2012 and Rule 15 (d) and (e) of the Auctioneers Rules, 1997 as regards the contents of the statutory notice dated 4th June 2018, the Appellant relied on the case of **Act Fast Security Limited vs Equity Bank[2014] eKLR** cited with authority by Gikonyo J in the case of **Albert Mario Cordeiro & Another vs Vishram Shamji [2015] eKLR** where the court held that failure to comply with statutory provisions gave rise to a *prima facie* case with serious chances of success. She also relied on the cases of **Giella vs Cassman Brown & Company Limited [1973] EA 358** and **Caleb Kositany & Another vs Industrial and Commercial Development Corporation & Another [2004] eKLR** among other cases.

12. On the other hand, the Respondent submitted that it strictly complied with the requisite provisions of the law in exercising its power of sale. It was categorical that the Appellant mutually entered into an agreement with it and was therefore bound by the terms and conditions of the said agreement.

14. To buttress its point, it relied on the cases of **Moses C. Muhia Njoroge & 2 Others vs Jane W. Lesaloi and 5 Others [2014] eKLR** and the case of **Gatobu M'ibuutu Karatho vs Christopher Muriithi Kubai [2014] eKLR** among other unreported cases.

15. Section 90 of the said Land Act No 6 of 2012 provides as follows:-

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 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 (emphasis court), 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 at to rectify the default and the time, not being less than two months, by the end of which the default must have been rectified;

d. the consequence 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.

16. In the Notice dated 12th January 2018, the Respondent wrote to the Borrower as follows:-

“We refer to previous correspondence from our Kisumu Branch, the first legal charge dated the 15th December 2015 for Kshs 3,300,000 (Kenya Shillings: Three Million Three Hundred Thousand Only) a further charge dated the 30th March 2016 for Kshs 4,600,000/= (Kenya Shillings Four Million Five Hundred Thousand Only) created over the above charge in favour of yourselves, to secure an aggregate sum of Kshs 7,800,000/= (Kenya Shillings Seven Million Eight Hundred Thousand Only) advanced to you together with interest thereon and other costs charges and expenses....

3. That you have failed to repay the money advanced to you in accordance with the terms, express or implied, in the said Charge and that by reason of your failure to honour your obligation to the Bank, we now DEMAND from you the payment of Kshs 6,032,219.00 being the sum in arrears (emphasis court) as at the date of this letter, that you are required to pay in order to regularize your account. Please note your liability to the bank amounts to Kshs 16,416,587.37 as at the date of the letter and continues to accrue interest at the prevailing rates until payment in full. ...

4. TAKE NOTICE that unless the bank receives the amount in arrears after the lapse of THREE (3) MONTHS from the date of service of this letter (which is deemed to be seven (7) days from the date of posting, we shall proceed to exercise our statutory power of sale...

5. Further take note that the bank will recall the entire loan amount outstanding if the default persists after the expiration of this demand...

Be advised that the charger reserves the right to apply to court and seek relief against any remedy the Bank may take to recover the sums secured under the charge therein.

THIS NOTICE is given under the terms of the charge and Section 90 of the Land Act, 2012 of the Laws of Kenya.”

17. Reading the contents of the said Statutory Notice dated 12th January 2018 against the provisions of Section 90 of the Land Act, it was evident that the said notice clearly indicated that the outstanding amount of arrears as at the time was Kshs 6,032,219/= and that the same was payable within three (3) month from the date of its service which was deemed to have been seven (7) days from the date of postage.

18. The said Notice was clear that the Respondent would call for the whole outstanding sum of Kshs 17,021,261.27 that was outstanding as at that time, which sum continued to accrue interest in the event the said arrears were not paid in full within three (3) months. It had also indicated that the Respondent reserved the right in respect of certain remedies to apply to the court for relief against those remedies. The Notice also clearly indicated that it had been issued pursuant to the provisions of Section 90 of the Land Act.

19. This court was thus satisfied that the aforesaid Statutory Notice dated 12th January 2018 fully complied with the provisions of Section 90 (2) of the Land Act.

20. It appeared that the Chargor did not pay the arrears within three (3) months as a result of which the Respondent issued the Appellant herein its Notice dated 4th June 2018 indicating that it would exercise its statutory power of sale if the entire outstanding sum was not paid within three (3) months. It wrote to the Appellant as follows:-

Further to our demand letter dated 12th January 2018, we note that Pius Olima Oloo Okello t/a Guumba Contractors has failed to liquidate his debt with the bank.

NOTICE is therefore given to you that Equity (Kenya) Limited, the Chargee of the aforementioned charged property now demands from you the immediate payment of Kshs 17,021,261.27 as at 4th June, 2018 now due and payable...

TAKE FURTHER NOTICE that Equity Bank Limited as the Chargee shall, after the expiry of THREE (3) MONTHS from the date of service of this notice (which is deemed to be Seven (7) days from the date of posting) proceed to sell the property in realization of the securities...”

21. Upon the Appellant and/or Borrower failing to rectify the default within the three (3) months as stipulated in Section 90 (2) (b) of the Land Act, the Respondent’s right to realise the securities crystallised as provided in Section 96 (1) of the Land Act. The same provides as follows:-

“Where a chargor is in default of the obligations under a charge and remains in default at the expiry of the time provided for the rectification of that default in the notice served on the chargor under section 90(1), a chargee may exercise the power to sell the charged land.”

22. Having said so, the court agreed with the Appellant that the Respondent’s Statutory Notice of Sale dated 4th June 2018 was irregular as it

was issued before three (3) months of the notice of 12th January 2018 had expired. The court was reluctant to say exactly when it ought to have been issued as the Certificates of Postage were not clear on the date the same was sent by way of registered mail to the last known address of the Chargor.

23. The Respondent, however, complied with the forty (40) days' notice under Section 96 of the Land Act that provides that:-

“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.”

24. The notice under Section 96 of the Land Act was issued on 19th September 2018. The forty (40) days' notice expired on 29th September 2018. The forty five (45) days' notice by M/S Nyaluonyo Auctioneers dated 13th November 2018 was proper. The date of the newspaper in which the subject properties were to be sold by public auction was not clear. The omission to provide a legible copy showing the date of the newspaper only led this court to draw a negative inference on the same. Suffice it to state that the date of re-advertisement of the public auction on 9th September 2019 was proper as the newspaper was for 15th August 2019.

25. In this regard, the court wholly concurred with the Respondent that the notices by the Auctioneers were in accordance with Rule 15 (d) and (e) of the Auctioneers Rules 1997. The same provides that:-

“Upon receipt of a court warrant or letter of instruction the auctioneer shall in the case of immovable property—

(d) give in writing to the owner of the property a notice of not less than forty-five days within which the owner may redeem the property by payment of the amount set forth in the court warrant or letter of instruction;

(e) on expiry of the period of notice without payment arrange sale of the property not earlier than fourteen days after the first newspaper advertisement.”

26. The principles guiding the grant of orders for injunction are well settled in the celebrated case of Giella vs Cassman Brown & Company Limited (Supra). These are that the applicant has to demonstrate that it has a *prima facie* case with a probability of success, that it shall suffer irreparable injury which cannot be compensated by damages if the interlocutory injunction is not granted and that if the court is in doubt, then it shall decide the application on a balance of convenience.

27. Whereas the court was persuaded that the Statutory Notice dated 4th June 2018 did not comply with the requisite law and therefore had no legal basis, it must be noted that issuance of invalid notices is not in itself a ground for a grant of injunctive orders for the reason that the omission can be rectified. In this regard, the court found and held that the Appellant did not establish a *prima facie* case with a possibility of success as she did not show that there was an arguable point of law to be argued on appeal once the issuance of the Notice was rectified.

28. In this respect, the court had due regard to the case of Mrao Ltd vs First American Bank of Kenya and 2 Others [2003] KLR 125 that was relied upon by the Respondent, in which the Court of Appeal rendered itself as follows:-

“A prima facie case in a civil application includes but not confined to a genuine and arguable case. It is 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”

29. Going further, deep sentimental attachment to a security is also not a ground for granting of an injunction for the reason that once a chargor offers such property as security for a facility advanced to him or her, then he risked the same being put up for sale in case of default. In this respect, this court was not persuaded that the Appellant had demonstrated that she would suffer irreparable loss in the event the Respondent exercised its statutory power of sale.

30. However, she ably demonstrated that Respondent's omission to serve her with a proper notice had fettered her right of redemption and hence damages would not have been an adequate remedy if the sale of the subject premises were to proceed without rectifying the said omission. In this regard, this court had due regard to its holding in the case of Manasseh Denga vs Eco Bank Ltd & Another [2015] eKLR it held that damages could not be adequate where there was a clear breach of law. Having said so, the argument of damages not being adequate if an injunction is not granted would not be applicable where a breach can be remedied before action is taken against an applicant.

31. Bearing in mind that there would be no triable issue for determination on appeal and the question of damages as adequate compensation did not arise once the omission was rectified, the balance of convenience tilted in favour of the Respondent in not having an injunction granted herein.

DISPOSITION

32. For the foregoing reasons, the upshot of this Court's decision was that the Appellant's Notice of Motion application dated and filed on 2nd September 2019 was not merited and the same be and is hereby dismissed. As the Appellant was clearly in default and the Respondent did not fully comply with the provisions of the law, each party will bear its own costs of this application.

33. For the avoidance of doubt, the interim order issued herein be and is hereby discharged and/or vacated. The Respondent is at liberty to

exercise its statutory power of sale only upon strictly complying with the provisions of the law.

34. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 28TH DAY OF JUNE 2021

J. KAMAU

JUDGE