



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CIVIL CASE NUMBER 1 OF 2021

FLAMCO LIMITED.....1ST APPLICANT
HASMUKH RAICHAND SHAH.....2ND APPLICANT
SANJAY RAICHAND SHAH.....3RD APPLICANT
KAVIT HASMUKH SHAH.....4TH APPLICANT
SHAH CHANDRIKA HASMUKH RAICHAND..... 5TH APPLICANT

VERSUS

BANK OF BARODA (LTD) 1ST DEFENDANT
KEYSIAN AUCTIONEERS.....2ND DEFENDANT

R U L I N G

1. The application before me is brought under **Section 96(2), 103, 104 of the Land Act, 2012, rules 15 (b) of the Auctioneers Act and Order 40 rules 1 & 2 of the Civil Procedure Rules and Sections 1A, 1B, 3A of the Civil Procedure Rules.**

2. The applicants seek injunctive orders against the respondent pending the hearing and determination of the suit herein restraining the respondents, their servants, agents from advertising or organizing any public auction with a view of selling, alienating, disposing of or in any way interfering with Land Parcel Number;

- Nakuru Municipality Block 5/116
- Nakuru Municipality Block 5/119
- Nakuru Municipality Block 10/105
- Nakuru Municipality Block 6/39
- Apartment No. E21 erected on LR 209/20181

3. It is the applicants' position as supported by the affidavits of Hasmukh Raichand Shah that by an offer letter of 17th October 2019, the 1st defendant/respondent offered to extend banking facilities to the 1st petitioner/applicant. These included overdraft facility of Kshs. 650,000,000/=, term loan of Kshs. 30,000,000/= a man friend based bank guarantee of Kshs. 70,000,000/=. The said bank facilities were served by pre-existing charges over the above listed properties owned by 2nd and 3rd plaintiffs.

4. It is the applicants' position that despite servicing the loans the 1st defendant's letter dated 7th December 2020 purported to serve the applicants forty (40) day notice to sell the properties pursuant to **Section 96(2) of the Land Act 2021**. This notice was not preceded by the mandatory 90 days' notice prescribed by **Section 90 of the Same Act**. That on 15th May 2021, the 1st respondent also purported to serve another forty (40) day notice under **Section 96 (2) of the Land Act**; and on 18th May 2021, the 1st respondent instructed the 2nd respondent to commence auction to sell the said properties.

5. The applicants contend that these notices are in violation of the law and therefore null and void

6. The application is opposed on two (2) fronts;

a. Through the Preliminary Objection that it an abuse of the court, in violation of Section 1A (3), 6 & 7 of the Civil Procedure Act.

b. Through the Replying Affidavit of Justus Paul Munga.

7. It is the position of the respondents that, the applicants approached the respondents for credit facilities, and after evaluation, the request was approved and letter of offer issued on 17th October 2019.

8. The applicants offered the suit properties as collateral and charges were drawn over them. Later on 27th November 2019, a debenture charge over all stock assets of the company was drawn and registered in favour of the 1st respondent and sanctioned by the applicants.

9. That it was an express term of the debenture that the applicants would draw money from the overdraft, purchase stock, and credit the account with sales from the said stock.

10. From June 2020, the applicants failed/refused/neglected to service the full interest of the overdraft account leading to a balance of Kshs. 841, 932, 692.82/= beyond the required limit of Kshs. 717,000,000/=, no interest/regular payment were made for the months of December 2020, January 2021, February 2021 and March 2021. The term loan had outstanding balance of Kshs. 27,003,729/= and was in arrears of Kshs. 3,003,720/= as at 30th November, 2020.

11. The 1st respondent conducted their own investigations and found that there was no stock in the applicants' go downs, yet sales had been made, leading to the conclusion that the applicants had no intention of repaying the loans. Hence the instructions to counsel to issue the Statutory Notice as per **Section 90 of Land Act**.

12. On 7th December 2020, a Notice was issued, but it was inadvertently stated to be the forty (40) days' Notice instead of ninety (90) Notice.

13. On 10th December 2020 a fresh notice in compliance with **Section 90** was issued. [Before the expiry of that notice on (10/3/2021) the applicants filed HCCC 4 of 2021] which they withdrew just before filing this cause).

14. In the fresh Notice of 10th December 2020 the letter clearly indicated that the applicants were to ignore the Notice of 7th December 2020. The applicants did not act upon receipt of this Notice and on 17th March 2021, the 1st respondent issued the forty (40) day notification of sale pursuant to **Section 96(2) of the Land Act 2012**.

15. In a Further Affidavit, Justus Paul Muga demonstrated that after expiry of the forty (40) days the 1st respondent instructed the 2nd respondent, to proceed with the recovery process and issue Statutory Notices. The 2nd respondent proceeded to issue the forty five (45) days Statutory Notice, after the lapse of which the 2nd respondent placed an advertisement in the People Daily Newspaper on 3rd August 2021.

16. The applicant's filed a further affidavit through which they raised issue with the notice in the People Daily and the failure by the 2nd respondent to respond to the issues raised against them.

17. Mr. Murimi argued the application for the applicants. He urged the court to find that there was no compliance with **Section 96 and 97 of the Land Act 2012**. That in addition no valuation of the property had been conducted. That the forty (40) days that redemption Notice was issued on 15th May 2021 to the applicants. On 18th May 2021, instructions were issued to auctioneer to release the security, and on 3rd June 2021, the auctioneer issued Notice of Sale. It is Mr. Murimi's position that the forty (40) days due to his client were to expire on 25th June 2021 yet the forty five (45) days' Notice to sell was issued on 3rd June 2021 in clear violation of **Section 96 and 98 of the Land Act, 2012**. In addition, that the 2nd respondent having issued the forty five (45) days' Notice, to the effect that unless the outstanding Kshs. 862,137,170.82/= was paid within forty five (45), and that they would proceed to advertise the property for sale by public auction, they still proceeded to file a document showing that they had received instructions to sell the property on 18th May 2021, and were going to sell the property on 18th August, 2021.

18. Mr. Murimi argues that the applicants were acting in a clandestine manner and were out to sell the property without following the laid down process. He argued that his client was making regular payments of Kshs. 800,000/= to 1 million per month to service the loan.

19. That in any event there was no valuation report and the advertisement had not been done as required by law.

20. It was also the applicant's position that the 2nd respondent despite being served, had not responded to the issues raised with regard to its infractions of the law, especially the advertisement in a "little known newspaper" and advertising the property for sale without a Valuation Report.

21. On his part Mr. Kisilah urged the court to find that the laid down process had been followed, that the contractual relationship between the applicants and 1st respondents were such that their properties which were voluntarily surrendered as security for the credit facilities were now chattels where the 1st respondent could dispose off at any time following default by the applicants, that the power of sale was both statutory and contractual, that the obligation to value the property was to have the valuation before sale, that the fact that Mr. Murimi's clients were aware of the sale, and has seen the Notice in the People Daily was evident that it was a newspaper of national circulation, and that in any event the requirement of **Section 98** had been complied with.

22. He argued that the applicant had come to court with unclean hands while seeking a remedy in equity.

23. On the issue of abuse of court process, he relied on **Meshack Waweru Wanguku vs Kamau Karwa (82 - 88) 1 KAR 780.**

24. He argued that the applicants had filed a multiplicity of suits in abuse of the process of court and relied on **Satya Bhama Gandhi v Director of Public Prosecutions & 3 others [2018] eKLR; where the court stated:**

“12. It is trite law that a litigant will not be allowed to litigate a matter all over again once a final determination has been made. Generally, a party will be estopped from raising issues that have been finally determined in previous litigation, even if the cause of action and relief are different. The purpose is obviously to prevent the repetition of lawsuits between the same parties, the harassment of a defendant by a multiplicity of actions and the possibility of conflicting decisions by the different courts on the same issue.

23. The situation that may give rise to an abuse of court process are indeed in exhaustive. it involves situations where the process of court has not been or resorted to fairly, properly, honestly to the detriment of the other party. However, abuse of court process in addition to the above arises in the following situations:-

(a) Instituting a multiplicity of actions on the same subject matter, against the same opponent, on the same issues or multiplicity of actions on the same matter between the same parties even where there exists a right to begin the action.

(b) Instituting different actions between the same parties simultaneously in different court even though on different grounds.

(c)...

(d)

(e) ...

(f) ...

(g)

(h) ...

25. Two issues arise for determination;

(i) Whether the suit and the application is an abuse of the court process.

(ii) Whether the respondent complied with the provisions of the Land Act No. 6 of 2012.

(iii) Whether the prayers sought are tenable

26. On the 2nd issue – first of all it is fact that the applicants are in default of meeting their contractual obligations in servicing the loan. Mr. Murimi in his submissions was not even certain how much was being remitted by the applicants. There was no contravention of the fact that there are months when no remittances were made to the 1st respondent towards the servicing of the credit facilities. So clearly the 1st respondent was within its right to start the process of exercising its power of sale.

27. **Section 90(1)** speaks very clearly to this, the default of one month is sufficient to trigger the process. In this case, following the default by 30th November 2020, the 1st respondent issued a notice on 7th December 2020. However it found out that the notice was defective and issued a fresh one on 10th December 2020. This notice strictly complied with the provisions of **Section 90(2) (a) (b) (d) and (e) of the Land Act, 2012.** In the notice the 1st respondent indicated that in default of compliance by the applicants the properties would be sold as per **Section 90(3) (e).**

28. This notice was to expire on 10th March 2021.

29. The exercise of power of sale is provided under **Section 96(1) of the Land Act.** Before the exercise of that power **Section 96(2)** requires the chargee to issue forty (40) days' notice to sell. This was issued on 15th May 2021. The forty (40) days were to expire on 25th June 2021. There is a caveat to the charge by **Section 96(2),** the chargee;

“Shall not proceed to complete any contract for the sale of the charged land until at least forty (40) days have elapsed from the date of service of that notice.”

30. Hence the chargee is stopped from completing a contract of sale before the end of the 40 days during which period the applicant had the opportunity to deal with the default.

31. **Section 98** provides for the powers incidental to the power of sale. **Section 98(2)** requires the chargee to ensure public advertisement in a manner to ensure that the people likely interested in bidding are aware of the sale. The People Daily in which the advertisement was placed is a newspaper. I am not certain about its circulation and whether it is available in the streets of Nakuru but it does comply with **Section 98(2)**.

32. **Section 98(2)** also requires that the chargee ensures that the provisions relating to auctions and tenders for land are as near as may be, followed in respect of that sale. This brings us to the provisions of **rule 15 of the Auctioneers Rules**. **Rule 15** requires the auctioneer, upon receipt of letter of instruction in case of immovable property to among other things prepare a notification of sale in the prescribed form indicating the value of each property to be sold; serve the notice and issue in writing to the owner of the property a notice of not less than 45 days, to redeem the property by payment of the amount on the letter of institution. Upon expiry of that notice, and where no payment has been made, arrange to sell the property not earlier than 14 days after the first newspaper advertisement. The auctioneer is required to advertise the property, in a newspaper, hence the auctioneer advertised the property in a newspaper as required. The newspaper advertisement was for 3rd August 2021, clearly therefore the auctioneer will have complied.

33. However, the notification of sale does not indicate the value of each property. The only thing the auctioneer did not do, is to avail the value of the property on the notification of sale. It was also evidence there 1st respondent did not comply with **Section 96(2)**, which states: (2) A chargee shall, before **exercising the right of sale**, ensure that a forced sale valuation is undertaken by a valuer... Rule 15 (b) of the Auctioneers Rules states; 15. *Immovable property; upon receipt of a court warrant or letter of instruction the auctioneer shall in the case of immovable property— (a)... (b) prepare a notification of sale in the form prescribed in Sale Form 4 set out in the Second Schedule indicating the value of each property to be sold*; The notification of sale issued by the auctioneer did not contain any values of the properties. Mr. Kisilah told the court that there was a valuation report on his desk, dated 9th June 2021, however none was annexed to the responses by the respondent, and the 2nd respondent did not indicate the value on the form. The law places the duty on the chargee to ensure a valuation is carried out **before** the exercise of the power of sale. The absence of this does not by itself vitiate the exercise of the power of sale by the chargee.

34. On the issue of abuse of the process of court, the applicants had HCC 4 of 2020 before me, where a lot of judicial time was expended on the same application and pleadings, only for the same to be withdrawn without any explanation, then there is the other one HCC 19 of 2020 which was a replica of this case but which the applicants say they withdrew before filing this suit. These suits involved the same parties the same properties and sought the same prayers, on the same grounds. The only conclusion one can draw from this is that, the applicants are not forthright in all these and they do not deserve the exercise of the discretion of the court in their favour.

Order 40 rule 1. Cases in which temporary injunction may be granted [Order 40, rule 1.] 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

(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 orders.

35. In **Mrao Ltd v First American Bank of Kenya Ltd & 2 others**[2003] eKLR the Court of Appeal held;

“The principles for granting an interlocutory injunction are that: - a) the applicant must show a prima facie case with a probability of success;

b) An interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not be adequately compensated by an award of damages;

c) If the court is in doubt, it will decide an application on the balance of convenience.

4. A prima facie case in a civil application includes but is 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 that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.

5. The Court of Appeal took all relevant matters into question in deciding whether the appellants presented a prima facie case. The appellants came to a court of equity but having failed to show utmost good faith, the court could not but hold that it was not entitled to the injunction in application.”

36. So from the foregoing it is evidence, on default by the applicants, the applicants were issued with the mandatory requisite ninety (90) days’ notice. The applicants have not demonstrated what they did to deal with the default within the 90 days’ notice on 10th December 2020, this expired on 10th March 2021. The applicant’s instead of trying to settle the loan filed a suit HCC 4 of 2021. I am not saying that they ought not to have filed the suit. I am saying the filing of the suit ought to have been accompanied by evidence of complying with their obligations under the charge. , the ninety (90) day Notice was issued, the applicants were also issued with the mandatory forty (40) day

notice of sell, was issued on 15th May 2021, it was to expire on 25th June 2021. There is no evidence that the applicants did anything to comply with that notice even as they filed this suit on 16th July 2021 to challenge the intended sale. The only thing that the chargee is prohibited from doing by s. 96(2) *is 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. It appears to me that from a plain reading of this section nothing stops the chargee from starting the process of sale but that no contract of sale can be completed before the expiry of the 40 days' notice of sale.*

37. That appears to take care of the apparently premature notice by the auctioneer as the sale would take place after the expiry of the 40 days. The issuance of the 45 days' Notice by the auctioneer did not in my view in any way clog the applicants' right of redemption because any sale made would be untenable if done within the 40 days as it would not be completed, as any completion would be in violation of Section 92(2).

38. The issue of valuation appears to me to be intended to ensure that the sale is at market price. For as long as a valuation is done before the sale the applicant will have complied with the law.

39. Guided by the ***Mrao*** case it is my finding;

i. That the applicants have not established that they have a prima facie case capable of success

ii. They have also not demonstrated that they will suffer any irreparable damage incapable of compensation in damages

iii. I hold that in view of the fact that the applicants received all the mandatory notices and did not do anything to deal with those notices since 10th December 2020, and that they have engaged in the filing of a multiplicity of suits, to paraphrase *Mrao* they have ***come to a court of equity but having failed to show utmost good faith, the court cannot but hold that they are not entitled to the injunction in application.***

iv. The application is without merit and is dismissed with costs to the respondents.

Dated this 17th day of August, 2021.

DELIVERED, AND SIGNED AT NAKURU VIA EMAIL THIS 17TH AUGUST 2021

MUMBUA T. MATHEKA

JUDGE

Via email

Edna Court Assistant

Murimi, Ndumia, Mbago & Muchela Advocates for the Applicants

nkr@mmmnlaw.org

Sheth & Wathigo Advocates for the Respondents info@sheth&wathigo.co.ke