



**REPUBLIC OF KENYA**

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

**HCC NO. E20 OF 2021**

**SHARLEEN AUMA KABBIS.....1<sup>ST</sup> APPLICANT/PLAINTIFF**

**STEVEN KABBIS MOKAKHA.....2<sup>ND</sup> APPLICANT/PLAINTIFF**

**-VERSUS-**

**BANK OF BARODA (K)LTD..... RESPONDENT/ DEFENDANT**

**RULING**

1. This is a ruling on **Notice of Motion** application dated **12<sup>th</sup> July 2021** and filed on 13<sup>th</sup> July 2021, seeking the following orders:-

a. Spent.

b. *THAT pending hearing and determination of the main suit, this Honourable Court be pleased to grant a temporary order of injunction restraining the respondent whether by himself, his employees, servants, agents, or auctioneers from doing any of the following acts, that is to say from advertising for sale, selling whether by public auction or private treaty, disposing of or otherwise howsoever, completing by conveyance or transfer of any sale concluded by auction or private treaty, taking possession, appointing receivers or exercising any power conferred by Section 90 (2),(3)and (4) of the Land Act 2012, leasing, letting, charging or otherwise howsoever interfering with the Applicants ownership or title to parcels of land known as; Nakuru Municipality Block 7/201, Nakuru Municipality Block 7/189, Nakuru Municipality Block22/1041 (Muguga), And Gilgil/Gilgil Block 1/9160 (Kekopey).*

c. *To be determined after hearing of main suit.*

d. *That, interlocutory mandatory injunction do issue compelling the respondent to render a true, proper and accurate account to the Applicant and the Court on the actual status of the charge properties separately being; Nakuru Municipality Block 7/201, Nakuru Municipality Block 7/189, Nakuru Municipality Block 22/1041(Muguga) and Gilgil/Gilgil Block 1/9160 (Kekopey).*

e. *THAT costs of this Application be provided for.*

2. The application is premised on the following grounds.

i. *On the 15<sup>th</sup> day of April 2021, the Respondents through its appointed advocates forwarded a notice to the Applicants dated the 15<sup>th</sup> day of April 2021 in respect to Title Numbers: NAKURU MUNICIPALITY BLOCK 7/201, NAKURU MUNICIPALITY BLOCK 7/189, NAKURU MUNICIPALITY BLOCK 22/1041(MUGUGA) AND GILGIL/GILGIL BLOCK 1/9160 (KEKOPEY), notably in respect to the estate of the late Margaret Nyokabi Kanyeki to whom the applicants are legal administrators.*

ii. *The genesis of the Notice is the existence of; Legal Charge dated 10/10/2014, a Further charge dated 07/07/15, 2<sup>nd</sup> Further Charge dated 10/05/16, and a 3<sup>rd</sup> Further Charge dated 02/02/12 over Nakuru Municipality Block 7/201. A legal Charge dated 02/03/16 over Gilgil/Gilgil Block 1/9160 (Kikopey). A Legal Charge dated 11/03/2014 and a further Charge dated 02/03/16 over Nakuru Municipality Block 22/1041 (Muguga) same executed in favor of the Respondent to Secure a figure as claimed by the respondent to the tune of kshs 29,800,000/= plus interest, fees, commissions, costs and other charges (as at the date of the notice being 15/04/21).*

iii. *The Respondent proceeded through the aforestated Notice to state that the Applicants as of 31<sup>st</sup> December 2018 were indebted to the Respondents to the tune of kshs 25,255,555.70/= together with interest accruing thereon at the rate of 14%p.a.*

iv. *The Respondent further pursuant to the stated notice instructed its advocates to unprocedurally demand the aforestated figures being kshs 25,255,555.70 as of 31/12/18 together with interest which continues to accrue at the rate of 14%p.a.*

v. In utter disregard to Section 83(1) of the Land Act No.6 of 2012, the Respondent has mischievously denied the Applicants their legal right to redeem any of the charged Securities owing to the fact that a consolidated figure is what was slammed upon the Applicants, while on the contrary, the Respondents ought to have tabulated each security with its respective charge subsequently according to the Applicants the opportunity to redeem any security. The respondent intends to invoke sections 90(2)(3) and 4 of the Land Act 2012, upon the expiry of the Notice period which shall be on the 15<sup>th</sup> day of July 2021 a position which shall, in turn, cause irreparable harm to the Applicants.

vi. In the event the respondent's alleged act to exercise its power of sale is not sanctioned by this honorable court, loss irreparable loss will result to the applicants unless the orders sought are granted and the court recognizes them.

vii. This application has been made without any unreasonable delay and it ought to be granted in the interest of justice.

viii. That the Respondent will not be prejudiced in any way if the orders sought herein are granted.

3. The application is supported by the annexed affidavit of **Sharleen Auma Kabbis** reiterating the grounds of the application.

4. In response, the respondent filed a replying affidavit sworn by **Justus Paul Munga**, the branch credit manager. He averred that the application is incompetent, illegal and has neither substance nor merit, and is an abuse of the court process.

5. He further averred that on or about 2016, the late **Margaret Nyokabi Kanyeki** approached the respondent for a credit accommodation of kshs 16,800, 000/, in 2016-2018 she approached the respondent for another credit accommodation of kshs. 13,000,000/= the charge was executed over **Nakuru Municipality Block 7/201, Nakuru Municipality Block 7/189, Nakuru Municipality Block 22/1041(Muguga) and Gilgil/Gilgil Block 1/9160 (Kekopey)**. She later passed away on 22<sup>nd</sup> March 2018.

6. He averred that on 28<sup>th</sup> August 2018, the respondent informed the applicants of the servicing of the deceased loan and as of 31<sup>st</sup> December 2018, the loan arrears was Kshs. 18,202, 838.40/= in the overdraft account and Kshs. 8,472,287.40 in the term loan account.

7. He further averred that on 25<sup>th</sup> January 2019, the respondent instructed their advocates to commence recovery proceedings; that the partial payments made by the applicants could not sufficiently service the loan and as a consequence, the loan fell into arrears of Kshs. 25,255,555.70 as of 15<sup>th</sup> April 2021 and the advocate proceeded with the recovery proceedings as per the terms of the charge and in the exercise of their rights under **Section 90(3) of the Land Act**.

8. He averred that the statutory notice was issued in compliance with **Sections 90(1) and (2) of the Land Act** and the applicants are undeserving of the orders as the estate is truly indebted to the respondent; that the orders if issued will be oppressive in nature and gross abuse of the court process as the respondent continues to suffer extensive loss.

9. He averred that the applicant has not established a *prima facie* case to warrant the grant on injunctions.

10. The application was canvassed by way of written submissions.

#### **APPLICANT'S SUBMISSIONS**

11. The applicant submitted that unless an interlocutory injunction is granted the suit properties is in danger of illegally being dealt with by the respondent.

12. The applicant submitted that the respondent has denied the applicants the right to redeem one charged security as of Kshs. 25,225,555.70 is a consolidated figure and cited the provisions of **Section 83 (1) of the Land Act** which provides as follows:-

“ (1) unless there is an express provision of the contrary set out in the charging instrument, a charger who has more than one charge with a single charge on several securities may discharge any of the charges without having to redeem all charges.”

13. The applicant further cited the case of **Kakamega District Co-operative vs Co-operative Bank of Kenya Limited & Anor (2013) eKLR** and **Jane Kinuthia vs Barclays Bank of Kenya (2007) eKLR** where the court held that, “where a charger has more than one charge with a single charge with several securities, he may discharge any of those charges without having to redeem, all the charges.”

14. The applicant submitted that **Clause 11(14)** of the charge instrument is ambiguous and the same cannot be ascertained as the applicants have several charges with the respondent and has demonstrated their beneficial interest in the said properties as conferred under **Article 40 of the Constitution**; and it will be in the interest of justice for the applicant to be granted the injunctive orders restraining the respondent from invoking **Sections 90 (2), (3), and (4) of the Land Act** and consolidating the charged securities.

15. The applicants submitted that they will suffer irreparable harm if an order of injunction is not granted as they will lose the suit properties and the loss will not be adequately compensated by an award of damages; that the suit properties are in the process of being wasted.

16. On the issue of a balance of convenience, the applicant submitted that it tilts in their favor and if the injunction is not granted, great hardship will be occasioned on the applicants as they risk losing the suit properties and cited the case of **Pius Kipchirchir Kogo vs Frank Kimeli Tenai (2018) eKLR** where the court stated as follows:-

**“...the meaning of balance of convenience in favor of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favor of the Plaintiffs, the inconvenience caused to the Plaintiff would be greater than that which would be caused to the defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the Plaintiff to show that the convenience caused to them would be greater than that which may be caused to the defendant's inconvenience...”**

17. The applicant urged this court to find they have established a prima facie case and allow the application.

### **RESPONDENT SUBMISSIONS**

18. The respondent submitted that the properties were offered by the deceased as security and were charged in respect of the credit facilities advanced as provided by **Section 83 (1) and (2) of the Land Act** but the applicants defaulted in all the credit facilities.

19. Under Paragraph 13 of the offer letter the bank is at any time without notice or demand to the borrower and notwithstanding any settlement of account or other matter whatsoever combine or consolidate any or all of the existing accounts.

20. Further, paragraph 11.2.2 of the offer letter indicates in case of default the bank will declare the facility has been unenforceable and whereupon all amounts payable by the borrower shall become immediately due and payable, all without diligence, presentment, demand for payment, protest, or notice of any kind which are hereby expressly waived by the borrower.

21. The respondent submitted that the bank is exercising its statutory power of sale as per **Sections 90 (1) (2) (3) and 4 of the Land Act 2012** and it was an express term of the charge that it was binding to then debtors, assignees hence the legal administrators are obliged to make timely payments in accordance with **Section 68 (1) of the Law of Succession**. That the applicants failed to repay the loan necessitating commenced the recovery process by the bank.

22. According to the respondent the applicants have not established a *prima facie* case to warrant the award of injunctions and cited in the case of **Mrao Ltd Vs First American Bank of Kenya Ltd & 2 Others**.

23. The respondent submitted that the applicants have blatantly defaulted in making the payments as obligated despite the correspondences to them informing them of their contractual obligation in clearing the credit facility and the current application is aimed to deprive the respondent of its monies lent to the deceased.

24. Counsel contends the statutory and the applicants will not suffer irreparable loss; that the respondent is in the business of selling money to earn some profit but the applicant being fully aware of the loan have consistently failed to honor the loan to the detriment of the respondent and the loan facility stands at Kshs 25,255,555.70/-. Thus the interest of the respondent is more imminent in need of protection by the court.

25. The granting of the injunction will occasion injustice to the respondent and it is a total injustice to the respondent who financed the deceased from the year 2014. Further, it will restrict or limit the respondent's right to exercise its right to recover the money owed by the defendant and the respondent will suffer huge losses.

26. Counsel submitted that the balance of convenience tilts in their favor; they failed to prove they are undergoing losses by virtue of being served with the notices, while the respondent is currently undergoing losses due to the temporary orders in place and there is no commitment by the applicants on how they intend to repay the credit facility or issue further security; that the applicants are employing delay tactics and have no intention of repaying the loan. Thus not deserving of the orders sought and urged this court to disallow the application with costs to the respondents.

### **ANALYSIS AND DETERMINATION**

27. I have considered ground in support of the application, averments and submissions herein. The principles guiding the court in granting the same are well settled in the case of **Giella vs. Casman Brown & Co. Ltd, (1973) EA 58** where the court stated 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 an irreparable injury that 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 (E.A Industries vs. Truefoods [1972] EA 420.”**

28. Further in **Nguruman Ltd V Jan Bonde Nielsen 2014 eKLR**, the Court of Appeal stated as follows:-

**“The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a prima facie case has been established, the Court does not hold a mini-trial and must not examine the merits of the case closely. All that the Court is to see is that on the face of it, the person applying for an injunction has a right that has been or is threatened with the violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. It is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance, or as otherwise put, on a preponderance of probabilities.”**

29. From the above, the court does not need to hold a mini trial to establish whether a *prima facie* case but on the face of it, the person seeking injunctive order has a right that is at the risk of being threatened with violation. It is not in dispute that the deceased was accorded financial facilities by the respondent and she died before she could repay the amount owing. As of 31<sup>st</sup> December 2018, the applicants were indebted to the respondent to the tune of **Kshs 25,255,555.70/=**. It is the respondent's case that the applicants being the legal representative of the estate of the deceased are entitled to service the loan facility. The applicant herein has argued that they were not granted an opportunity to redeem one security as the credit facilities were consolidated making it difficult to redeem properties separately. The applicant is seeking to prove right to redeem one of the securities. In my view, the applicants have demonstrated a *prima facie* case.

30. On irreparable loss, I am persuaded to believe that if injunction is not granted, the applicants stand to suffer irreparable loss as they will have lost the opportunity to redeem the charged property.

31. There is no doubt that the balance of convenience tilts in favor of granting the order of injunction as it carries the lower risk of injustice. It is not however disputed that there is default in repayment of the loan facilities advanced. In view of the above, I will however impose conditions the order sought.

**32. FINAL ORDERS**

- 1) The Respondent is hereby restrained whether by themselves, their employees, servants, agents, are hereby restrained from advertising for sale or selling or transferring LR NAKURU MUNICIPALITY BLOCK MUNICIPALITY BLOCK 7/201, NAKURU MUNICIPALITY BLOCK 7/189, NAKURU 22/1041(MUGUGA)AND GILGIL/GILGIL BLOCK 1/9160 (KEKOPEY) pending the hearing and determination of the suit.**
- 2) Order 1 above to issue on condition that kshs 5 million is paid to the respondent within 45 days from the date of this ruling**
- 3) The respondent to furnish the applicants with statements separate accounts on charge properties being NAKURU MUNICIPALITY BLOCK 7/201, NAKURU MUNICIPALITY BLOCK 7/189, NAKURU MUNICIPALITY BLOCK 22/1041(MUGUGA) AND GILGIL/GILGIL BLOCK 1/9160 (KEKOPEY).**
- 4) Failure to comply with order 1 and 2 above the said orders to stand discharged**
- 5) Costs shall be in the cause.**

**RULING DATED, SIGNED AND DELIVERED VIA ZOOM AT NAKURU THIS 16TH DAY OF DECEMBER, 2021**

.....

**RACHEL NGETICH**

**JUDGE**

**In the presence of:**

Jenifer - Court Assistant

Mr. Mwendu holding brief for Odhiambo for plaintiff/applicant

Mr. Kisila for Respondent