



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCC NO. 95 OF 2019

FLORENCE MUTHONI MUCHIRIPLAINTIFF

VERSUS

NATIONAL BANK OF KENYA LIMITED.....1ST DEFENDANT

BRAND HOUSE SOLUTIONS LIMITED.....2ND DEFENDANT

MILKA WAIRIGIA MUCHIRI.....3RD DEFENDANT

DAVID MUCHIRI.....4TH DEFENDANT

RULING

1. Through the Notice of Motion dated 8th September 2016, the plaintiff/applicant seeks orders to restrain the 1st defendant (National Bank of Kenya Ltd) from selling, auctioning, alienating, transferring or in any other way dealing with LR No. Muguga/Gitaru/T. 491 (hereinafter “**the suit property**”) pending the hearing and determination of the suit.

2. The application is supported by the plaintiff’s affidavit sworn on 8th September 2016 and is premised on the grounds that:

i. The suit property is her matrimonial home and she will suffer irreparably if the same is sold.

ii. She is not aware of how the matrimonial home changed hands from the 4th defendant to the 2nd defendant and the subsequent charging to the 1st defendant.

iii. She offered to repay the loan by installments but the bank declined.

3. In the said application, the applicant also seeks orders that:

1. That the time for compliance and/or for rectifying any default to redeem L.R. No. MUGUGA/GITARU/T.491 be extended for a period of 24 months or for such other period as the court may determine pursuant to powers conferred on the court under Section 104(2) as read with Section 90 of the Land Act, 2012.

2. That the 1st defendant/respondent’s statutory powers of sale be suspended and/or postponed for a period of twenty four (24) months or for such other period as the court may determine to enable the plaintiff/applicant to redeem L.R. No. MUGUGA/GITARU/T.491.

3. That pending the determination of this application and suit, interest and any other penalties be stopped from accumulating.

4. That the costs of this application to be provided for.

4. In her affidavit in support of the application, the plaintiff avers that she is the wife of the 4th defendant while the 3rd defendant is their daughter and the 2nd defendant a company in which the 3rd and 4th defendants are directors. She accuses the 3rd and 4th defendants of taking advantage of her illness to transfer and charge the suit property on which her matrimonial home stands.

5. She avers that she then approached the 1st defendant with a proposal to offset the loan by way of monthly installments of Kshs 20,000 which proposal the 1st defendant rejected thereby necessitating the filing of this application.

The 1st defendant's case.

6. The 1st defendant opposed the application through the replying affidavit of its Remedial Manager **Mr. Michael Mwita** who avers that through a letter of offer dated 24th February 2014, the 2nd defendant (hereinafter "**the Borrower**") was granted various loan facilities amounting to Kshs 2,560,000 which loan was secured by a charge over the suit property and the 2nd defendant's personal guarantees.

7. He avers that the borrower defaulted in the repayment of the loan thereby leading to the issuance of the requisite statutory notices to the borrower and demand notices to the guarantors. He states that the applicant acknowledged the debt and approached the bank with a payment proposal of Kshs 20,000 per month which did not materialize and that the bank then instructed the auctioneers to commence the sale process of the suit property.

8. He further avers that the bank confirmed the suit property was registered in the name of the Borrower and that the Borrower had a resolution to borrow before the perfection and registration of the charge. He contends that the Borrower is truly and justly indebted to the 1st defendant and that the instant application is misconceived as the bank's statutory power of sale has properly crystallized and had been properly exercised.

The 4th defendant's case.

9. The 4th defendant swore a replying affidavit filed on 5th September 2017 wherein he states that the plaintiff is his spouse and that he obtained a loan of Kshs 2,600,000 which loan was secured by a charge over the suit property. He confirms that he had challenges in repaying the loan.

10. He states that the subject suit property was not matrimonial property having been transferred to the 2nd defendant prior to the loan agreement. He concedes that the 2nd defendant is willing to continue making the loan repayments to the 1st defendant. He seeks for time to rectify the default so as to redeem the suit property.

The 2nd and 3rd defendants case.

11. Through the 3rd defendant's replying affidavit dated 28th July 2017, she confirms the averments contained in the 4th defendant's replying affidavit and states that the suit property is not matrimonial property. She avers that the realization process commenced by the 1st defendant is a nullity in law as the 1st defendant did not issue the statutory notices in compliance with Section 90(1) and 90(2) (b) of the Land Act and neither did the auctioneer issue the 2nd defendant with a notification of sale.

12. Parties filed written submissions to the application which I have carefully considered.

13. The main issue for determination is whether the plaintiff had made out a case for the granting of the interim orders of injunction. The principles governing the granting of orders of injunction were articulated in the celebrated case of **Giella v Cassman Brown & Company Ltd** [1973] EA 353.

Prima facie case

14. In the present case, it was not disputed that the 2nd defendant obtained a loan facility from the 1st defendant which loan it did not repay thereby resulting in the issuance of the statutory notices of sale that precipitated the filing of the instant application and suit. The 3rd and 4th defendants conceded that the 2nd defendant obtained a loan facility from the 1st defendant which loan it did not repay.

15. From the above uncontested facts of the case it is clear to me that the bank's statutory power of sale crystallized following the 2nd defendant's default in the loan repayments. The 3rd and 4th defendants were categorical that the suit property is not matrimonial property. Be that as it may, even assuming that the suit property is matrimonial property, that fact alone would not preclude the bank from exercising its statutory power of sale over such property once the power of sale arises. I am guided by the decision in **Anita Chelegat v Fredrick Kumah** Civil Appeal No. 300 of 2018 wherein it was held:

"The law has long been that once a property is offered as security for financial advances, it immediately becomes liable to be liquidated as a commodity in the property market the tender memories and deep emotions associated with it notwithstanding. We think the learned judge did well to follow and apply this court's holding in JOSEPH GITAI GACHAU- VS- PIONEER HOLDINGS [2009] e KLR:

***However, we recognize the argument put forward by the applicants that the suit property is matrimonial home in which they occupy in their now sunset years. But we would like to point out that couples such as the one now before us must realize that when they charge their matrimonial property to secure a loan, they are in fact converting that property into a commodity for sale available for purchase by all sundry, if they fail to pay the charge debts or the loans and that no sentimental value or attachment to the mortgaged property, however, great, perse, would operate against the exercise of statutory power of sale by the mortgagee"*(Emphasis added).**

It is patent that both under statute and the authorities, the sale of a charged property in exercise of a statutory power of sale is not an irreparable injury or an irredeemable loss. Should it be found upon the hearing of the case that there was irregularity or impropriety in the sale, such property is well- capable of valuation and the ensuing monetary compensation is sufficient to repair the harm or loss. On the aspect was well find the complaints against the learned judge to be misplaced. See ANDREW MURIUKI WANJOHI vs EQUITY BUILDING SOCIETY LTD [2014] e KLR”

16. In the present case, all the parties, including the plaintiff, admitted that the 2nd defendant owes the 1st defendant the debt. Having regard to the admission of debt and the findings that I have made in this ruling I find that the plaintiff has not established a prima facie case so as to entitle her to the orders of injunction sought herein.

17. In view of my findings on the issue of prima facie case, I find that there is no reason to delve into determining if the rest of the limbs of principles of injunction were proved as the conditions for granting an interlocutory injunction are sequential so that the second and third hurdle of irreparable loss and balance of convenience can only be addressed if the first condition of prima facie case is satisfied.

18. Before concluding this ruling I find it necessary to address the issue of lack of service with the statutory notices that was raised by the 3rd defendant. Courts have taken the position that lack of or improper service with the statutory notice cannot be a ground for stopping the charge from exercising its statutory power of sale. This was the position taken by the Court of Appeal in *National Bank of Kenya Limited v Shimmers Plaza Ltd* [2009] eKLR wherein the learned judges held as follows:

“We venture to say that where the court is inclined to grant an interlocutory order restraining mortgagee from exercising its statutory power of sale solely on the ground that the mortgagee has not issued a valid notice, then in our view, the order of injunction should be limited in duration until such time as the mortgagee shall give a fresh statutory notice in compliance with the law. We respectfully think that the learned judge did not exercise his discretion judicially in the circumstances of this case when he granted an order of injunction until the determination of the suit.”

19. From the foregoing findings, I find that the application dated 8th September 2016 is not merited and I therefore dismiss it with costs to the 1st defendant.

Dated, signed and delivered in open court at Nairobi this 12th day of March 2020.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Muoma for Thangei for 1st defendant/respondent

No appearance for applicant

Court Assistant: Sylvia