



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCC NO. 02 OF 2020

ISABELLA NYAMBURA GITAU.....PLAINTIFF/APPLICANT

-VERSUS-

HFC(K) LIMITED.....1ST DEFENDANT/RESPONDENT

JOSRICK MERCHANT AUCTIONEERS.....2ND DEFENDANT/RESPONDENT

RULING

1. The plaintiff's application dated 8th January 2020 is for the following orders:

1. Spent

2. Spent

3. That this honourable court be pleased to issue orders restraining the respondents by themselves, their officers, servants, agents or anyone acting on their behalf from attaching, transferring, alienating, advertising, selling, or in any other way interfering with that properties known as title Number Nairobi/block 93/343, House No. 343 Golden Gate estate or any other property of the applicant pending of this suit.

4. That this honourable court be pleased to issue an order restraining the 1st respondent from listing the applicant with the Credit Reference Bureau pending the hearing and determination of this application.

5. That this honourable court be pleased to issue an order restraining the 1st respondent from listing the applicant with the Credit Reference Bureau pending the hearing and determination of this suit.

6. That pending the hearing and determination of this application, this honourable court do issue an order compelling the 1st respondent to furnish the applicant with:

i. Copies of the charge documents of the facility issued to the 1st applicant.

7. That this honourable court be pleased to issue an order compelling the respondents to furnish the applicants with copies of the forced sale valuation report for the above mentioned property title Number Nairobi/block 93/343, House No. 343 Golden Gate estate earmarked for sale.

2. The application is brought under Order 40 Rule 1 of the Civil Procedure Rules and is supported by the applicant's affidavit sworn on 8th January 2020. The application is premised on the following grounds:

1. That the object of this application will be defeated and the same rendered nugatory if it is not heard urgently. This is in view of the fact that the 2nd defendant/respondent under the instructions of the 1st defendant/respondent has advertised and plans to sell the plaintiff's property charged in favour of the 1st defendant.

2. That the 1st defendant/respondent herein entered into an agreement with the plaintiff/applicant whereby the former was to advance the latter some loan facility in form of capital finance.

3. That the said loan facility was securitized by charge over the property known as title Number Nairobi/block 93/343, House No. 343 Golden Gate estate (herein after "the suit property") registered in the name of the plaintiff/applicant.

4. That the plaintiff was surprised to see her property advertised for sale by auction as the 1st defendant/respondent never issued the chargor with statutory notices in accordance with Section 90 of the Land Act 2012 which ostensibly would indicate how much is owed and how much the charger and/or borrower would need to pay to rectify the default.

5. That the 1st defendant/respondent has also not issued the charger with a notification of sale as required under Section 96 of the aforesaid Act.

6. That no forced sale valuation report has been carried out to indicate the reserve price, the amount that the 1st defendant/respondent would recover from the intended sale and how much money would be payable to the chargor after the 1st defendant/respondent recovers whatever amount is owed to it.

7. That despite the glaring irregularities, the 1st defendant/respondent has instructed the 2nd defendant/respondent to advertise the property for sale on the 9th day of January, 2020.

8. That the actions of the 1st defendant/respondent are clearly informed by malice and are clearly crafted to ensure that the plaintiff/applicant loses her property.

9. That instructively, even the advertisement for the auction was done clandestinely during the holiday seasons that the plaintiff/applicant was informed of the impending auction by friends who saw the advertisement on the newspapers.

10. That there is imminent fear the unless this honourable court urgently intervenes and halts that auction, the defendants/respondents will eventually and unfairly dispose of the properties in question on third parties out of the reach of the plaintiff consequently occasioning her irreparable loss, the irregularities indicated herein notwithstanding.

11. That unless the honourable court intervenes the respondent's actions will cause irreparable harm and loss to the applicants if the charged property is sold and transferred to 3rd parties in view of the irregular or failure thereof by the respondents to issue notices as expressly provided by the law.

12. That the impending sale is not only unfair but also unprocedural and illegal and it is only through this honourable court's intervention that the protection of the 2nd plaintiff's/applicant's rights and interests can be guaranteed.

3. A summary of the plaintiff's case is that it entered into an agreement with the 1st defendant wherein the latter was to advance a loan facility of Kshs 3,600,000/- which was working capital for the plaintiff's business. The said facility was securitized by a legal charge over the property known as Title Number/Block 93/343 registered in the name of the plaintiff.

4. The plaintiff has been diligently servicing the facilities until some point its business started experiencing some turbulence and financial difficulties, subsequently falling behind on some scheduled payments at which point, the plaintiff and the bank renegotiated on the terms and a loan restructure agreement was entered between the parties.

5. Unfortunately, sometime in the year 2016, the plaintiff was diagnosed with dementia which is chronic or persistent disorder of the mental processes caused by brain disease or injury and marked by memory disorders, personality changes, and impaired reasoning which meant that although she has lucid moments, she could not reasonably take care of all her personal affairs including servicing the facility in question.

6. The Bank consequently caused to be advertised the suit property for sale by the 2nd defendant even though the statutory notices for the said sale were never served upon her or her primary caregivers.

7. The defendant opposed the application through the replying affidavit of its Legal Officer **Mr. Joseph Lule** who confirms that the plaintiff herein, together with **Victor Ndirangu Gitau** and **Jayne Albert Lema** (hereinafter "the Borrowers") applied to the 1st defendant and obtained a loan facility for the sum of Kshs 3,600,000. The loan was secured by a charge over L.R No. Nairobi/Block 93/433 House No. 343 South B (hereinafter "**the charged property**"). He states that the Borrowers defaulted in the loan repayments contrary to the terms of the loan agreement thus prompting the 1st defendant to initiate steps towards the recovery of the debt. He attached copies of the statutory Notices together with the certificates of posting as annexure marked "**JL5**" to the Replying Affidavit.

8. He further states that the 1st defendant engaged the services of M/S Valley Auctioneers to personally serve the Borrowers with the Statutory Notice dated 28th October 2016 but that the Borrowers still remained in arrears.

9. He further avers that the Borrowers successfully applied for the restructure of the loan facility sometime in January 2018 but that the Borrowers did not keep up with the repayment of the restructured facility. He states that the failure to keep up with the repayments necessitated the re-engagement of the auctioneers to restart the loan recovery process through the issuance of fresh Statutory Notices.

10. He further avers that the 1st defendant engaged the services of M/S Gitiscape Valuers and Estate Agents Limited (hereinafter “**the valuers**”) to assess the value of the charged property. He states that contrary to the plaintiff’s assertion that she was not served with the 45 days’ notice to settle the outstanding debt, with the said notice on 5th November 2019 but that she still persisted with the default thus leading to the intended sale of the Public Auction slated for 9th January 2020. It is the 1st defendant’s case that the outstanding loan balance as at 20th December 2019 was Kshs 4,470,991/53.

11. Parties canvassed the application by way of written submissions which I have carefully considered. The main issue for determination is whether the applicant/plaintiff has made out a case for the granting of the orders of injunction. The 1st defendant also raised the issue of the jurisdiction of this court to hear and determine this matter.

Jurisdiction.

12. Having regard to the above cited decisions on the centrality of jurisdiction in any given case, this court is of the humble view that the subject of jurisdiction ought to be determined first before the court can zero into determining the issue of whether or not the applicant has established that she is entitled to the injunctive reliefs sought.

13. In advancing the argument that this court lacks the jurisdiction to hear and determine this case, counsel for the 1st defendant cited the provisions of Section 11 of the Civil Procedure Act which stipulates as follows: -

“Every suit shall be instituted in the court of the lowest grade competent to try it, except that where there are more subordinate courts than one with jurisdiction in the same district competent to try it, a suit may, if the party instituting the suit or his advocate certifies that he believes that a point of law is involved or that any other good and sufficient reason exists, be instituted in any one of such subordinate courts: Provided that—

(i) if a suit is instituted in a court other than a court of the lowest grade competent to try it, the magistrate holding such court shall return the plaint for presentation in the court of the lowest grade competent to try it if in his opinion there is no point of law involved or no other good and sufficient reason for instituting the suit in his court; and

(ii) nothing in this section shall limit or affect the power of the High Court to direct the distribution of business where there is more than one subordinate court in the same district.

14. Section 18 of the said Act, on the other hand, stipulates as follows: -

(1) On the application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard, or of its own motion without such notice, the High Court may at any stage—

(a) transfer any suit, appeal or other proceeding pending before it for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or

(b) withdraw any suit or other proceeding pending in any court subordinate to it, and thereafter—

(i) try or dispose of the same; or

(ii) transfer the same for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or

(iii) retransfer the same for trial or disposal to the court from which it was withdrawn.

(2) Where any suit or proceeding has been transferred or withdrawn as aforesaid, the court which thereafter tries such suit may, subject to any special directions in the case of an order of transfer, either retry it or proceed from the point at which it was transferred or withdrawn.

15. Practice Directions Relating to the Filing of Suits, Applications and References in Proper Court, 2009 Gazette Notice No. 1756 stipulates thus: -

1. The place of suing is to be determined in accordance with the provisions of Section 11 and 18 of the Civil Procedure Act and not according to the preference or convenience of the plaintiff.....

2. Where suits have already been filed in the wrong court should exercise its authority.....to return the plaint to be presented to the court in which suit should have been instituted, without prejudice to any other powers that it may possess under the law to strike out the pleadings as an abuse of the court process.

16. I have perused the pleadings filed herein and I note that parties were in agreement that the amount of money advanced to the Borrowers in respect to the loan facility in question was Kshs 3,600,000. According to the 1st defendant’s deponent, the loan arrears, as at 20th December 2019, stood at Kshs 1,115,126/26 while the total outstanding sum was Kshs 4,470,991/53 as shown in annexure marked “**JL8**”.

At the time of filing its Memorandum of Appearance, the 1st defendant also registered its objection to the jurisdiction of this court to hear the application through the Grounds of Opposition dated 9th January 2020.

17. While this court is alive to the fact that it has original and appellate jurisdiction in matter of this nature, it also trite that the lower court's pecuniary jurisdiction (Chief Magistrate's Court) is up to the sum of Kshs 20 million. It is therefore not clear to me why the applicant opted to file this case before this court when it could have easily been handled before the lower court.

18. In line with the provisions of Section 11 of the Civil Procedure Act and owing to the fact that under Section 18 of Civil Procedure Act this court has powers to transfer this suit to the lower court, I am not persuaded to make any substantive orders on the subject application which orders, I believe, should be granted by the appropriate court.

19. In view of the fact that this court had on 9th January 2020 granted orders for maintenance of status quo pending the hearing of the application, I will in the interest of justice extend the said orders for a further 30 days only, to enable the parties transition the case to the subordinate court, after which the said orders will lapse, unless they are extended by the subordinate court.

20. The upshot is that this matter is hereby transferred to the subordinate court at (Chief Magistrate's Court) Milimani, Nairobi which is competent to hear and determine it. I direct that it be placed before the Chief Magistrate's Court on 28th August 2020 for further directions.

Dated, signed and delivered via Microsoft Teams at Nairobi this 20th day of August 2020 in view of the declaration of measures restricting court operations due to Covid - 19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17th April 2020.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Kamwami for 1st defendant.

Mr. Ikua for the plaintiff.

Court Assistant: Sylvia