



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA**

**ELC CASE NO. 50 OF 2019**

LINUS MURIMI CHOMBA.....1<sup>ST</sup> PLAINTIFF

ANN WANDIA MAINA.....2<sup>ND</sup> PLAINTIFF

VERSUS

EQUITY BANK LIMITED.....DEFENDANT

VIEWLINE AUCTIONEERS.....INTENDED 2<sup>ND</sup> DEFENDANT

**RULING**

**Introduction**

The application before me is the Notice of Motion dated 3<sup>rd</sup> February 2020 brought under Sections 1A, 1B, 3 & 3A of the Civil Procedure Act, Order 40 Rule 1 & 2 of the Civil Procedure Rules, Section 68 of the Land Registration Act No. 3 of 2012 and all other enabling provisions of the law. The Applicant is seeking the following orders:-

1. Spent.
2. That this Honourable Court be pleased to issue inhibitory orders inhibiting the registration of any dealings on the register of land parcel No. MWERUA/KAGIO/2496 pending the hearing and determination of this application.
3. That this Honourable Court be pleased to issue inhibitory orders inhibiting the registration of any dealing on the register of land parcel No. MWERUA/KAGIO/2496 pending the hearing and determination of this suit.
4. That the costs of this application be provided for.

The said application is premised on the following grounds:-

- (a) The 1<sup>st</sup> applicant is the registered owner of land parcel No. MWERUA/KAGIO/2496.
- (b) That the aforesaid land was charged vide a loan facility advanced by the 2<sup>nd</sup> respondent to the 1<sup>st</sup> applicant.
- (c) That the 2<sup>nd</sup> respondent has been faithfully servicing the suit charge via rice farming proceeds until sometime in November 2019 when the said farming was adversely affected by the unexpected prevalent change of climate, an act of God.
- (d) That the applicants are ready and willing to continue servicing the said charge to completion noting that they have already substantially served the same.
- (e) That it is mete and just the orders sought be issued in order to preserve the subject matter of this suit.

In further support of the said application, the applicant through the 1<sup>st</sup> applicant swore an affidavit the same date.

**Applicants Statement of Facts**

The applicant in their supporting affidavit of Linus Murimi Chomba stated as follows:-

- That the 2<sup>nd</sup> respondent has been faithfully servicing the said charge via rice farming proceeds until sometime in November 2019 when the said farming was adversely affected by the un-expected prevalent change of climate.
- That the foregoing may be substantiated by the fact the respondent was so satisfied by the servicing of the said charge that it issued subsequent charges over the suit property.
- That the respondent had through View Line Auctioneers advertised the suit land for sale by public auction on 23<sup>rd</sup> January 2020 which is now past.
- That he learnt from reliable sources that the respondent, through the said auctioneers, and on the aforesaid date, secretly executed the said auction during the pendency of this suit.
- They together with the 2<sup>nd</sup> respondent, are willing to continue servicing the said loan to its completion.
- That however, he is now apprehensive that the respondent may cause a transfer of the suit land to a 3<sup>rd</sup> party illegally.
- That they live with the 2<sup>nd</sup> respondent who is his wife on the suit land where they have put up their dwelling house.
- That they elk out their living from the suit land via farming and if the same is sold, they stand to be rendered destitute.
- That they have already serviced substantial amount of the aforesaid loan and that it is only mete and just that they be accorded a chance to finalize the same.
- That it is in the interest of justice and fairness that the orders sought be issued in order to preserve the subject matter of this suit.

### **Respondents Statement of Facts**

The respondent filed grounds of opposition and a replying affidavit in opposition to the application and stated as follows:-

- That the application dated 3<sup>rd</sup> February 2020 is bad in law and an abuse of the Court process.
- That indeed the respondent advanced to the 2<sup>nd</sup> applicant several loan facilities which were secured by registration of legal charges over title No. L.R. MWERUA/KAGIO/2496 registered in the name of the 1<sup>st</sup> applicant.
- That the 2<sup>nd</sup> applicant was to repay the loan facility in 24 months installments of Ksh. 91,225/=.
- That contrary to the agreement between the 2<sup>nd</sup> applicant and the respondent, the 2<sup>nd</sup> applicant did not meet her loan repayment obligations as a result of which the loan facility fell into arrears. A copy of the 2<sup>nd</sup> applicant's loan statement is attached.
- That as of 10<sup>th</sup> February 2020, the loan arrears stood at Ksh. 1,379,374.05/= and that it continues to attract interest and penalties until payment in full.
- That as a result of the 2<sup>nd</sup> applicant's breach of her loan repayment obligations, the respondent issued a demand notice under Section 90 of the Land Act to the 2<sup>nd</sup> respondent demanding payment of arrears. A copy of the said demand notice is also annexed.
- That after eliciting no response from the 2<sup>nd</sup> applicant, the respondent issued a notice to sell under Section 96 of the Land Act to the 1<sup>st</sup> applicant giving him 3 months to clear the loan or risk the security being realized. A copy of the said notice is also annexed thereto.
- That further the respondent issued the 1<sup>st</sup> applicant with a redemption notice under Section 96 of the Land Act giving him 40 days to redeem his security (copy also annexed).
- That when all efforts by the respondent to have the applicant repay the loan facility failed, the respondent was left with no other option and duly instructed an auctioneer to attach and sell by public auction L.R. No. MWERUA/KAGIO/2496 in an effort to recover its monies.
- That the auctioneer upon taking up instructions from the respondent duly proceeded to issue the applicants with both the 45 days redemption notice and a notification of sale copies of the two notices are annexed.
- That it is therefore clear that contrary to the averments by the applicants, they were afforded numerous opportunities to settle their obligations with the respondents but chose to do nothing.
- That it is not true that the applicants are willing to continue servicing the loan as they have made no effort to do so to-date and this averment is only meant to hoodwink the Court.

- That it is clear from the loan repayment statement that the 2<sup>nd</sup> applicant defaulted in repaying the loan way back in 2018.
- That the respondent is well within its rights as a lender to attach and sell the suit property in an effort to recover its monies.
- That contrary to the averments by the applicants, there was nothing stopping the respondent from exercising its statutory power of sale.

**Analysis and Determination**

The applicants have invoked the provisions of *Order 40 Rules 1 & 2 Civil Procedure Rules* and the inherent powers of this Court under *Sections 1A, 1B, 3 & 3A Civil Procedure Act*. *Order 40 Rule 1 & 2* is a substantive provision of the law where the Court is invoked by a litigant for the protection of a right recognized under the law either at an interlocutory stage or permanently. In this case, the applicants are invoking the orders in this application and a permanent injunction in their plaint dated 25<sup>th</sup> November 2019. The gist of the application as deponed in the supporting affidavit is that the 2<sup>nd</sup> applicant approached the respondent for a loan facility which was secured by registration of legal charges over the suit property being L.R. No. MWERUA/KAGIO/2496 registered in the name of the 1<sup>st</sup> applicant.

The 1<sup>st</sup> applicant at paragraph 4 of the supporting affidavit admits that the 2<sup>nd</sup> applicant serviced the loan until sometime in 2019 when she defaulted payments due to unexpected prevalence of climate change. In her response, the respondent through the replying affidavit sworn by her Credit Manager Kagio Branch one Edith Matere sworn on 20<sup>th</sup> February 2020 stated that contrary to the agreement between the 2<sup>nd</sup> applicant

and the respondent, the 2<sup>nd</sup> applicant did not meet her loan payment obligations as a result of which the loan facility fell into arrears and that as of 10<sup>th</sup> February 2020, the loan arrears stood at Ksh. 1,379,374.05/= and continues to attract interest and penalties until payment in full. The respondent further stated that as a result of the 2<sup>nd</sup> applicant’s breach of her loan repayment obligations, the respondent issued a demand notice under *Section 90 of the said Act* to the 2<sup>nd</sup> applicant demanding payment of arrears.

She further deponed that after eliciting no response from the 2<sup>nd</sup> applicant, the respondent issued a notice to sell under ***Section 96 of the Land Act*** to the 1<sup>st</sup> applicant giving him 3 months notice to clear the loan or risk the security being realized. She also stated that she issued the 1<sup>st</sup> applicant with a redemption notice under *Section 96 of the Land Act* giving him 40 days to redeem his security and when all efforts to have the applicants repay the loan facility failed, the respondent was left with no other option and duly instructed an auctioneer to attach and sell by public auction the suit property. She stated that the auctioneer upon taking up instructions from the respondent duly proceeded to issue the applicants with both the 45 days redemption notice and a notification of sale. She annexed all the documents referred herein above. The applicants did not file any supplementary affidavit to challenge or controvert these averments.

From the averments contained in the replying affidavit, I am satisfied that the applicants defaulted in their obligation to repay the loan advanced which stood at Ksh. 1,379,374.05/= as of 10<sup>th</sup> February 2020. The applicants are not complaining that the payments being demanded by the respondent is contrary to what they agreed upon but they seem to argue that their default is an act of God which was beyond their control.

In my view, parties are bound by their agreements and Courts do not re-write contract for them. Where a party to a loan advance is unable to repay the loan as had been agreed, he/she can re-negotiate and agree on a new repayment schedule. As regards *Order 40 Rule 1 & 2*, the principles for injunction as set out in the case of ***Giella Vs Cassman Brown Co. Ltd (1973) E.A. 358*** apply. The applicant must establish the following principles:-

- (a) ***Prima facie case with high chances of success.***
- (b) ***Establish that he stands to suffer irreparable loss and***
- (c) ***Where the Court is in doubt, it may decide the case on a balance of convenience.***

On the first principle, I find that the applicants have not demonstrated a prima facie case with any chance of success. They were given a loan advance which they defaulted payment leaving the respondent with the statutory power of sale under the loan agreement. The Court can only intervene where the terms of agreement between parties are unconscionable or were obtained through coercion or other undue influence as was stated by the Court of Appeal in the case of ***National Bank of Kenya Ltd Vs Pipe plastic Samkolit (K) Ltd and another (2002) E.A. 503*** where it was held:-

***“This, in our view, is a serious misdirection on the part of the learned Judge. A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the clause”.***

I agree with the decision by the superior Court. For all the reasons I have stated hereinabove, I find the Notice of Motion dated 3<sup>rd</sup> February 2020 lacking in merit and the same is hereby dismissed with costs. It is so ordered.

**READ, DELIVERED and SIGNED in open Court at Kerugoya this 23<sup>rd</sup> day of October, 2020.**

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**E.C. CHERONO**

**ELC JUDGE**

*In the presence of:-*

1. *Mwangi Maina holding brief for C.S. Macharia for Plaintiffs*
2. *Mbogo – Court clerk.*