



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KIAMBU**

**COMMERCIAL CASE NO. 3 OF 2020**

**ALICE NJOKI MUGO.....PLAINTIFF/APPLICANT**

**VERSUS**

**KCB BANK KENYA LIMITED**

**JOEL MWANZIA VELELE**

**T/A BETABASE AUCTIONEERS.....DEFENDANTS/RESPONDENTS**

**R U L I N G**

1. The Plaintiff **Alice Njoki Mugo** filed this case **against KCB Bank Kenya Ltd**, as the 1<sup>st</sup> Defendant and **Betabase Auctioneers** as the 2<sup>nd</sup> Defendant. By this claim the Plaintiff seek an order for permanent injunction to restrain the defendants from selling by auction property Villa No 54 erected on LR No 19094/38 (Five Star Meadows, Kiambu) hereinafter the property; and for an order that the 1<sup>st</sup> Defendant do account to the Plaintiff the amount borrowed and interest applied.

2. The plaintiff admits that in the year 2016 she obtained from the 1<sup>st</sup> Defendant a loan for Ksh.33,255,000 and as security the 1<sup>st</sup> Defendant created a mortgage over the property. The Plaintiff pleaded that the mortgage instrument is defective because it fails to show the amount payable by her on a monthly basis, that the 1<sup>st</sup> Defendant without informing her made changes to the interest rate applicable to her account which the Plaintiff termed as void and of no legal effect; that the plaintiff cleared her loan with the 1<sup>st</sup> Defendant; that the 1<sup>st</sup> Defendant failed to serve Statutory Notices on the Plaintiff; that the 1<sup>st</sup> Defendant failed to supply the Plaintiff with bank statements; and that there was no valuation of the property undertaken before the scheduled auction.

3. Pending the hearing and determination of this suit the Plaintiff filed a Notice of Motion application dated 24.1.2020 seeking interlocutory injunction to stop the auction of the property by the 2<sup>nd</sup> Defendant under the instructions of the 1<sup>st</sup> Defendant.

4. That application is opposed by the Defendants. In response to the application the Defendants filed a replying affidavit sworn by **Fredrick Mung'athia** on 25<sup>th</sup> June 2020. By that affidavit it is deponed that the Plaintiff executed a letter of offer wherein are the terms of repayment of the loan; the 1<sup>st</sup> Defendant denied varying the rate of interest, that the 1<sup>st</sup> Defendant served on the plaintiff all the requisite statutory notice; that the 1<sup>st</sup> Defendant obtained a valuation; and that the Plaintiff previously filed a case seeking similar orders as sought here before the **Thika Chief magistrate's Court** being Case Thika MCLE 132 OF 2019, which case was struck out. In that case at Thika Chief Magistrate's court the Plaintiff admitted being indebted to the 1<sup>st</sup> Defendant and also admitted to being served with the statutory notices by the 1<sup>st</sup> Defendant.

**ANALYSIS AND DETERMINATION**

5. The Court of Appeal in the case **Mbuthia -v- Jimba Credit Finance Corporation and Another (1988) e KLR**

“The correct approach in dealing with an application for the injunction is not to decide the issues of fact, but rather to weigh up the relevant strength of each side's propositions. There is no doubt in my mind that the learned Judge went far beyond his proper duties, and has made final findings of fact on disputed affidavits.”

6. That approach will guide me as I begin to consider the Plaintiff's application.

7. The plaintiff alleged that the 1<sup>st</sup> Defendant failed to serve upon her the statutory notices before embarking on the auction of the property.

The 1<sup>st</sup> Defendant provided, through its replying affidavit the statutory notices served on the Plaintiff. The first notice is dated 18<sup>th</sup> January 2019 which gave a breakdown of the Plaintiff's indebtedness and gave the Plaintiff 3 months' notice to pay the amount due as required under Section 90 (3) of the Land Act. The 1<sup>st</sup> Defendant further gave another notice of default by letter dated 29<sup>th</sup> July 2019 which notice again set out the Plaintiff's indebtedness and required the Plaintiff to rectify the default within 40 days. Those two notices were served on the Plaintiff, in the first instance through registered post and further physically through tenants of the property that the Plaintiff authorized to be served. It needs to be stated that these depositions are not controverted by the Plaintiff at all. But perhaps more disturbing and is contrary to what is pleaded before this court, the Plaintiff before the Thika Chief Magistrate court admitted to having received the 1<sup>st</sup> Defendant's demand notice dated 29<sup>th</sup> July 2019. The Plaintiff before that court also pleaded as follows:

**“The Plaintiff acknowledges the indebtedness to the Defendant and in proposing to present a scheme of repayment.”**

8. The Plaintiff again in Thika Chief Magistrate's court case pleaded in her plaint that she intended to pay the 1<sup>st</sup> Defendant the entire amount she owed. Those pleadings are in the Plaintiff's plaint before that court and which plaint was supported by a verifying affidavit of the Plaintiff.

9. It becomes, therefore, abundantly clear that the Plaintiff, by pleading in this case contrary to what she pleaded before the Thika Chief Magistrate's court she has not been truthful.

10. The 1<sup>st</sup> Defendant by the replying affidavit attached a valuation of the property dated 10<sup>th</sup> July 2019. Since the Plaintiff did not controvert that valuation it follows that the correct position is that the 1<sup>st</sup> Defendant valued the property before instructing the 2<sup>nd</sup> Defendant to auction the same.

11. The 1<sup>st</sup> Defendant by its affidavit in reply attached the letter of offer for the loan signed by the Plaintiff which letter provided the monthly instalments payable by the Plaintiff plus the interest rate. Although the Plaintiff argued that the charge instrument did not provide for the rate of interest that in fact is incorrect because under clause 2 (a) of the charge it provides in part the Plaintiff would pay:

**“...Such interest to be calculated at the rate or rated set out in any facility letter, ....”**

12. The Plaintiff signed the facility letter dated 1<sup>st</sup> September 2016 which set out the amount payable and the applicable interest.

13. Although the Plaintiff alleged the 1<sup>st</sup> Defendant failed to supply her with bank statements she failed to prove that she requested for such statement. The Plaintiff had a burden to prove such a request as provided under **Section 107 of Evidence Act**. That is in the following terms:

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

14. Having made a determination that the Plaintiff contradicted herself in her pleadings before the Thika Chief Magistrate's Court matter with what she pleaded in this matter it becomes clear that the Plaintiff approached this court seeking equitable relief with unclean hands. He who comes to equity must come with clean hand: see the case **Caliph Properties Limited -v- Barbel Sharma and Another (2015) e KLR** as follows:

**“Kyangaro v. Kenya Commercial Bank Ltd & Another (2004) 1 KLR 126 as cited in Patrick Waweru Mwangi & Another v. Housing Finance Co. of Kenya Ltd (2013) eKLR at page 145 stated:**

**“Secondly, the injunction sought is an equitable remedy. He that comes to equity must come with clean hands and must also do equity. The conduct of the Plaintiff in this case betrays him. It does not endear him to equitable remedies. ... He who comes to equity must fulfill all or substantially all his outstanding obligations before insisting on his rights. The Plaintiff has not done that. Consequently he has not done equity.”**

15. Having considered the Plaintiffs application, I find the words stated in the case **Jopa villas -v- Overseases Private Investment and 2 Others (2009) e KLR** very fitting. The court there stated:

**“I am clear in mind that the Applicant is running away from obligations lawfully imposed and with its full knowledge and participation. Courts should not aid it in that quest but will instead uphold the rights of the 1<sup>st</sup> Defendant to recover its monies lawfully advanced. That is a tradition that I cannot depart from and as was advised in Aiman vs Muchoki (1984) KLR 353. Our courts must uphold the sanctity of lawful commercial transactions.”**

16. The Plaintiff's Notice of Motion dated 24<sup>th</sup> January 2020 in view of what is stated above is found without merit and is dismissed with costs.

17. Orders accordingly.

**SIGNED AND DELIVERED VIRTUALLY THIS 15<sup>th</sup> DAY OF DECEMBER 2020.**

**MARY KASANGO**

**JUDGE**

15<sup>th</sup> December 2020

Before Justice Mary Kasango

C/A - Kevin

For the Plaintiff/Applicants – No appearance

For the Defendants/Respondents – Ms Waigwa

**COURT**

Ruling virtually delivered in their presence.

**MARY KASANGO**

**JUDGE**