



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. E 408 OF 2018

MARY WAMAITHA KAITTANY.....PLAINTIFF/APPLICANT

VERSUS

PROGRESSIVE CREDIT LIMITED.....DEFENDANT/RESPONDENT

RULING

1. The subject of this ruling is the Plaintiff's (herein "the Applicant") application dated 3rd December 2018, seeking for orders that, the Defendant (herein "the Respondent") be restrained from disposing of the suit property namely L.R. No. 11927/8, pending the hearing and determination of this suit. That the costs of the application be borne by the Respondent.
2. The Applicant deposed that, she is the registered proprietor of the suit property and that she charged the said property in favour of the Respondent for a sum of Kenya Shillings Eight Million (Kshs. 8,000,000). That as at 10th October 2018, the amount due and owing was Kenya Shillings Seventeen Million One Hundred and Eleven Thousand Four Hundred and Eighty Four and Two Cents (Kshs. 17,111,484.02).
3. The Applicant averred that she took the loan facility to "advance her business" but she was unable to repay the same within the contracted time and thus the interest accrued thereon. As such, the Respondent has threatened to exercise its statutory power of sale, with sale scheduled to take place on the 4th December 2018, (a day before she filed the application).
4. The Applicant further averred that, she is of an advanced age and resides in the suit property with her family and therefore the sale will render her homeless. Further that, she has four children of adult age who depend on her who were not involved in the charging of the suit property nor consented to it and therefore they will lose their customary rights over the property.
5. Finally, she argued that, the property should not be sold as she has offered an additional security being LR No. Mavoko Town Block 2/123 to settle the debt. That, even then, the interest claimed offends the provisions of Section 44A (2)(b) of the Banking Act. She also argued that property was undervalued and that amounts to a breach of duty of care by the chargee under the provisions of Section 97(a) of the Land Act.
6. The Respondents filed a replying affidavit dated 21st February 2019, sworn by Kenneth Muchiri Mbaabu, its Managing director. He joined issues with the Applicant on the advance of the loan of Kenya Shillings Eight Million (Kshs. 8,000,000) and the creation of the charge over the suit property. The charge was stated to have been created on 19th December 2016.
7. That the loan was advanced to be utilized as "working capital" and the Applicant was to repay the same by monthly installments of Kenya Shillings Three Hundred and Fifty Thousand (Kshs. 350,000) for the first five months from January 2017 to June 2017, and the final amount of Kenya Shillings Eight Hundred Million Five Hundred and Thirty Thousand and fifty (Kshs. 8,530,050) to be paid on the 6th months being June 2017.
8. That since obtaining the loan facility, the Applicant defaulted in making the repayment and is therefore abusing the court process in a bid to frustrate the Respondent from exercising its statutory power of sale. The Respondent argued that, it has complied and sent all requisite statutory notices as indicated under paragraph 12 of the replying affidavit.
9. In response to the allegation that the Applicant is elderly and that her children were not privy to the contract between the parties herein, the Respondent argued that, these factors are immaterial and cannot defeat statutory right of sale. That neither the issues raised regarding the valuation and/or the alternative security offered can be a bar to the exercise of right of sale.
10. However, the Applicant filed an undated further affidavit in response to the replying affidavit, whereby she brought to the knowledge of the court that, Moran Auctioneers had advertised the suit property for sale on 26th February 2019. She reiterated that, the title to the

property MavokoTown Block 2/1213 is sufficient security as it is valued at an open market value of Kenya Shillings Thirty Million (Kshs. 30,000,000) and forced sale value of Kenya Shillings Twenty Five Million Five Hundred Thousand (Kshs. 25,500,000).

11. The application was considered ex parte on 4th December 2018, whereby the court ordered that it be served for directions on 7th December 2018. On that date, the Respondent sought for and was granted time to respond to the application which was then stood over to 21st January 2019. The parties were also given directions on the filing of their respective submissions. On 21st January 2019, the Hon. Deputy Registrar, dealt with the matter as the court was indisposed and directed the parties to return to court on 12th February 2019, to highlight the submissions.

12. However, on that date, the Applicant was absent, and although the Respondent sought to be heard, the court ordered the file placed aside, but at 1.00pm, when the matter was called out, none of the parties were in court. The court ordered the Hon. Deputy Registrar to send them a notice to them to progress the matter, and the matter stood over to 21st February 2019. On the 21st February 2019, the Applicant informed the court that, the sale of the property was scheduled for 26th February 2019. Despite the busy schedule and the fact that the court was on training over to 22nd February 2019, the matter was stood over to the 25th February 2019, when it was heard orally due to the urgency of the eminent sale.

13. I have considered the application and I find that, the basis upon which the court will grant a temporary injunction order is established in the case of; *Giella vs Cassman Brown (1973) EA 360*. The Applicant must establish that, she has a prima facie case, (as defined in the case of; *Mrao Ltd Vs. First American Bank of Kenya Ltd [2003] KLR 125*) with high probability of success, and that, the award of damages is not adequate and sufficient remedy and that the balance of convenience tilts in her favour.

14. In the instant case, there is no dispute that, the Applicant advanced Kenya Shillings Eight Million (Kshs. 8,000,000) which was secured by the suit property namely L.R. No. 1192718 and subsequently L.R. No. Mavoko Town Block 2/1213. It is not in dispute that, the Applicant has not serviced the loan facility regularly and she is in arrears. The only issues she has raised are that, the property has been undervalued and the interest charged is against the provision of the law and that the statutory notices were not served.

15. However, I find that, the Respondent has annexed to the replying affidavit copies of several statutory notices that were served upon the Applicant. The Applicant did not rebut the same in the further affidavit. In the oral submissions advanced by the Applicant's Counsel, the Applicant conceded to the fact that she is in default in servicing the loan and proposed to repay the loan by monthly installments of Kenya Shillings Two Hundred Thousand (Kshs. 200,000).

16. However, it is noteworthy that, according to the bank statements, produced by the Respondent, the last payment made by the Applicant was on 26th September 2017. That is a period of one and a half (1 ½) years. How then can the Plaintiff convince the court that granted an opportunity, she will pay the proposed Kenya Shillings Two Hundred Thousand (Kshs. 200,000) per month.

17. It also suffices to note that, her contractual monthly repayment was Kenya Shillings Three Hundred and Fifty Thousand (Kshs. 350,000). If the court were to order otherwise, it will amount to varying the contractual terms and re-writing the contract for the parties (see; *National Bank of Kenya Ltd vs Pipe Plastic Samkolit (K) Ltd and another (2002) EA 503*). It is therefore evident that, the Respondent's power of sale has arisen.

18. In fact, the continued delay of realization of the property is not benefitting the Applicant as interest continuous to accrue and increase the debt.

19. Be that as it were, as regards the issue of undervaluation, the Respondent is duty bound to exercise "reasonable care" to obtain "the best price" which can reasonably be obtained (see *Cuckmere Brick Co. Ltd & Anot. Vs Mutual Finance Ltd (1971) ch 949*), where the Court of Appeal held that, in exercising his power of sale, a mortgagee/chargee was not merely under a duty to act in good faith, but also to take reasonable care to obtain "a proper price" or as Salmon LJ preferred to say "the true market value". It therefore follows that the mortgagee/chargee is bound to have reasonable regard for the interests of the mortgagor/chargor. That is to say, he must not willfully sacrifice the property but is empowered to sell it either by public auction or private contract.

20. Indeed, in view of the fact that the value of property can be ascertained, the sale thereof can be compensated adequately by award of damages. It therefore follows that, if the Applicant suffers any loss as a result of unlawful or unprocedural sale of the property, she can be compensated by damages.

21. As a result of the aforesaid, I find that, the balance of convenience tilts in favour of the Respondent and I decline to issue a temporary order of injunction to restrain the Respondent from disposing off the suit property LR No. 11927/8 Ngong Road Estate, Dagoreti Corner. It suffices to note that, this is the only property advertised for sale, therefore the subsequent property given to the Respondent does not form the subject matter of this application and/or order.

22. However, before I rest the matter, it suffices to note that, the Applicant was given an opportunity from the 4th December 2018, to make a reasonable proposal to the Respondent to wade off the sale. Nothing was forth coming until the 25th February 2019 when the offer of Kenya shillings Two hundred thousand (Kshs. 200,000) was made.

23. The court appreciates the hard economic times as submitted by the Applicant, but the court's role is the enforcement of contracts not the drafting and/or variation thereof. Had the Applicant made a reasonable proposal, the court would have been inclined to request the Respondent consider it. But more so, if the Applicant was at least making the contractual monthly installments.

24. In conclusion, if the court were to stay the sale, the Applicant will have to deposit a sum of Kenya Shillings Two million (Kshs. 2,000,000) out of the admitted sum of Kenya shillings Six million Four Hundred Thousand (Kshs. 6,400,000) and pay all the expenses

associated with the stopped sale, if it is stopped. In the absence of compliance, the sale should proceed. Therefore the application is otherwise dismissed with costs to the Respondent.

25. Those then are the Court orders.

Dated, delivered and signed in an Open Court this 26th day of February 2019.

G.L. NZIOKA

JUDGE

In the presence of :

Ms. Kibebo for the Applicant

Mr. Njoroge for the Respondent

DennisCourt Assistant