



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAJIADO**

**CIVIL SUIT NO. 35 OF 2018**

**AMBIENT CONSTRUCTION.....PLAINTIFF**

**VERSUS**

**NATIONAL BANK OF KENYA LIMITED.....DEFENDANT**

**JUDGEMENT**

The matter was brought originally in the Environment and Land Court through suit No. 1238 of 2016 at Nairobi through a plaint dated 7<sup>th</sup> October, 2016 and filed on 10<sup>th</sup> October, 2016 which was brought through chamber summons application under certificate of urgency dated 7<sup>th</sup> October, 2016. The plaintiff in its plaint prayed for judgment against the defendant for inter alia:

**1. A permanent injunction restraining the defendant by itself, its servants, agents or auctioneers or any of them be restrained by injunction from advertising, offering for sale, disposing off, selling by Public Auction or private treaty or otherwise howsoever alienating, parting with possession or interfering with the plaintiff's ownership of the property comprised in Land Parcels LR. Nos Ngong/Ngong65212. 65224, 6522, 65227 and 65228 (Subdivisions of the title No. Ngong/Ngong/7409 veterinary Area Ngong town Outskirts in Kajiado county.**

**2. Costs of the suit and interests**

**3. Such other or further orders as this honourable court shall deem fit.**

In response, the defendant entered appearance and filed a defence together with a list and bundle of documents dated 13<sup>th</sup> November, 2018 and further filed a supplementary list and bundle of documents dated 21<sup>st</sup> November, 2018. The suit was later transferred to the ELC court here in Kajiado and was later brought to this court. The facts of the case are that the defendant herein, which is a bank, on or about 17<sup>th</sup> November, 2014 advanced to the plaintiff various loan facilities amounting to Kshs. 10,000,000 pursuant to that, the plaintiff's directors executed a legal charge to secure the repayment of the Kshs. 10,000,000 which was for a period of one year, and were to finance repeated LPO from specific employers whose limit was to run for one year and included and overdraft and guarantees not exceeding the sum of Kshs. 10,000,000 over the aforementioned properties hereinafter referred to as the "suit Properties"

**The plaintiff's case**

It was the plaintiff's submissions that indeed the defendant bank had indeed loaned the plaintiff company Kshs. 10,000,000 but what it disputed was the fact that the defendant had erred in calling the loan at the time it did and that it did not follow the proper process, and that the interest that was levied was wrong due to unlawful variations without notice. That despite signing the charge document, the executed and registered instrument has never been given to them despite constant pleas to furnish them with the same. The plaintiff averred that the defendant sent a thirty da notice that was late when long after it had expired and the purported date had lapsed and that the defendant knew the physical location of the plaintiff's office.

The plaintiff went on to submit further that upon the lapsed, null and void notice they went to the defendant's office seeking to know what the notices were about and in fact collected a copy of the other thirty days' notice, despite it also being stale as it had also lapsed and only came to the attention of the plaintiff company after he went to inquire from the defendant. The plaintiff company avers that he has tried to get a clarification of what was owed to the defendant and no clarification has been forthcoming. It was his testimony that the plaintiff company did not know what to do went the officers of the defendant told the director, who was a plaintiff witness, to pay the entire sum so as to forestall any adverse action.

The plaintiff submitted that he was therefore called by M/s Leakey Auctioneers, thereafter the auctioneers, who attempted to serve him with a 45 days' notice, which notice he was advised by his advocates not to receive on account of the invalidity and anomaly in the previous

60 days' notice. His advocates advised that the redemption notice would also be invalid now that the foundational 60 days were invalid after seeing the secured properties advertised for sale in the newspaper, the plaintiff company rushed to court and obtained orders preserving the status quo, hence this suit.

The reason the plaintiff came to court was due to the fact that the loan was for the development of residential houses, which project was and still is ongoing and whose viability was affected by the adverse reports intended auction by the defendant, while the delay in repayment by its actions and what the plaintiff company was requesting was a renegotiated facility as the securities value was still way more, above four times, than the sum sought to be redeemed.

The defendant company witness, Elizabeth Mwangi, upon cross examination admitted that after she had taken over supervision of the account about a year ago, she did not know that the executed and registered charge instrument had not been furnished to the plaintiff, on posting the notices and neither did she have notices on variations on the interest and levies as required by the Banking Act. She admitted that the interests kept on varying and while the negotiated interest rate was 18.5% it oscillated at 19.3%, 22.83%, 25.5% at various times as evidenced by the demand letters contained in the defendants bundle of documents. Her explanation had been that the bank was at liberty to do so as there was no capping of bank interest then, and that the statement of accounts that the defendant bank was issuing to the plaintiff had different figures from what was contained in the demand letters and that the latest summary of liabilities as contained in the supplementary bundle of documents by the defendant, the figures were misleading and confusing to a non-banker and kept on varying as shown in the attachments in their original bundle of documents.

The plaintiff submitted that the defendant had failed to discharge the burden to show that indeed there had been copies supplied by the defendant bank. It relied on *Livingstone Gichora v Family Finance Building Society; HCCC No. 1480 of 2001* that:

***“Once the charger alleges non receipt of the statutory notice, it is for the chargee to prove that indeed the notice was sent. In the absence of proof of posting the same is invalid and void”***

In the absence of the lapsed and expired notices, it was incumbent upon the defendant to issue fresh notices since the others were invalid if indeed their right to redeem had arisen, which they had not done.

Further the plaintiff argued that due to unlawful regimes of interest being levied, without due notice, there were major variances in the amounts payable, throwing into jeopardy efforts by the plaintiff company's director's to have clarification on what was due and when. This was further complicated by the capping of bank interest and to show the defendant's intransigence, the amounts due are yet to be known by the defendant.

The defendant bank had issued the plaintiff company with demand letters, with the latter averring that demand letters do not constitute valid notices under the banking Act. The defendant's right to redemption of security and for its power of sale to crystallize, the same can only accrue upon lawful, valid and religious adherence to the redemption process as laid out in the Banking Act.

The plaintiff had satisfied, it argued, the threshold for deserving of an injunction as spelt out in *Giella v Cassman Brown Ltd* more so when it considered that the plaintiff stands to lose irreparably should the proposed project be scuttled by the sale the assets, rendering the planned gated project untenable.

On a balance of convenience, the greater hardship would be visited upon the plaintiff were the defendant not restrained, while again rendering ourselves that the defendant is still covered by the securities that they hold and that the plaintiff had established a prima facie case. That indeed there has been a violation of its rights as was laid in the affidavit and the evidence adduced and that it was deserving of the prayers sought.

### **Defendant's case**

The plaintiff's director (Pw1) indicated that there were indeed three notices that he knows of, the 3 days' notice, the 90 days' notice and the 45 days' notice. He admitted to receiving the said 30 days' notice which was sent via registered post, late. Pw1 also noted that upon receipt of the late notice, he went immediately to the defendant bank to question it, where he was served with the 90 days' notice. In his submissions, the plaintiff admitted to having been served with the 45 days' notice by the auctioneers but declined service on the advice of his advocate. The 45 days' notice in the defendants bundle of documents bears the plaintiff's postal address which was admitted by Pw1 during trial, which is the same one that was handwritten in the guarantees. The defendant bank submitted that the notices were all properly served.

The 45 days' redemption notice by Leakey's Auctioneers was served on 29<sup>th</sup> July, 2016, by which time the 30, 40 and 90 days' notice had already lapsed. This redemption notice gave the plaintiff a further 45 days and the sale was scheduled for 11<sup>th</sup> October, 2016, which gave the plaintiff a further three months to put his accounts in order. During trial Pw1 did not indicate that he declined service of the said 45 days' notice by the Auctioneers as supposedly advised by his advocate, but the same is clearly admitted in the plaintiff's submissions.

### **Analysis And Determination**

The issues for determination, in my view are:

- i. Whether the notices were properly served**
- ii. Whether the defendants statutory power of sale had crystallized**

**iii. Whether the prayers ought by the plaintiff company are tenable.**

**Where the notices issued were proper**

In the first issue, we look to the law on what the procedure is on service of statutory notices on power of sale Section 90 of the Land Act provides:

***“If a charger is in default of an obligation, fails to pay interest or any other periodic payment or any part thereof due under any charge or in the performance or observation of any covenant express or implied, in any charge, and continues to be in default for one month, the charge may serve on the charger a notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be.”***

Although under Section 90(5) of the Land Act, the Cabinet Secretary, in consultation with the National Land Commission is required to prescribe the form and content of a notice to be served, unfortunately, the said form or content has not been prescribed as yet. Meanwhile, charges have to formulate the form and content of the notice to be served which must comply with the express provisions of Section 90. The defendant has exhibited at page 99 of the bundle of documents, a demand letter dated 10<sup>th</sup> March 2016, what is said to be a statutory notice. The said letter states as follows: **“Further to the earlier notice dated 25<sup>th</sup> August, 2015, we note that you have failed to liquidate your debt with the bank”**

Consequently, National Bank of Kenya Limited, as charges of the aforementioned property hereby gives you notice that you may redeem the property by paying to the charge the sum of Kenya Shillings Thirteen million one hundred and thirty thousand three hundred and twelve ninety five cent (13,130,312,95) and Kshs.47,380.80 being balance in the National Bank of Kenya transactional account and Kshs.13,082,932.15 being the balance in the business LPO account, the above balances continue to attract interest at rate of 25.5% p.a on the transactional account, 22.83% p.a on the business loan account.

Take notice that unless the said sum together with further interest will accrue as aforesaid is paid to the bank 40 days from the date of service of this notice to sell (which is deemed to be 7 days from the date of posting), the bank shall, after expiry of outstanding and remaining unpaid together with interest thereon shall have been received in full before then, the sale of the property shall go on such payment notwithstanding. This notice to sell is given pursuant to the terms of Section 96(2) of the Land Act 2012.

According to the plaintiff company the letter of 10<sup>th</sup> March, 2016, and all other notices that the defendant bank issued do not comply with the provisions of Section 90 on statutory notice as:

- (a) Does not notify; the intended recipients that the charged property could be sold if compliance therewith was not made.**
- (b) Merely threatened that recovery proceedings will be taken if payment was not made.**
- (c) Fails to adequately (or at all) inform the intended recipient of the nature and extent of the default, if any.**
- (d) And since the alleged default consisted of alleged non-payment of money due under the purported charge, it failed to specify the amount that must be paid to rectify the alleged default.**
- (e) Further, it gives the recipient thereof a period of 40 days instead of the statutory three months as per the land Act.**
- (f) It did not give the recipient thereof any opportunity to rectify and/or restore the default to normalcy as intended by the Section 90(2) of the Land Act.**
- (g) It did not inform the recipient that they had a right to apply to court for relief; and**
- (h) It brazenly took away statutory rights bestowed under Section 90(2) of the Land Act.**

Section 90(2) of the Land Act. The notice required by subsection (1) shall adequately inform the recipient of the following matters:

- (a) The nature and extent of the default by the chargor.**
- (b) If the default consists of the non-payment of any money due under the charge, the amount that must be paid to rectify the default and the time, being not less than three months, by the end of which the payment in default must have been completed.**
- (c) If the default consists of the failure to perform or observe any covenant, express or implied, in the charge, the thing the charger must do or desist from doing so as to rectify the default and the time, being not less than two months, by the end of which the default must have been rectified.**
- (d) The consequences that if the default is not rectified within the time specified in the notice, the charge will proceed to exercise an of the remedies referred to in this section in accordance with the procedures provided for in this sub-part, and**
- (e) The right of the charger in respect of certain remedies to apply to the court for relief against those remedies.**

In this matter, the defendant bank served upon the plaintiff company various letters demanding payment of the monies owed to it, which was done via registered post. For the plaintiff company director, Pw1, to have personally visited the defendant bank to inquire on the letter that he received in the mail, is suffice to say, that he was properly served with the notice of intention to sell the suit premises.

The letter of 10<sup>th</sup> March, 2016 meets the threshold that Section 90(2) of the Land Act provides and as such the plaintiff company cannot claim otherwise. The lack of the relevant authorities to provide a prescribed form of notice is not a loop hole for the plaintiff company to rely on and claim that the letters served upon it are not sufficient nor proper notices as required by the process of the Land Act.

#### **Whether the defendant/s right to sale had crystallized**

Section 96 of the Land Act provides that:

***“where a charger is in default of the obligations under a charge and remains in default at the expiry of the time provided for the rectification of that default in the notice served on the charger under Section 90(1), a charge may exercise power to sell the charged land.”***

In the matter at hand, the defendant bank has sufficiently proved that it properly executed the provisions of Section 90(1) of the Land Act and had sufficiently proved that its right under the above section had crystallized and was well within the law and rights to exercise it.

#### **Whether the plaintiff’s prayer for permanent injunction can be granted**

Since the remedy being sought by the plaintiff is an equitable one, the court should decline to exercise its discretion because the plaintiff has been shown to be guilty of conduct which does not meet the approval of the court of equity. See G.V. Odunga J. in ***Jane Wambui Weru v Overseas Private Investment Corporation & 3 others [2012] eKLR***. The defendant further submitted that there exists a higher threshold that must be satisfied before grant of an injunction. This was held so by Ringera, J. as he then was in the case of ***Showind Industries v Guardian Bank Limited & another [2002] 1 EA 284***. The learned judge stated as follows:

***“An injunction is granted very sparingly and only in exceptional circumstances such as where the applicant’s case is very strong and straight forward. Moreover, as the remedy is an equitable one, it may be denied where the applicant’s conduct does not meet the approval of court of equity or his equity has been defeated by laches”***

The plaintiff has admitted that since the loan was granted almost four years ago, it has never paid a single shilling towards repaying back the money owed to the defendant bank. It is common knowledge and sense that when one borrows money from another, that money will be paid back at a certain agreed time and terms. The argument that the plaintiff was relying on that the defendant bank has never provided it with a copy of the charge document, is not sufficient grounds to rely not to pay back money borrowed from the bank.

The plaintiff has failed to demonstrate that he has clean hands, while coming to this court to seek equity. Granting its prayer to issue a permanent injunction against the defendant bank, would be unjust to the letter, denying it its right to claim what is owed to it and would be enabling the plaintiff’s bad faith of not honouring its obligations towards the defendant bank. The plaintiff had not made out a prima facie case with probability of success to warrant the grant of an order of injunction from this honourable court.

In total, the plaintiff was given over a year from 30<sup>th</sup> September, 2015 to 11<sup>th</sup> October, 2016 to pay back the bank the monies owed. In any case, it has been close to three years since the last notice by the auctioneers was served upon the plaintiff’s director who has been aware all this time. The notice period was way more than what was envisaged under Sections 90 and 96 of the Land Act. It was the defendant bank admission that indeed the plaintiff company was properly issued with all notices under the law.

Pw1 rightly stated that the loan facility was indeed given to the plaintiff company and that the plaintiff company has not paid back the said facility at all. Dw1- Elizabeth Mwangi, indicated that the interest rate kept fluctuating and that the public was notified about it in the local newspapers. At paragraph 4. 1 of the defence bundle, it indicates that the bank could revise and vary the interest rate. Dw1 further went on to state that this was never the issue that was raised in any of the pleadings and that is why no documentation was availed by the bank with regard to the issue and that the plaintiff was notified of the fluctuating rate.

The defendant bank submitted that as at 15<sup>th</sup> November, 2018, the plaintiff company liability to the bank stood at Kshs. 16,719,543.58, which sum include the interest and the principal advanced. The defendant bank submits that owing to the fact that the plaintiff company has in fact admitted to having not even paid even a single shilling back to the bank, this amount justifiably owed to the bank. The defendant bank further admits that its power of sale has crystallized and therefore the plaintiff company is truly and justly indebted to the defendant bank.

Pw1 rightly stated that the loan facility was indeed given to the plaintiff company and that the plaintiff has not paid back the said facility. The plaintiff prayer to court for **“a permanent injunction restraining the defendant.....”** is essentially asking the court to order the bank not to sell the charged property despite the plaintiff company director admitting that not a single shilling has been paid back to the bank since November, 2014 when the facility was advanced to the plaintiff company. The defendant relied on the case of ***Muhani & another v National Bank of Kenya Limited, Civil case No. 2280 of 1988*** where the court held that **“An injunction will not issue to restrain a mortgagee from exercising his statutory power of sale merely because the amount is in dispute”**, which principle was relied on in ***Joseph Okoth Waudi v National Bank of Kenya, Civil Application No. 77 of 2004***, where the court of appeal in dismissing an appeal quoted from Halsbury’s Laws of England Vol. 32, 4<sup>th</sup> Edition page 752, stated that:

***“It is trite law that the court will not restrain a mortgagee from exercising its power of sale merely because the amount due is in***

***dispute or because the mortgagor has begun a redemption action or because the mortgagor objects to the manner in which the sale is being arranged. It will be restrained however, if the mortgagor pays the amount claimed in court, that is, the amount which the mortgagee claims to be due to it unless on the terms of the mortgage, the claim is excessive”***

It was all times material to this suit, within the knowledge and information of the plaintiff company and its directors, that the bank had advanced the money to the said plaintiff company and the sum was to be paid back with the interest rate of 18.5%. the plaintiff could not now come to the court to seek prayers not to have the bank exercise its rights as envisaged in the Land Act. If the prayers in the plaint were to be granted, the defendant bank, would be left out in the cold.

The plaintiff company had a duty to service its loan in accordance with the loan agreement. In the case of ***Francis J. K. Icatha v Holding Finance Co. Ltd. Kenya HCCC No. 414 of 2004*** the honourable court held that

***“A Plaintiff should not be granted an injunction if he does not have clean hands, and no court of equity will aid a man to derive advantage from his own wrong, for the plaintiff seeks this court to protect him from the consequences of his own default. He who seeks equity must do equity. The plaintiff should not be protected or given advantage by virtue of his own refusal to make payments to the defendant/respondent a debt which he expressly undertook to pay”***

The defendant prayed to the court to uphold the aforementioned position.

The defendant bank further submitted that should this honourable court allow the suit herein, it would then follow that the debt owed to the bank would be technically cancelled and that the plaintiff company would have a free pass into not paying off the debt admittedly owed by to the bank. It was evident that the plaintiff was at all times aware that he was truly indebted to the defendant bank. The permanent injunction being sought is akin to the plaintiff asking the court to help it out of its debt.

From the foregoing above, there is indeed a cause of action that has arisen that is well within the jurisdiction of this court. The plaintiff in this case is a company that is in the business of developing residential houses and approached the defendant bank for a loan facility to help facilitate and finance its building projects. The plaintiff's company directors went into an agreement with the defendant bank, whereby the latter advanced to the former KShs, 10,000,000, and in exchange the plaintiff company's directors gave out various title deeds to secure the charge/mortgage. This was in 2016. The plaintiff company director, who was a witness, did not dispute that there was a loan advanced.

In view of the evidence that was adduced and arguments presented in court and submissions, is whether, the defendant bank indeed properly serve upon it, the statutory notices of intention to foreclose on their properties, that were charged to the defendant bank. The plaintiff company submitted that the defendant's bank statutory power of sale had not crystallized by its failure to properly serve upon it the notices.

## **Conclusion**

In this suit I am satisfied that the plaintiff has not discharged the burden of proof on a balance of probabilities to be granted a permanent injunction on the following grounds:

The legal charge provides for a mortgage contract which gave the defendant Bank the power to sell the property in the event the plaintiff defaults in any of the repayments schedule. The repayment is for both the principal and interest due under the mortgage deed.

The loan advanced to the plaintiff fell in arrears and it therefore continues to accrue interest and other penalties as stipulated in the loan agreement. The collateral security registered in the name of the plaintiff's offered to the defendant Bank is to be sold in the event it failed to comply with any of the terms and conditions of the loan repayment. Under Section 90 of the Land Act once the Bank established default it is entitled to exercise the statutory power of sale. I do not think that the facts of the present case are of a kind to which this court can exercise discretion to grant a permanent injunction because there is an amount which remains unpaid together with interest. I therefore disagree with the plaintiff that the power of sale had not matured and become exercisable by the defendant bank.

Accordingly, granting the relief sought would only worsen the plaintiff position which weighs heavily in favour of the defendant whose outstanding loan remains unpaid. The plaint as filed is hereby dismissed with costs.

**Dated, signed and delivered in open court at Kajiado this 25<sup>th</sup> day of February, 2019.**

.....

**R. NYAKUNDI**

**JUDGE**

### **Representation:**

Mr. Karanja for the plaintiff

Mr. Githuka for Kimani for the defendant