



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL CASE NO.52 OF 2018

SAMWEL MWAURA NDORONGO.....APPLICANT

VERSUS

RAFIKI MICROFINANCE BANK.....RESPONDENT

RULING

1. **SAMWEL MWAURA NDORONGO** (applicant) filed the application dated 15.6.2016 seeking for an injunction against **RAFIKI MICROFINANCE BANK** (respondent) from evicting him, transferring or selling land parcel number **Eldoret Municipality/ Block 21(King'ong'o) 4388**. The application had been filed before the Environment and Land court, which heard the application inter-parties and on 14th July 2017 granted the following orders:

- a) The plaintiff has not given any evidence that he has a spouse as the said spouse has not shown any affidavit that her consent was required but was not obtained.*
- b) It was necessary to value the property. This was not done.*
- c) The plaintiff has satisfied this court that he has a prima facie case with a possibility of success.*
- d) The issue revolves on procedure and not substance. Therefore,*

It is hereby ordered that

- i. The defendant restarts the process of exercising his statutory power of sale and do comply with the law.*

2. The applicant states that despite the orders issued by the court the respondent proceeded to offer for sale the land by public auction and the applicant once more moved the court by an application dated 5.10.2018 seeking for orders that the branch manager for the defendant **Daniel Mavindu** be ordered to attend court in person and show cause why he should not be committed to civil jail for not less than 2 years for disobedience of court orders issued on 14.7.2018. In the affidavit in support of the application he deposed that the respondent was served with the orders on **31.8.2018** but on **18.9.2018** through **Jomuki Auctioneers** advertised on **The Standard** newspaper that they would proceed to sell the land by public auction on **8.10.2018**. He contends that the respondents conduct undermined the authority and dignity of the court thus they ought to be punished.

3. The respondent through its Relationship Manager swore an affidavit deposing that they fully complied with the court's order. A fresh statutory power of sale dated **19th February 2018** was issued on **21.2.2018** giving a 90 days notice to both the principal borrower and the plaintiff using the postal address issued. (a certificate of posting is annexed). Upon expiry of the 90 days notice, a **40 days notice dated 30.4.2018** was issued on **9.5.2018** when the borrower and the plaintiff failed to regularize the default arrears.

4. The applicant is accused of giving the court misleading information, and that infact, the applicant was fully aware that the bank was exercising its statutory power of sale as demonstrated by the letter dated 28th August 2018, through his advocates. That he has not established any grounds to merit granting an order for an injunction since they had re-started the statutory power of sale process as ordered by the court.

5. In his supplementary affidavit, the applicant averred that the respondent did not serve him with the **45 days redemption notice and the valuation report** before offering it for sale.

6. The respondent's deponent **Rono Hillary Kipkurui** swore a further affidavit stating that a statutory notice was issued to the plaintiff on **9.11.2017** and not **19.2.2018**, it was sent on 13.11.2017. It is explained that the notices were inadvertently issued twice. Valuation of the land was done by **Hallmark Valuers Company Limited** before instructing the auctioneers to issue a 45 days redemption notice. On 26.7.2018 **Jomuki Auctioneers** issued a 45 days redemption notice.

7. It is pointed out that the applicant/borrower has not made any attempt to repay the loan and as at 11.10.2018 the outstanding balance was Ksh 3,176,557.50 and is just employing delaying tactics. He urged that the court to dismiss the application.

8. The question that arises is whether the respondent is in contempt of the orders issued on **14.7.2018**. The orders directed that the respondent starts the process again. What is the process involved for a banking institution or lender to exercise its statutory power of sale. The statutory notice on record was issued pursuant to section 90 of the Land Act, the same provides as follows.

90. (1) If a chargor is in default of any 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 default for one month, the chargee may serve on the chargor a notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be.

(2) 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 chargor 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 consequence that if the default is not rectified within the time specified in the notice, the chargee will proceed to exercise any 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 chargor in respect of certain remedies to apply to the court for relief against those remedies.

(3) If the chargor does not comply within two months after the date of service of the notice under, subsection (1), the chargee may—

(a) sue the chargor for any money due and owing under the charge;

(b) appoint a receiver of the income of the charged land;

(c) lease the charged land, or if the charge is of a lease, sublease the land;

(d) enter into possession of the charged land; or

(e) sell the charged land;

9. This court finds that the procedure above gives the steps that the respondent is to follow in default of the loan payments. In the instant case, the respondent served the applicant with the notice and when he failed to respond within two months then section **90(3) (e)** gives the respondent the go ahead to sell the charged property. **Section 90(2) (b)** gives the applicant not less than three months to make payments.

10. **Section 96 of the Land Act** provides the procedure as follows;

Chargee's power of sale

96. (1) Where a Chargor is in default of the obligation under a charge and remains in default at the expiry of the time provided for the rectification of the default in the notice served on the Chargor under Section 90 (1), a Chargee may exercise the power to sell the charged land.

(2) Before exercising the power to sell the charged land, the Chargee shall serve on the Chargor a notice to sell in the prescribed form and shall not proceed to complete any contract for the sale of the charged land until at least forty days have elapsed from the date of the service of that notice to sell.

(3) A copy of the notice to sell served in accordance with subsection (2) shall be served on

(a)...

(b)...

(c)...

(e) any Lessee and Sub-lessee of the charged land or of any building on the charged land;

(f) any person who is a co-owner with the Chargor;

(g)...;

(h)...;

(i) any other person known to have a right to enter on the use the land or the natural resources in, on, or under the charged land by affixing a notice at the property; and

11. The respondents opted to rely on **section 90 and not 96** of the **Land Act**. The statutory notice was sent to the applicant by registered post as evidence by the postage receipt. What remains in question is whether the statutory notices were issued to the applicant. The initial statutory notice annexed in the replying affidavit of 6.10.2018 is dated 19.2.2018 and the one in the further affidavit is dated 9.11.2017. An explanation has been given as to why there were two notices in the further affidavit that the initial notices were for the 40 days notice which were inadvertently issued to the plaintiff and the borrower. To err is human, and I accept that explanation.

12. The valuation report dated 23.7.2018 is included in the further affidavit of 11.10.2018. Going by the further affidavit annexure of the notification of sale sent on 13.11.2017, the 90 days period ended on 13.2.2018. Then the auctioneers could also have issued their notice to the applicant for 45 days some time in the month starting March 2018, which is not the case here. If we use the notification of sale for February, then the redemption notice by **Jomuki Auctioneers** should have been in the month of June or July depending on the day they were given instructions. Apparently in this case **Jomuki Auctioneers** issued their 45 days redemption on the **26.7.2018!** However that does not negate the fact that indeed, the respondent restarted the entire process.

13. Whether the respondent is in contempt of court order

The court in *Cecil Miller v. Jackson Njeru & Anor* [2017] eKLR, said as follows on contempt. According to the Black's Law Dictionary;

“Contempt is a disregard of, disobedience to, the rules or orders of a legislative or judicial body, or an interruption of its proceedings by disorderly behavior or insolvent language, in its presence or so near thereto as to disturb the proceedings or to impair the respect due to such a body”

In the case of Econet Wireless Kenya Limited Vs Minister for Information & Communication of Kenya & Another, the court stated as follows;

“It is essential for the maintenance of the rule of law and order that the authority and the dignity of our courts are upheld at all times. The court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against or in respect of whom, an order is made by the court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or void.”

Again, in the case of Teachers Service Commission Vs Kenya National Union of Teachers & 2 others (2013) eKLR Ndolo J observed that;

“The reasons why courts will punish for contempt of court then is to safeguard the rule of law which is fundamental in the administration of Justice. It has nothing to do with the integrity of the judiciary or the court or even the personal ego of the presiding Judge. Neither is it about placating the applicant who moves the court by taking out contempt proceedings. It is about preserving and safeguard the rule of law”

The statutory basis of contempt of court in so far as the High court is concerned is section 5 of the Judicature Act. Section 63 (c) of the Civil Procedure Act provides that a disobedience of an order of a temporary injunction will attract punishment in the form of imprisonment or attachment and sale of the contemnor's property.

Section 5 (l) of the Judicature Act provides as follows;

“The High court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and that power shall extend to upholding the authority and dignity of subordinate courts.”

14. As seen above court orders are issued and they ought to be obeyed, they are not given in vain. The respondent indeed re-started the entire process as set under statute in exercising its statutory power of sale, and it indeed obeyed the order. I find that there was no disobedience of the court orders to warrant any order for committal to civil jail for contempt. The application lacks merit and is dismissed with costs to the respondent.

DELIVERED AND DATED THIS 15TH DAY OF MARCH 2019 AT ELDORET

H. A. OMONDI

JUDGE