



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL CASE NO. 20 OF 2018

BEATRICE WATHANU WAITHAKA.....PLAINTIFF

-VERSUS-

KENYA WOMEN MICRO-FINANCE LIMITED.....1ST DEFENDANT

AGUNJA AUCTIONEERS.....2ND DEFENDANT

RULING

[1] The Notice of Motion dated **31 May 2018** was filed by the Plaintiff pursuant to **Sections 1A, 1B, 3A and 63** of the **Civil Procedure Act, Chapter 21 of the Laws of Kenya** and **Sections 90 and 104(2)** of the **Land Act, 2012**, as well as **Order 40 Rules 1 and 2** of the **Civil Procedure Rules, 2010**, for the following orders:

[a] Spent

[b] That a temporary injunction be issued restraining the Defendants either acting by themselves, their servants and/or agents from alienating, advertising for sale, offering for sale, selling, taking possession of, leasing, transferring and/or otherwise disposing off the whole of that parcel of land known as **ELDORET MUNICIPALITY/BLOCK 12/418** pending the hearing and determination of the application *inter partes* and thereafter pending the hearing of the main suit.

[c] In the alternative to prayer (b) above, the time for compliance and or/ rectifying any default to redeem that parcel of land known as **ELDORET MUNICIPALITY/BLOCK 12/418** be extended for a period of 24 months or for such other period as the Court may determine pursuant to powers conferred on the Court under **Section 104(2)** as read with **Section 90** of the **Land Act, 2012**.

[d] In the alternative to prayers (b) and (c) above, the Defendants' Statutory Power of Sale be suspended and/or postponed for a period of 24 months or for such period as the Court may determine to enable the Plaintiff redeem that parcel of land known as **ELDORET MUNICIPALITY/BLOCK 12/418**.

[e] That the costs of the application be provided for.

[2] The application was predicated on the grounds that the Plaintiff is the registered owner of the parcel of land number **ELDORET MUNICIPALITY/BLOCK 12/418** (hereinafter, "the Suit Property") and that she will suffer irreparable loss unless the order of injunction is issued. It is supported by the Plaintiff's affidavit sworn on **31 May 2018**, wherein she averred that, the 1st Defendant advanced her a loan facility of **Kshs. 6,793,841.67** on **21 September 2015**; and that on the **17 May 2018**, she was served with a Notification of Sale dated **17 April 2018** by the 2nd Respondent, notifying her of the intended sale of the Suit Property unless the outstanding balance of **Kshs. 8,603,150/=** was paid within 45 days. She averred that the intended sale was improper for the following reasons:

[a] The Defendants had not issued her with a proper Statutory Notice pursuant to **Section 90(1)** of the **Land Act, 2012**;

[b] No Statutory Notice of Sale was served on her pursuant to **Section 96(2)** of the **Land Act**;

[c] The alleged realization process commenced by the Defendants is a nullity in law;

[d] No valuation of the Suit Property had been carried out;

[e] Her equity of redemption was being clogged;

[f] The Defendants had not exhausted alternative remedies available before resorting to the sale of the collateral.

[3] It was further the averment of the Plaintiff that she is ready and willing to repay the loan, but would require more time due to financial hardships that she is currently experiencing. She added that the Suit Property is worth more than **Kshs. 50,000,000/=** and that if sold, she will undoubtedly suffer irreparable loss.

[4] On behalf of the 1st Defendant/Respondent, a Replying Affidavit was filed herein on **17 October 2018** sworn by its Eldoret Branch Manager, **George Odhiambo**, averring that the Plaintiff approached the 1st Defendant in the year **2011** for a banking facility of **Kshs. 8,000,000/=**, which she was granted; and that in **2014**, the Plaintiff applied for a top-up of **Kshs. 6,722,746/=**, which was also provided. The facilities were secured by a Charge over the Plaintiff's Land Title **No. ELDORET MUNICIPALITY BLOCK 12/418**. It was further the averment of the 1st Defendant that the Plaintiff thereafter failed terribly in her primary duty to service the loan and by **5 October 2017** was in arrears to the tune of **Kshs. 11,623,857.76**; and that it was for that reason that it commenced the process of realizing its security.

[5] According to **Mr. Odhiambo**, all the statutory notices were served and the relevant provisions of the **Land Act, No. 6 of 2012** complied with, including **Section 97** which obligates a chargee to obtain a current valuation of the charged property before exercising its statutory power of sale to ascertain the market value as well as a forced sale value. Copies of the said notices and the Valuation Report were annexed to the Replying Affidavit in support of the 1st Respondent's averments. It was therefore the contention of the 1st Respondent that the Plaintiff is not entitled to the orders sought and that her application is an abuse of the process of the court.

[6] The application was urged by **Mr. Mathai** on behalf of the Plaintiff; and he fashioned his submissions under the following issues:

[a] Whether the Plaintiff has a *prima facie* case with probability of success;

[b] Whether damages shall be an adequate remedy;

[c] Where does the balance of convenience lie;

[d] which course appears to carry the lower risk of injustice.

[7] It was thus the contention of **Mr. Mathai**, on behalf of the Plaintiff that a *prima facie* case has been demonstrated herein; in that she has proved that she is the registered owner of all that parcel of land known as **ELDORET MUNICIPALITY/BLOCK 12/418**; and that she charged it to the 1st Defendant for a loan; but that the 1st Defendant did not follow the laid down procedure before commencing the process of sale of the said property as it was required to. Counsel referred the Court to **Sections 90, 96 and 97** of the **Land Act** and the cases of **David Gitome Kulunguka vs. Equity Bank Limited [2013] eKLR**; **Nyagilo Oching and Another vs. Kenya Commercial Bank [1996] eKLR**; **Act Fast Security Limited vs. Equity Bank [2014] eKLR** and **Moses Kibiego Yator vs. Eco Bank Kenya Limited [2014] eKLR** to underscore the importance of compliance with the provisions of **Sections 90 and 97** of the **Land Act**. Counsel further maintained the posturing that no valuation had been done by the time the 1st Defendant issued instructions to the auctioneers to sell the Suit Property.

[8] On whether the Plaintiff can be adequately compensated in damages, her Counsel made reference to **Injunctions and Specific Performance by Robert Sharpe, Canada Law Book 1992, pages 2-27**, for the proposition that irreparable harm has not been given a definition of universal application; and that its meaning takes shape in the context of each particular case. In **Mr. Mathai's** view, no amount of damage would adequately compensate the Plaintiff should the Respondents be allowed to continue with the sale of the Plaintiff's property in disregard of the due process; and that even where damages can be awarded, it should not be done where a charge has violated the express provisions of the law.

[9] It was further the submission of **Mr. Mathai** that the Plaintiff has clearly demonstrated that the Respondents never complied with the statutory requirements and therefore that the balance of convenience tilts in her favour. He relied on **Samuel Mwaura Ndongoro vs. Rafiki Micro Finance Bank Ltd [2017] eKLR** and urged the Court to find that the Plaintiff has met the threshold for the issuance of a temporary injunction and allow the application as prayed.

[10] In her written submissions filed herein on **20 January 2019**, **Ms. Chesoo**, learned Counsel for the 1st Defendant opposed the application, reiterating the posturing of the 1st Respondent that the Plaintiff is not deserving of the orders sought. She endeavoured to demonstrate that the 1st Respondent's power of sale as a chargee had accrued, granted the admission of default by the Plaintiff; and that the 1st Respondent complied with all the applicable provisions of the law and issued the requisite statutory notices; and therefore that it cannot be said in the circumstances that the Plaintiff has a *prima facie* case with a probability of success or that she stands to suffer irreparable harm.

[11] Counsel further submitted on the authority of **National Bank of Kenya Ltd vs. Pipeplastic Samkolit (K) Ltd & Another [2001] eKLR** and **Housing Finance Company of Kenya Ltd vs. Njuguna [1976] KLR** that contracts belong to the parties; and that a court of law cannot re-write a contract for the parties. She accordingly urged the Court to decline the invitation to extend the time for compliance by 24 months, as has been sought by the Plaintiff in her application dated 30 May 2018. Counsel also impugned the conduct of the Plaintiff herein, contending that she is precluded, by equity from seeking the aid of equity in that she admitted her default; that she admittedly chose to ignore the statutory and demand notices served on her; and that she never approached the 1st Defendant for restructuring of the facility, yet now wants to have the 1st Defendant restrained from exercising its statutory power of sale. She prayed that the Plaintiff's application be dismissed with costs.

[12] One of the enabling provisions pursuant to which the application dated 31 May 2018 has been brought is **Order 40** of the **Civil Procedure Rules. Rule 1(a)** thereof provides that:

"Where in any suit it is proved by affidavit or otherwise that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongly sold in execution of a decree ... the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders."

[13] Having given careful consideration to the application, the grounds raised in support thereof, the affidavits and the annexures relied on as well as the submissions made herein by Learned Counsel, there is no dispute that the Plaintiff did approach the 1st Defendant for a loan for which title for the Suit Property, namely, **Eldoret Municipality/Block 12/418** was offered as security. There appears to be no dispute either that the Plaintiff defaulted in servicing that facility; and that in consequence thereof, the 1st Defendant commenced the process of realizing the security. Accordingly, the key issue for the Court's determination is whether the Plaintiff has satisfied the conditions set out in the case of **Giella vs. Cassman Brown & Co. Ltd** (supra), wherein it was held that:

"The conditions for the grant of an interlocutory injunction are ...well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."

[14] As to what amount to a *prima facie* case, the Court of Appeal, in **Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others [2003] KLR 123** furnished the following helpful definition:

"A prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."

[15] This being an interlocutory application, the Court need not examine closely the merits or otherwise of the Plaintiff's case. In **Nguruman Limited vs. Jan Bonde Nielsen & 2 Others: Civil Appeal No. 77 of 2012**, the Court of Appeal made this point thus:

"We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right, which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right, which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed."

[16] In the light of the foregoing principles, I have given due consideration to the Plaintiffs' application and noted that it comprises of two prongs, namely: that the Defendant did not serve the requisite statutory notices under **Sections 90 and 96** of the **Land Act**; and that the property was not valued by an independent valuer as required by **Section 97** of the **Land Act**. To begin with, **Section 90** of the **Land Act**, is explicit that:

(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 in 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 ninety days 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.**

(4) If the charge is a charge of land held for customary land, or community land shall be valid only if the charge is done with concurrence of member of the family or community the chargee may--

- (a) appoint a receiver of the income of the charged land;**
- (b) apply to the court for an order to--**
 - (i) lease the charged land or if the charge is of a lease, sublease the land or enter into possession of the charged land;**
 - (ii) sell the charged land to any person or group of persons referred to in the law relating to community land.**

[17] Section 96 of the Land Act, on the other hand provides that:

(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.

[18] The 1st Defendant has refuted the Plaintiff's allegations that no statutory notice was served. This it did by exhibiting, as annexures to the Replying Affidavit, copies of the requisite statutory notices served under **Section 90 and 96 of the Land Act**, as well as **Rule 15 of the Auctioneers Rules, 1997**. The copies were marked as **Annexures "BK5", "BK6" and "BK7"**. The 1st Defendant also annexed documents to the Replying Affidavit to prove postage of the notices. They were marked Annexures **"BK8" "BK9" and "BK10"**; and they show that the notices were duly served. Indeed, at paragraph 4 of her Supporting Affidavit, the Plaintiff conceded that she was served with the Redemption Notice dated **17 April 2018**. She however denied having been served with notices under **Section 90 and 96 of the Land Act** and therefore faulted the process preceding the issuance of the Redemption Notice.

[19] I note however from copies of the notices exhibited by the 1st Defendant that they were sent by registered post to the Plaintiff's correct address as furnished in the Charge Instrument (marked **Annexure "BK1"** to the Replying Affidavit). Counsel for the Plaintiff relied on **Nyagilo Ochieng & Another vs. Kenya Commercial Bank Limited [1996] eKLR** wherein it was held that once the chargor alleges non-receipt of the statutory notice, it becomes the obligation of the chargee to prove that the notices were indeed served. I have no quarrel with that submission. However, it is notable that in **the Nyagilo Ochieng Case**, the Bank did not prove postage but opted to rely on file copies of the notices issued. Accordingly, the Court of Appeal made the observation that:

Unless the receipt of statutory notice is admitted, posting thereof must be proved and upon production of such proof the burden of proving non-receipt of such notice or notices shifts to the addressee as is contemplated by section 3(5) of the Interpretation and General Provisions Act, Cap 2, Laws of Kenya."

[20] And, **Section 3(5) of the Interpretation and General Provisions Act**, is explicit that:

"Where any written law authorizes or requires a document to be served by post, whether the expression "serve" or "give" or "send" or any other expression is used, then, unless a contrary intention appears, the service shall be deemed to be effected by properly addressing to the last known postal address of the person to be served, prepaying and posting, by registered post, a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would have been delivered in the ordinary course of the post."

[21] Clearly therefore, the burden shifted to the Plaintiff to present cogent proof that she did not receive the notices by involving the Postal Service providers. No such evidence having been presented herein, it is my finding that all the requisite statutory notices were duly served on the Plaintiff and therefore that the 1st Defendant complied well with the provisions of **Section 90 and 96 of the Land Act** as well as **Rule 15(d) of the Auctioneers Rules**.

[22] As to whether the charged property was valued for purposes of the sale, **Section 97** of the **Land Act** states that:

(1) A Chargee who exercises a power to sell the charged land, including the exercise of the power to sell in pursuance of an order of court, owes a duty of care to the Chargor, any Chargee under a subsequent charge or under a lien to obtain the best price reasonably obtainable at the time of sale.

(2) A Chargee shall, before exercising the right of sale, ensure that a forced sale valuation is undertaken by a Valuer.

(3) If the price at which the charged land is sold is twenty-five per centum or below the market value at which comparable interests in land of the same character and quality are being sold in the open market-

(a) There shall be a rebuttable presumption that the Chargee is in breach of the duty imposed by subsection (1); and

(b) The Chargor whose charged land is being sold for that price may apply to a court for an order that the sale be declared void, but the fact that a plot of charged land is sold by the Chargee at an undervalue being less than twenty-five per centum below the market value shall not be taken to mean that the Chargee has complied with the duty imposed by subsection (1).

[23] The contention of the Plaintiff is that no valuation was undertaken as required by **Section 97** aforesaid. To counter this assertion, it was averred by **Mr. Odhiambo** at paragraph 12 of the Replying Affidavit thus:

“THAT I am aware the 1st Defendant/Respondent did instruct Orion Valuers to carry out a forced sale valuation on the property pursuant to Section 97 of the Land Act No. 6 of 2012. The property was valued at Kshs. 15,000,000/- market value and Kshs. 11,250,000/- forced sale value.”

[24] To buttress that averment, the 1st Defendant annexed to the Replying Affidavit copies of the letter of instruction and the Valuation Report as **Annexures “BK11” and “BK12”**. It is noteworthy however, that the letter of instruction is, in fact dated **4 September 2018**; while the Valuation Report is dated **26 September 2018**. The implication is plain, that no valuation had been done by **17 April 2018** when the Redemption Notice was issued. Hence, I would agree that, in that respect, the Plaintiff has shown, albeit on a *prima facie* basis, that the duty of care owed to her by dint of **Section 97(1)** of the **Land Act**, was not discharged before the intended sale, noting that **Section 97(2)** is couched in peremptory terms. Thus, she has demonstrated that she has a right **which has apparently been infringed by the Defendant. As to whether the Plaintiff stands to suffer irreparable loss, it is now well settled that where there is breach of the law, an applicant cannot be compelled to accept damages as recompense. Thus, in Kanorero River Farm Ltd and 3 others –vs- National Bank of Kenya Ltd (2002) 2 KLR 207, Ringera, J. (as he then was) held as follows at page 216:**

“I would for those reasons alone accede to the Plaintiff’s prayer for interlocutory injunction in respect of the two properties on the grounds that the 1st and 2nd Plaintiffs have a very strong prima facie case with a probability of success. I would not be deterred by any argument that the National Bank could compensate them in damages if it failed at the trial. In my opinion, no party should be allowed to ride roughshod on the statutory rights of another simply because it could pay damages.”

[25] Likewise, in the case of **Joseph Siro Mosioma vs. Housing Finance Company of Kenya Limited & 3 Others [2008] eKLR**, it was held that:

“...damages is not automatic remedy when deciding whether to grant an injunction or not. Damages is not and cannot be substitute for the loss which is occasioned by a clear breach of the law, in any case, the financial strength of a party is not always a factor to refuse an injunction. More so a party cannot be condemned to take damages in lieu of his crystallized right which can be protected by an order of injunction.”

[26] The same position was taken in **Sharok Kher Mohamed Ali & Another vs. Southern Credit Banking Corporation [2008] eKLR** thus:

“... a party deprived of his property through an illegal process would suffer irreparable loss and/or damage. In any case, a party entitled to a legal right cannot be made to take damages in lieu of his right. In essence the damages and/or loss that would be suffered by the Plaintiffs would be significant if an injunction is not granted. My position is that a party in contravention of the law cannot be rewarded for his contravention. (see also Olympic Sports House Limited vs. School Equipment Centre Limited [2012] eKLR)

[27] As to whether the balance of convenience is in favour of the Plaintiff, the decision of the Court of Appeal in **Charter House Investments Ltd vs. Simon K. Sang and Others Civil Appeal No. 315 of 2004** is instructive, that:

“Injunction is an equitable and discretionary remedy, given when the subject matter of the case before the court requires protection and maintenance of the status quo. The award of temporary injunction by courts of equity has never been regarded as a matter of right, even where irreparable injury is likely to result to the applicant. It is a matter of sound judicial discretion, in the exercise of which the court balances the convenience of the parties and possible injuries to them and to third parties.

[28] Moreover, it is imperative that the Court opts for the lower rather than the higher risk of injustice. This was held to be so in the case of **Suleiman –vs- Amboseli Resort Ltd (2004) 2 KLR 589** in which **Ojwang Ag. J** (as he then was) quoted the following words of **Justice Hoffmann** in the English case of **Films Rover International vs. Cannon Film Sales Ltd (1986) 3 All ER 772**:

“The principal dilemma about the grant of interlocutory injunctions, whether prohibitory or mandatory, is that there is by definition a risk that the Court may make the ‘wrong’ decision, in the sense of granting an injunction to a party who fails to establish his right at the trial (or would fail if there was a trial) or alternatively, in failing to grant an injunction to a party who succeeds (or would succeed) at trial. A fundamental principle is therefore that the Court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been ‘wrong’ ...”

[29] In the instant matter, it is my considered view that the path leading to the lower risk of injustice would be to stop the impugned auction pending compliance with the express stipulations of the applicable law. This means that the Defendant is at liberty to issue fresh notices and to comply with **Section 97** of the **Land Act**, granted that the Plaintiff has expressly admitted that she is in default. Accordingly, I would grant orders in her favour in the following terms:

[a] That a temporary injunction be and is hereby issued restraining the Defendants either acting by themselves, their servants and/or agents from alienating, advertising for sale, offering for sale, selling, taking possession of, leasing, transferring and/or otherwise disposing off the whole of that parcel of land known as **ELDORET MUNICIPALITY/BLOCK 12/418** pending fresh compliance with **Sections 90, 96 and 97** of the **Land Act** and **Rule 15** of the **Auctioneers Rules**.

[b] That the costs of the application be in the cause.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 28TH DAY OF AUGUST, 2019

OLGA SEWE

JUDGE