



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL SUIT NO.636 OF 2012

WILSON NYAMTEGA MUGA.....PLAINTIFF/APPLICANT

VERSUS

HOUSING FINANCE COMPANY OF KENYA LIMITED.....DEFENDANT

RULING

1. Before this Court is the Notice of Motion dated **12th October 2018** by which **WILSON NYAMTEGA MUGA** (the Plaintiff/Applicant herein) sought the following Orders:-

“1. SPENT

2. SPENT

3. THAT an injunction do issue restraining the Defendant/ Respondent by themselves, their servants, employees and/or agents and anybody claiming through them from exercising the statutory power of sale over the Plaintiff/Applicant's property namely a three bedroom house in Ngong on LR NO.NGONG/NGONG/43783, further adverti-sing for sale, or in any way interfering with the Plaintiff/ Applicant's quiet possession and enjoyment of the said property, pending the hearing and determination of this suit.

4. THAT the costs of this Application be provided for”

The application which was premised upon **Order 40 Rule 1,2 Order 51, Section 3A of the Civil Procedure Act CAP 21, laws of Kenya** and all other enabling provisions of the law was supported by the Affidavit of even date sworn by the Plaintiff.

2. The Defendant/Respondent **HOUSING FINANCE COMPANY OF KENYA** opposed the Application by way of their Replying Affidavit dated **5th December 2018**, sworn by **JOSEPH LULE** a legal officer in the Defendant Bank. The Court directed that the application be disposed by way of written submissions. The Plaintiff/Applicant filed his written submissions on **25th March 2018** whilst the Defendant/Respondent filed their submissions on **18th December 2018**.

BACKGROUND

3. On or about the month of **February 2011** the Plaintiff approached the Defendant Bank and secured a loan facility in the amount of **Kshs.4,802,500/=** at a concessionary interest rate of 6% per annum. It was agreed that the facility would be serviced by monthly installments of **Kshs.42,500/=** commencing in June 2011 for a period of 15 years.

4. About March 2012 the Plaintiff left his employer Safaricom Ltd. Upon leaving employment he was longer entitled to the concessionary interest rate negotiated by Safaricom Ltd for its employees and the Bank adjusted the interest rate upwards to 16.5% per annum which was the prevailing market interest rate at the time. The Plaintiff approached the Defendant Bank and the loan period was adjusted to twenty years at a monthly repayment of **Kshs.72,000/=**.

5. The Plaintiff continued with the repayments as agreed but sometime in mid 2016 he fell into arrears. The Plaintiff approached various other banks seeking to have them take over this loan facility. He claims that although the banks he approached were agreeable to taking over the loan facility the fact that the Defendant/Respondent declined to have the Plaintiff's name removed from the Credit Reference Bureau, meant that these arrangements fell through.

6. The Defendant/Bank then issued the Plaintiff/Applicant with a Statutory Notice of sale with a public auction scheduled for **15th October 2018**. The Plaintiff then moved to Court and filed this application.

ANALYSIS AND DETERMINATION

7. The principles governing the grant of interlocutory injunction were set out in the case of **GIELLA –VS- CASMAN BROWN [1973] KLR**. These are that firstly an applicant must show a prima facie case with a probability of success at trial. Secondly an interlocutory injunction will not be granted unless the Applicant stands to suffer irreparable loss which cannot be compensated by an award of damages. Thirdly if in any doubt the court must decide the case on a balance of probability.

PRIMA FACIE CASE

8. The Court must first determine whether the Plaintiff/Applicant herein has shown a prima facie case. The Court in **MRAO –VS- FIRST AMERICAN BANK OF KENYA LTD & 2 OTHERS [2003] KLR** defined a “prima facie” case as follows:-

“...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.”

9. From the record it is clear that the suit property was charged to Housing Finance Company of Kenya in order to secure the credit facility advanced to the Plaintiff/Applicant. The charge document dated **4th March 2011** was duly registered as a valid security. The bank advanced the required funds to the Applicant and the Applicant acknowledged receipt of said funds.

10. The Plaintiff/Applicant does not deny his indebtedness to the Bank. Neither does the Applicant raise any challenge in respect to the statutory notices issued to him by said Bank. Furthermore despite detailing the efforts he has made to service the facility and to have another bank take over the loan, the Plaintiff/ Applicant does not deny the fact that he is currently in arrears. It is therefore manifest that the Plaintiff/Applicant has breached crucial terms of his financing contract with the bank.

11. In **EUROBANK LIMITED –VS- GIKONYO KIANO [1998] KLR 761**, the Court held that where default in payment is admitted an interlocutory injunction ought not to issue. Accordingly I do find that the Applicant has failed to show a prima facie case with a probability of success.

IRREPARABLE HARM

12. In support of his application for an interlocutory injunction to issue the Plaintiff/Applicant pleads that the suit property is the family home and if it is sold his family is likely to be rendered homeless. He submits that loss of the family home amounts to irreparable harm which cannot be adequately compensated by an award of damages. This argument may pull at the heartstrings but does not in any way negate the contractual obligations which the Applicant owes to the Bank. In the case of **ANDREW MWANJOHI –VS- EQUITY BUILDING SOCIETY & 7 others [2006]eKLR**, the Court held that:-

“Whenever the Applicant offered the suit property as security, he was fully conscious of the fact that if the borrower did not meet his obligations, the suit property could be sold off. Therefore, in the event that it later became necessary for the suit property to be sold off, by the charge, the chargor could not be heard to complain that his loss was incapable of being compensated in damages. He had had the said property evaluated in monetary terms. He had then told the chargee with the peace of mind, of knowing that the money given as a loan would become recoverable, even if the borrower did not pay it.

By offering the suit property as security the chargor was equating it to a commodity which the chargee may dispose of, so as to recover his loan together with interest thereon. Therefore, of the chargee were to sell off the suit property, the chargor’s loss could be calculable, on the basis of the real market value of the said property.

In a nutshell, sentimental attach-ment to the charged property should play no role in the matter. So that, if any person felt that he or his family attached great senti-mental value to any property, he should never offer it as security.

Therefore, on the basis of the material presented by the plaintiff, I find that he has not persuaded the court that if the court declined to grant an injunction to stop the sale of the suit property, he would suffer irreparable loss.” [own emphasis]

13. Therefore fact that the suit property is the family home is not sufficient grounds upon which to grant an injunction. This position finds support in the decision in **MATHYA –VS – HOUSING FINANCE COMPANY OF KENYA & Another [2003] E.A 133** where **Hon. Justice Nyamu** (as he then was) held as follows:-

“Charged properties are intended to acquire or are supposed to have a commercial value otherwise lenders would not accept them as securities. The sentiment of ownership which has been greatly treasured in this country over the years has in many situations given way to commercial considera-tions. Before lending, many lenders banks and mortgage houses are increasingly insisting on valuations being done so as to establish forced sale values and market values of the properties to constitute the securities for the borrowings or credit facilities...loss of the properties by sale is clearly contemplated by the parties even before the security is formalized.” [own emphasis]

14. The Plaintiff/Applicant voluntarily offered the suit property to secure the loan facility with full knowledge that it was the family home.

The suit property therefore became a commodity which was subject to sale, in the event of default. The chargee is within its rights to sell the suit property. I find that the Applicant has not persuaded this court that any loss he stands to suffer is irreparable as it can be adequately compensated by an award of damages.

15. The Defendant/Respondent is a financial institution with several branches countrywide. I have no doubt that they would be in a position to compensate the Plaintiff in the event they be ordered to do so.

BALANCE OF CONVENIENCE

16. The Plaintiff/Applicant willingly and voluntarily entered into a loan contract with the Defendant Bank. He cannot be allowed to run away from his contractual obligations thereunder. Under that contract the Respondent Bank was obliged to advance to the Applicant the sum specified in the contract. The Bank fulfilled this obligation and advanced the required funds to the Plaintiff/Applicant. The Applicant confirms receipt of those funds. The Plaintiff/Applicant on his part was obliged under the contract to remit the monthly payments as provided for. He failed to do this and defaulted in payment. The Defendant/Respondent was therefore at liberty to exercise its statutory power of sale pursuant to **Sections 90 and 96** of the **Land Act 2012**. The Bank advanced the monies in question to the Applicant way back in the year 2011 (seven (7) years ago). The Respondent relies on the loan repayments and interest on the loan to remain viable as a profit making financial institution. I find that the balance of convenience favours the Defendant Bank.

17. Based on the foregoing I find no merit in this application for interlocutory relief. The same is accordingly dismissed in its entirety with costs awarded to the Defendant/Respondent.

Dated in Nairobi this 30th day of September 2019.

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Justice Maureen A. Odera