



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL SUIT NO. 65 OF 2018**

**DAVIES NYAMBU MWALANDI.....PLAINTIFF**

**VERSUS**

**1. AFRICAN BANKING CORPORATION LTD**

**2. VALLEY AUCTIONEERS.....DEFENDANTS**

**R U L I N G**

1. In this suit, the plaintiff seeks an order of permanent injunction to restrain the sale of the suit property known as RONGE/NYIKA/2530. The plaintiff also sought orders that the Notices issued pursuant to Sections 90 and 96 of the Land Act be rescinded or voided and that accounts be taken to establish if the plaintiff has paid the defendants debt in full.

2. The facts pleaded to give rise to the suit were that the plaintiff sought and was granted a facility by the defendant in the sum of Kshs.42,000,000/= to put up students hostels. The security for the payment of the facility was a charge created over the suit land which was valued in the sum of Kshs.65,000,000/= with a forced sale value of Kshs.48,750,000/= in September 2015. One year later the same property was revalued on behalf of KCB Ltd at Kshs.70,000,000/= with a forced sale value of Kshs.52,500,000/=. After the charge had been registered and a commitment fees of Kshs.4,320,000/= paid, the facility was restructured downwards from initial sum to Kshs.15,065,955 but the commitment fees was never refunded nor was the charge amended to reflect the reduced facility. It was then pleaded that in May 2016, Taita Taveta University inspected the property and recommended same to its students and an Mpesa paybill number 111777 was created to ensure that all payment for rents were channelled to the plaintiff's account with the bank.

3. All that having taken place, the plaintiffs complaint is that the defendant had failed in its fiduciary duty to account for all the sums received toward reduction of the loan and payment obligations by continuing to charge interests without regard to the reduced facility and that the plaintiff only came to learn of the intention to sell the property when his son spotted an advertisement by the defendant pinned on an electric pole in Mombasa.

4. The defendant was additionally faulted for breach of statutory duty of care when exercising its statutory power of sale by failing to personally serve the plaintiff with the statutory notice, the notification of sale as well as the 45 days' notice by the auctioneer. There was another complaint that the plaintiffs spouse was never served with the statutory notice and that the best possible price would not be obtained because there had not been a current valuation carried out prior to the advertisement. For that reason it was asserted that the plaintiff would suffer irreparable loss unless the sale was stalled.

5. That plaint was the foundation upon which the Notice of Motion dated 15/8/2018 was filed seeking a temporary injunction to stop the public auction scheduled for the 16/8/2018. The grounds for seeking the injunction were essentially those pleaded in the plaint being failure to serve a statutory notice under Section 90 of the Land Act. Ambiguously it was pleaded that if such notice was ever issued and served then the same was void because no current valuation had been carried out to establish the forced sale value. The fact of failure to service the spouse with the statutory notice and that of failure to serve 45 days' notice were reiterated with a parting shot that there was need for accounts to be taken because the plaintiff denied owing the defendant any money.

6. Those facts were reiterated in the Affidavit in support which gave the history of the dealings between the parties revealing that after the charge was executed there were constructions of hostels executed over the property and that the rent collected from students using the hostels have never been accounted for but far exceeded the agreed monthly instalment. There was however a confirmation in a statement of accounts covering the period between 29/9/2016 and 27/3/2018 that the plaintiff owned Kshs.19,137,879/= which was alleged not to account for the rental income. That affidavit exhibited the application for the facility, the facility letters, valuation reports and a statement of accounts between five 2015 and March 2018.

7. The defendant opposed the application by a Replying Affidavit sworn by EVALYN GACHOKI whose stand point was that the facility

granted was proposed for construction of hostels and acquisition of the furniture for the same and that the sum would be disbursed in tranches against certificates by architects and quantity surveyors with a condition precedent that the plaintiff would have to meet 40% of the construction costs and execute a charge.

8. Pursuant to the contract it was asserted, the bank disbursed to the plaintiff an aggregate sum of Kshs.13,000,000/= in 3 tranches and agreed to be paid by instalments of Kshs.787,969/= per month but the plaintiff failed to so pay and the account went into arrears for which reason the plaintiff requested for a restructure of the facility and limit set at the sum then outstanding for which reason there was never need to execute a deal of variation of the charge because the restructure was to assist the plaintiff pay the debt. The deponent then asserted that after the default, the defendant issued the four notices required by the law to be issued and served. It was then asserted that despite the agreement to deposit all the rental income in the account the sums deposited were never sufficient to meet the half yearly instalments of Kshs.1,422,120/= with the plaintiff having paid only Kshs.508,924/=. It was further noted that the plaintiff made several withdrawals from the account contrary to the intention to devote payment of the facility. The allegations of monthly deposit into the account Kshs.732,599 was denied together with the demand for reconciliation and that as at the date of 22/8/2018 the plaintiff owed Kshs.21,810,009.

9. In support of the assertions the defendant exhibited to court the correspondence between the parties including facility letters duly executed, the legal charge together with the statutory notices issued on different dates with receipts for postage and Affidavits of Service to evidence service. There was also an account statement for the period between May 2015 and July 2015 and a valuation report dated 23/10/2017 giving the property a market value of Kshs.75,000,000/= and forced sale value of Kshs.56,250,000/=

10. The application was canvassed by way of written submissions which were then highlighted in court by counsel. Both side agree in their submissions that the only issue for determination is whether the plaintiff has met the pre-requisites of grant of a temporary injunction pending the determination of the suit.

11. The plaintiffs claim and dispute is quite straight forward and need not much analysis to understand. It is that the debt is indeed admitted but the defendant is seeking to enforce it's statutorily underpinned contractual right to sell the security offered to it by the plaintiff by circumventing or just ignoring the mandatory provisions of the law. The requirements of law said to be outstanding performance by the defendant is the issuance and service of statutory notices pursuant to Section 90 and 96 of the Land Act and Rule 15 of the Auctioneers Rules.

12. I have at the beginning of this determination outlined the positions taken by the parties in their affidavits and the documents exhibited as evidence of such positions. From the study of all the documents by all sides, it is clear that indeed the notices were issued as set out in the Replying Affidavit of EVALYN GACHOKI at paragraph 9 and supported by the documents marked EG4 annexed to the said Affidavit. Those notices were each evidently served by way of registered post. It is not enough that the plaintiff asserts that there was a practice by which he was always personally served. That practice would not vitiate the terms of the charge and the letter of offer at clauses 14.4. and 16 respectively. So far as the suit is grounded on failure to issue and serve statutory notices there is no prima facie disclosed and the suit has not probability of success in that regard. The materials availed is that such notices were indeed issued and served.

13. The other ground advanced is that there was no valuation not older than twelve months by the date of sale and setting a forced sale value. In answer to this claim the defendant exhibited annexure EG 7 which is a valuation by ACUMEN VALUERS LTD shown to be dated 23/10/2017. That report was barely ten (10) months by the time the auction was scheduled to take place. That ground is equally not advance in good faith but a mere pretence.

14. I do find that the foundation upon which the plaintiff suit is grounded is neither genuine nor factual. I do say the suit is ill- grounded and does not disclose a prima facie case in whose absence no injunction can issue..

15. Having so found I do find that the Notice of Motion dated 15/8/2018 lacks merit and the same is hereby dismissed with costs.

**Dated and delivered at Mombasa this 29th day of October 2019.**

**P.J.O. OTIENO**

**JUDGE**