REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CIVIL SUIT NO. 9 OF 2019

HARBERT PONYOCHI KUNYOBO.....PLAINTIFF

VERSUS

NATIONAL HOUSING CORPORATION.....1ST DEFENDANT

MUGANDA WASILWA T/A KEYSIAN AUCTIONEERS.....2ND DEFENDANT

RULING

1. I am called upon to determine a Motion dated 21st May 2019. It principally seeks orders to restrain the disposal of the suit property, being Butsotso/Shikoti/6130, pending hearing and determination of the suit.

2. By way of background, the plaintiff herein, Harbert Ponyochi Kunyobo, filed the instant suit, by way of a plaint dated 21st May 2019. He had borrowed a sum of Kshs. 3, 000, 000.00 from the 1st defendant sometime in 2011, which amount he was to repay within ten years. He secured the same with the subject property, whose value he avers to be Kshs. 38, 500, 000.00. He avers to have paid a total of Kshs. 1, 200, 000.00 so far. He avers that he received, on 3rd May 2019, from the 2nd defendant, a notice dated 30th April 2018, giving him notice to pay to the 1st defendant a sum of Kshs 6, 811, 502.00 together with a notice of sale by public auction. He avers to have had received a previous demand notice dated 30th April 2018, vide a letter dated 17th May 2018 from the 2nd defendant for Kshs. 6, 527, 069.00.

3. The plaintiff avers that after the first notices, he approached the 1st defendant and they negotiated, and agreed that he pays Kshs. 1, 000, 000.00 on or before 21st August 2018, and thereafter to liquidate the balance in amounts of Kshs. 100, 000.00 per month, and, if not successful, transfer a piece of land measuring one naught five acres to the 1st defendant after valuation. The auction was suspended, and he deposited a sum of Kshs. 500, 000.00 into the account. He expressed surprise that he received another notice on 29th May 2019. He asserts that he has never been served with a notice under section 90 of the Land Act, No. 6 of 2012, saying that the notices from the 2nd defendant, of 17th May 2018 and 30th April 2018, were not notices under section 90 of the Land Act. He submits that upon the 1st defendant having accepted his offer after the notice of 30th July 2018, the 1st defendant was estopped from instructing the 2nd defendant to sell his property by public notice. He avers that from the two notices that were served upon him, it was clear that accounts needed to be taken to determine the amount actually due.

4. The orders sought in the plaint are as follows:

> a. A declaration that the intended sale of the suit property by the 2nd defendant by public auction on 29th May 2019 was premature and illegal for lack of a statutory notice under section 90 of the Land Act and the amount due and owing being dispute; and
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> b. In the alternative, that the court exercises power under section 104(2), presumably of the Land Act, to allow the plaintiff to dispose of part of the property under the supervision of the 1st defendant through private treaty.

5. There is defence on record, filed by the 1st defendant, on 17th July 2019, dated 16th July 2019. It is denied that the plaintiff paid to the 1st defendant the sum of Kshs. 500, 000.00 after the first notices, and asserted that the amount due and owing as at 25th April 2019 was Kshs. 6, 811, 502.00. It is asserted further that the plaintiff was served with the notices contemplated under sections 90 and 96 of the Land Act, 2012. It is argued that the plaintiff deliberately and voluntarily charged the suit property as security to the 1st defendant to secure repayment of the loan in the event he was unable to repay the loan, which made the suit property a commodity in the commercial transaction which should be readily available to the 1st defendant in lawful exercise of its statutory power of sale. It is averred that the requirements contingent upon exercise of the reliefs under section 104 of the Land Act had not been met.

6. The Motion dated 21st May 2019 seeks to restrain exercise of the 1st defendant's right to sell the charged property pending the hearing of the suit as set out in the plaintiff's plaint. The affidavit sworn by the plaintiff in support of the Motion largely reiterates the averments made in the plaint. Attached to the affidavit are several documents meant to buttress his case. There is a notice, from the 2nd defendant, dated 30th April 2018, to him, of sale of the suit property after twenty one days should he not pay the sum of Kshs. 6, 811, 502.00, the amount outstanding on the loan as of 25th April 2019. There is also a notification of sale of immovable property, dated 25th April 2019, from the 2nd defendant, over the same property. There is also a document where the plaintiff signed, on 3rd May 2019, acknowledging receipt of the notice. There is also a document which an announcement to the general public of the sale scheduled for 29th May 2019. Then there is another notice from the 2nd defendant dated 17th May 2018, where the outstanding sum is put at Kshs. 6, 527, 069.00 as at 31st May 2018 and a notification of sale dated 10th May 2018, and a record showing that the notice was sent through mail. There is copy of the letter dated 27th July 2018, where the plaintiff made an offer to settle the amount due, and the 1st defendant's letter of 30th July 2018 stopping the planned auction based on that proposal. There is also a customer transaction receipt from National Bank dated 18th August 2018, showing a deposit of Kshs. 500, 000.00 in account number 01521209016300 in the name of Pagmas Investment. There is, finally, a valuation report, dated 21st August 2017, by Legend Valuers, of the suit property.

7. The 1st defendant has replied to the application, through an affidavit sworn on an unknown date in 2019, at Kisumu, by Martin Bulinda Shivere, an employee of the 1st defendant. He avers that the plaintiff had applied for and was granted the loan the subject of the suit, and had offered the suit property as security for the loan. It is averred that the plaintiff fell into arrears, whereupon the 1st defendant took steps to recover the said arrears. The parties exchanged correspondence in 2016 and 2017, which the deponent avers amounted to the statutory notice envisaged in section 90 of the Land Act. They followed up the statutory notice with a redemption notice dated 17th May 2018 and a notification of sale. After the redemption notice the plantiff then made the proposal to the 1st defendant to pay the Kshs. 1, 000, 000.00 by 21st August 2018 and the subsequent monthly payments of Kshs. 100, 000.00. The plaintiff is said to have failed to honour the proposal and as at 25th April 2019 the balance outstanding stood at Kshs. 6, 811, 502.00. A twenty-one (21) day notice was served on the plaintiff, which triggered this suit. It is averred that the notices contemplated under sections 90 and 96 of the Land Act were duly issued. It is reiterated that the plaintiff had voluntarily charged the suit property, and that it was now unfair for him to turn around and allege that that he would suffer irreparably should the 1st defendant sell the property.

8. Attached to that affidavit are several documents that support the 1st defendant's contention. There are copies of the loan application form duly filled by the plaintiff, the title deed for the subject property, the 1st defendant's letter of offer, the charge registered over the subject property, letters dating back to 2013 and 2014 with respect to arrears, statutory notices dated 15th March 2016 and 15th May 2017, a forty-five day notice dated 2018, notifications of sale dated 10th May 2018 and 25th April 2019, an acknowledgement of receipt duly signed by the plaintiff on 3rd May 2019, affidavits of service sworn by the 2nd defendant with respect to service of the notices on the plaintiff, a twenty-one day notice dated 30th April 2018, there are several copies showing that there was postage of the notices, there is the letter by the plaintiff dated 27th July 2018 admitting the arrears and proposing a mode of settlement, a statement of account of the moneys outstanding, and a valuation report by Legend Valuers dated 6th November 2017.

9. The Motion dated 21st May 2019 seeks restraint of exercise of the statutory power of sale by a lender. What does the law say with respect to such restraint? According to the *Halsbury's Laws of England*, Vol. 32 (4th edition), paragraph 725:

> "The mortgagee will not be restrained from exercising its power of sale 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. He will be restrained, however, if the mortgagor pays the amount claimed in court, that is the amount the mortgagee claims to be due to him, unless, on the terms of the mortgage, the claim is excessive."

10. It was said in *John PO Mutere & Another vs. Kenya Commercial Bank Ltd* HCCC No. 3125 of 1995 (unreported) that:

> "Once a power of sale has arisen a mortgagee has the right to exercise it. The Court has no power to prevent exercise of the power if it is being properly exercised. It is a power parliament has granted a mortgagee and courts cannot and ought not to interfere if it is being exercised."

11. What I gather from the above is that once the right to exercise the power of sale has accrued, the court should not stop it so long as the same is being exercised in a proper manner, unless the money has been deposited in court or the claim is excessive.

12. With regard to the plaintiff being exposed to irreparable loss, should the sale not be stopped, the courts have consistently stated that a mortgagor freely and voluntarily charges his property, well aware of the consequences of default in servicing the loan, principally that the property was liable to be sold. In *Andrew Muriuki Wanjohi vs. Equity Building Society Ltd* (2006) eKLR, the court said:

> "Whenever the Applicant offered the suit property as security, he is conscious of the fact that if the borrower did not met 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 chargee, the charger could not be heard to complain that his loss was incapable of being compensated in damages. He had the property evaluated in monetary terms. He had then told the chargee that he knew that the property was capable of providing 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."

13. In *Nancy Wacici vs. Kenya Women Micro Finance Bank Ltd* [2017] eKLR , the court remarked:

"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, if 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. I find and hold that damages would be adequate remedy and therefore an injunction cannot be issued in the circumstances."

14. The court went on to say:

"I have reviewed the reasons advanced by the Applicant as far as the property is alleged to be family land is concerned. When the Applicant/guarantor gave the land as security, she sought to have contemplated a situation where the same could be sold off if the Applicant defaults … the rights of both the borrower and the bank are within the contractual framework and I would hesitate to interfere."

15. The management of public and private land in Kenya is regulated by the Land Act, No. 6 of 2012. The said Act carries provisions relating to charges. The previous regime was the Registered Land Act, Cap 300, Laws of Kenya, which was repealed by the coming into force of the new land legislation.

16. The charge, the subject of this suit, was created in 2011, before the Land Act 2012 came into force. The said charge was created under the Registered Land Act. Following the repeal of the Registered Land Act, section 78 of the Land Act is relevant so far as transition from the old legal regime to the current one is concerned. The said provision states as follows:

"78. Application of Part to charges (1) This Part applies to all charges on land.

Provided that —

(a) the provisions of this Part shall not be construed so as to affect the validity of any entry in the register or any charge, mortgage other security instrument which was valid immediately before the commencement of this Act and the entries in the register and the charges, mortgages or other instruments shall continue to be valid in accordance with their terms not withstanding their inconsistency with the provisions of this Part;

(b) the provisions relating to the realization of any charge, mortgage or other instrument created before the commencement of this Act shall apply save for the requirement to serve notice to spouses and other persons who were not required to be served under the repealed Acts of Parliament.

(2) References in this Part to "the charged land" shall be taken to mean and include a charged land, a charged lease and sublease and a second or subsequent charge".

17. The exposure of property to the exercise of the power of sale is subject to contract. When the owner, or other person, submits the title to the property to the chargee for use to secure a loan, a contract must be executed to bind the owner to a term which would state that the property would be liable to sale upon his defaulting in the repayment of the loan. The contract would also have a term stating the point at which the right would accrue. To that end, section 80 of the Land Act has set out certain prerequisites with regard to the charge, in the following terms:

"(3) Every charge instrument shall contain—

(a) the terms and conditions of sale;

(b) an explanation of the consequences of default; and

(c) the reliefs that the chargor is entitled to including the right of sale."

18. Then there is section 90 of the Land Act, which provides for remedies under the charge. The same states as follows:

"90. Remedies of a chargee

(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 ..."

19. What emerges from the above is that before the power is exercised, a notice must be given to the chargor. The notice envisaged under that provision is issued in circumstances where the chargor defaults in any of the obligations under the charge, and the default continues for one month. It is that statutory notice under, section 90 of the Land Act, that initiates the process, through which the chargee exercises the remedies specified in section 90(3) of the Act. The ingredients of the notice are specified in section 90(2) of the Land Act. The first is the nature and extent of default. Second, where the default consists of non-payment, the amount required to be paid within three months for the purposes of making good the default or where the default is non observance of a covenant in the charge, what the chargor should do or desist from doing so as to rectify the default. The third one is the fact that if the default is not rectified within the time stated in the notice, then the chargor would thereafter sue for money due and owing under the charge, appoint a receiver of the income of the security property, lease the security property, enter into and keep possession of the security property or sell the security property. The fourth one is that the chargor has the right to apply to court and seek any relief or challenge the exercise by the charge of any of the statutory remedies. The notice should crystalize after the expiry of ninety (90) days from the date it is received by the chargor. The notice contemplated by section 90 the Land Act is mandatory and statutory. The right to access the remedies stated in that provision accrues only after full compliance with the legal framework on statutory notices.

20. Does the statutory notice on record satisfy the requirements of that law? The notice that the respondent relies on as its statutory notice under section 90 is that dated 15th May 2017. I have carefully perused through the said notice, and I am persuaded that it largely complies with section 90(2) of the Land Act, save for the omission to inform the chargor of the remedies he has under the provisions. I hold the view that the omission is minor, and should not form a basis for restraint of the defendant's right to exercise the power of sale.

21. Then there is section 96 of the Land Act, which deals with what should follow where the chargor fails to remedy the default in accordance with the notice issued under section 90(1). The said provision states as follows:

"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 sale of the charged land until at least forty days have elapsed from the date of the service of the notice to sell."

22. The effect of that provision, in my understanding, is that the chargor is entitled to another notice of not less than forty (40) days under section 96(2) of the Land Act, before the chargee can sell the charged property. The notice under section 96(2) of the Land Act is equally statutory and mandatory.

23. Quite often, chargees confuse this second notice with the redemption notice issued under Rule 15 of the Auctioneers Rules, and do not bother to issue it, assuming that the redemption notice issued by the auctioneer instructed would suffice as a notice under section 96 of the Land Act. The requirement in section 96(2) of the Land Act is similar to that in Rule 15 of the Auctioneers Rules, 1997. The only major difference between them is that the notice contemplated under Rule 15 of the Auctioneers Rules is forty-five (45) days and not the forty (40) days contemplated under section 96.

24. It was stated in Albert Mario Cordeiro & anor vs. Vishram Shamji (2015) eKLR :

"... the requirements under section 96(2) of the Land Act are mandatory and quite separate from the requirements under the Auctioneers Act. The Redemption Notice under the Auctioneers Act is also mandatory but it is issued separately from and after the one under section 96(2) of the Land Act; strictly in that sequence ..."

25. The court then went on to conclude:

"28... in the absence of a Notice to Sell under section 96(2) of the Land Act, the Statutory Power of Sale cannot be exercised even if the Statutory Notice, the Notification of Sale and the Redemption Notice have been issued. This is a potent ground for an injunction."

26. In another case, David Ngugi Ngaari vs. Kenya Commercial Bank Limited [2015] eKLR, it was said:

'Of importance, when Parliament enacted section 96(2) of the Land Act, the provisions of the Auctioneers Act were existing law as per section 7 of the Sixth Schedule of the Constitution. Again, rule 15 of the Auctioneers Rules applies to sale by public auction of any immovable property in execution of a decree or on instructions such as by a chargee. It is not specially tailored for purposes of section 96(2) of the Land Act. One other important thing: Until the enactment of the Land Law, 2012, equity of redemption had been left to judicial interpretation and case law. But now it has gained statutory expression in section 89 of the Land Act which provides expressly that equity of redemption will not be extinguished except in accordance with the provisions of the said Act. Therefore, exercise of Chargee's Statutory Power of Sale will only extinguish the Chargor's Equity of Redemption if it is strictly exercised in accordance with the Land Act. Section 96(2) of the Land Act is one of the provisions of the Land Act which reinforce the Chargors Equity of Redemption. I refuse that section 96(2) of the Land Act is an embellishment in the statute or a duplication of or could be read to mean Rule 15 in the Auctioneers Act.'

27. I have carefully perused through the record before me, and I have not come across a notice under section 96(2) of the Land Act. What is on record are two notices issued by Keysian Auctioneers. The said notices do not state the law under which they are purported to have been issued under. From their language, however, and the fact that they were issued by an auctioneer, it is clear that they were issued under Rule 15 of the Auctioneers Rules. Needless to say that even if they were to be purported to have been issued under section 96(2) they would not be effective as they would not be notices issued by the chargee. The conclusion to make, therefore, is that no notice was issued to the plaintiff under section 96(2) of the Land Act, to sell the charged land. Other than the statutory notices of 15th March 2016 and 15th May 2017, what I see annexed to the replying affidavit, of the defendant's officer, are the notifications of sale by the auctioneers dated 10th May 2018 and 25th April 2018, and the forty-five days redemption notices dated 17th May 2018 and 30th April 2018. In the absence of a notice clearly indicated to be a notice under section 96(2) of the Land Act, I am not able to legally pronounce that such notice was issued.

28. Several other issues have been raised in the application, but I shall not advert to them in view of what I have stated so far above.

29. I am persuaded that a case has been made out for grant of an injunction to restrain the sale of the suit property for as long as a proper notice under section 96(2) of the Land Act was not issued. I do hereby grant an injunction to restrain the defendants from selling the suit property, to subsist for as long as a proper notice is not issued under the relevant law.

30. One last thing. Even though I have decided on the application that was before me, I still entertain serious misgivings as to whether I have any jurisdiction to handle a dispute that revolves around a charge created under the Land Act. I say so being mindful of the provisions in section 2 and 150 of the said Land Act, which state as follows:

"2. "Court" means the Environment and Land Court established under the Environment and Land Court Act, 2011 (No. 19 of 2011).

150. Jurisdiction of the Environment and Land Court

The Environment and Land Court established in the Environment and Land Court Act and the subordinate courts as empowered by any written law shall have jurisdiction to hear and determine disputes, actions and proceedings concerning land under this Act."

31. The dispute before me is on land. I have set out the prayers sought in the suit in paragraph 4 of this ruling. They centre around the subject land, and specifically on the power to enforce the charge so as to sell the land. They also dwell on the application of sections 90 and 104 of the Land Act. The transaction herein has two elements. There is the moneylending contract between the borrower and the lender, and then there is the charge contract between the chargor and the chargee. The moneylending contract is governed by banking law, while the charge agreement is subject to land legislation. The High Court does have jurisdiction over disputes around the moneylending aspect, but no jurisdiction over the charge since the same is created and regulated by the Land Act.

32. The Court of Appeal in *Owners of the Motor Vessel "Lillian S" vs. Caltex Oil (Kenya) Ltd* [1989] eKLR, expressly stated, on the matter of jurisdiction, that jurisdiction is everything, and a court without jurisdiction should not go any further. The exact words of the court were:

"Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

33. Jurisdiction is conferred by the Constitution and legislation. With regard to land matters, the Constitution, at Article 162(2) (a), located in an article which provides for the system of superior courts in Kenya, allocates jurisdiction over land matters to a court, with equal status to the High Court, to be established through an Act of Parliament. Article 162 states as follows:

"162. (1) The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts mentioned in clause (2).

(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—

(a) …

(b) the environment and the use and occupation of, and title to, land.

(3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2)."

34. Parliament has since enacted the legislation contemplated in Article 162(2)(3) of the Constitution, the Environment and Land Court Act, No. 19 of 2011, to establish the court envisaged in Article 162(2) (b), and to set out the jurisdiction of the said court. The preamble to the Act states the objective of the Act to be: -

"… to give effect to Article 162(2)(b) of the Constitution; to establish a superior court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land; and to make provision for its jurisdiction functions and powers and for connected purposes."

35. The scope and jurisdiction of the Environment and Land Court is set out in section 13 of the Environment and Land Court Act, which states as follows:

"13. Jurisdiction of the Court

1. The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2) (b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to the environment and land.

2. In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes –

a. relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

b. relating to compulsory acquisition of land;

c. relating to land administration and management;

d. relating to public, private, and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

e. any other dispute relating to environment and land."

36. Section 13(d) of the Environment and Land Court Act, no doubt, covers charges, being contracts or instruments that grant enforceable interests in land. A charge creates an interest in favour of the chargee in the property of a chargor, which is enforceable through exercise of the statutory power of sale. Any disputes that arise with respect to exercise of that right are disputes that fall within section 13(e) of the Environment and Land Court Act, and, therefore, within the jurisdiction exercisable by the Environment and Land Court, by virtue of sections 2 and 150 of the Land Act.

37. Article 165 of the Constitution establishes the High Court and sets out the scope of its jurisdiction. Article 165(5) specifies areas in which the High Court has no jurisdiction, and these include matters that fall under Article 162(2) of the Constitution. The relevant portions of Article 165 state as follows:

"(5) The High Court shall not have jurisdiction in respect of matters—

(a) …

(b) falling within the jurisdiction of the courts contemplated in Article 162 (2)."

38. The plain effect of these provisions is that the High Court has no jurisdiction to handle matters that fall under the jurisdiction of the Environment and Land Court. The dispute that has been placed before me relates to enforcement of a charge, which is an instrument which confers an enforceable interest in land. The creation of a charge and the process of its enforcement are governed by the Land Act, and any dispute arising from the same ought to be a matter for resolution by the Environment and Land Court as envisaged by the Land Act.

39. The Constitution is emphatic that the High Court shall not superintend over disputes that fall within the jurisdiction of the courts contemplated by Article 162(2) of the Constitution. I doubt whether I have any jurisdiction over these matters, and I wonder whether I am not acting contrary to the Constitution by assuming jurisdiction over this matter.

DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 22nd DAY OF NOVEMBER, 2019

W MUSYOKA

JUDGE