



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL AND TAX DIVISION
CIVIL SUIT NO. 322 OF 2013

GEORGE W. OMONDI.....PLAINTIFF

VERSUS

GUILDERS INTERNANTIONAL BANK LTD.....1ST DEFENDANT

GUARDIAN BANK LIMITED.....2ND DEFENDANT

ZEN NOMINEES LIMITED.....3RD DEFENDANT

WHITESTONE AUCTIONEERS4TH DEFENDANT

LAND REGISTRAR, NAIROBI.....5TH DEFENDANT

RULING

[1] Before the Court for determination is the Notice of Motion dated **6 June 2016**. It was filed herein on even date by the Plaintiff pursuant to the provisions of **Article 159** of the Constitution, **Sections 90 and 96** of the **Land Act, No. 6 of 2012**, **Sections 1A, 1B and 3A** of the **Civil Procedure Act, Chapter 21 of the Laws of Kenya**, **Order 8 Rule 3(1) and (5)** and **Rule 5** as well as **Order 40 Rules 1(a), 2(1), 3 and 4** of the **Civil Procedure Rules** and all enabling provisions of the law, for the following orders:

[a] Spent

[b] Spent

[c] That leave be granted to the Plaintiff to amend its Plaintiff in terms of the draft Amended Plaintiff annexed to the application upon such terms as the Court shall deem just and expedient;

[d] That upon leave being granted to the Plaintiff to amend its Plaintiff, the draft Amended Plaintiff be deemed duly filed upon payment by the Plaintiff of the requisite court filing fees;

[e] That pending the hearing and final determination of this suit, the Court be pleased to issue an order of injunction restraining the Defendant by itself, its servants, its agents or representatives or any one of them howsoever from offering for sale and from selling by auction or otherwise or disposing of, or in any other way interfering with the Plaintiff's property known as **LR No. 209/4401/307** (the Suit Property);

[f] That further or other orders be made as will meet the ends of justice.

[2] The application was founded on grounds that the 1st and 2nd Defendants had purported to advertise in the Nation Newspapers of **23 May 2016** that the suit property would be sold by public auction on **15 June 2016**, yet the statutory right to realize the security had not arisen. It was further the contention of the Plaintiff that he had not been served with a notice specifying the principal sum due, interest, bank charges or commissions as stipulated in **Section 90(2)(b)** of the **Land Act**; that the 1st and 2nd Defendants had not obtained the latest or any forced sale valuation of the property as required by **Section 96(2)** of the **Land Act**. The Plaintiff also averred that the 1st and 2nd Defendants have kept on varying the amount of the debt demanded from him; and therefore that there is need for him to be furnished with detailed statements

of accounts in relation to the account.

[3] In support of the grounds aforementioned, the Plaintiff relied on his affidavit sworn on **3 June 2016**, in which he averred that, in consideration of certain financial accommodation extended to him by the 1st Defendant, he executed a Charge over his matrimonial property **LR No. 3734/311, Lavington (the Lavington Property)** in favour of the 1st Defendant. The Charge was registered on **9 April 1999**, and a copy thereof was annexed to the Supporting Affidavit and marked **Annexure "GMO1."** He further deposed that due to financial constraints on his part, he was unable to service the loan, and upon the 1st Defendant placing a demand notice for the immediate payment of **Kshs. 10,261,178.40**, he entered into negotiations with the 1st Defendant, whereupon they agreed to have the charged property sold by private treaty to a buyer that he had identified, namely, **M/s Planning & Development Options Ltd**, for the sum of **Kshs.10,000,000/=**. The proceeds thereof were to be paid directly to the 1st Defendant to clear the entire loan; and according to the Plaintiff, the 1st Defendant consented to the arrangement.

[4] The Plaintiff averred further that, after the buyer had deposited **Kshs. 1,000,000/=** with the 1st Defendant, the 1st Defendant, in a surprise turn of events, thereafter refused to discharge **LR No. 3734/311** to facilitate completion of the sale transaction as had been agreed. Accordingly, the sale of the property was frustrated, whereupon the buyer pulled out of the deal. It was further the averment of the Plaintiff that, after scuttling the sale agreement in respect of **LR No. 3734/311**, he offered the 1st and 2nd Defendants an alternative property, being **LR No. 209/4401/171/307 (the Makadara Property)**, as a replacement to cover the loan in place of **LR No. 3734/311**; which arrangement was similarly accepted by them. He added that it was their understanding that upon registration of the Charge in respect of the replacement property, the 1st Defendant would effect the discharge of **LR No. 3734/311**; but that in breach of the 1st Defendant's undertaking to release the documents, it refused to do so, and had to be compelled to do so by a Court Order; and that although the Court found that the property had been discharged and was henceforth free property, the 1st Defendant attempted to sell it thereafter, in disregard of the Court Order.

[5] At paragraphs 17 to 27 of his affidavit, the Plaintiff set out the various attempts made by him to settle the debt and the various court interventions he was constrained to resort to in order to protect his interests. These included an appeal to the Court of Appeal in **Civil Appeal No. 91 of 2012**. In the course of time, the 1st Defendant purported to have advertised and sold **the Makadara Property** by public auction on **2 November 2012**, and on moving to Court to challenge the sale in this matter, a Ruling was delivered in his favour dated **18 December 2014**, by which the Court held that the sale, if any, was illegal. It was thereafter that the 1st Defendant purported to issue the impugned fresh Notice to Sell dated **4 February 2015** in respect of which the Auctioneers re-advertised the property for sale by public auction on **15 June 2016**. Thus, the Plaintiff denied having been served with any Statutory Notice.

[6] The 1st and 2nd Defendants opposed the application. They relied on the affidavit of their Legal Manager, **Mary Omullo**, sworn on **19 July 2016**. According to them, the Plaintiff's injunction application has no merit as the grounds upon which it is made are not valid. It was the contention of the 1st and 2nd Defendants that the issue of whether their statutory right to realize the security had arisen or not is *res judicata*, having been determined by a court of competent jurisdiction on **18 December 2014**; the Court (**Kamau, J.**) having found, as a matter of fact, that the Plaintiff had been served with a valid Statutory Notice. It was further averred that the rate of interest was specifically stated in the Letter of Offer to be 35% per annum, variable at the sole discretion of the 1st Defendant, and therefore, it could not be said that the 1st Defendant contravened **Section 44 of the Banking Act, Chapter 448** of the Laws of Kenya, as alleged.

[7] **Ms. Mary Omullo** confirmed that the Suit Property was advertised for sale; and that the 1st and 2nd Defendants obtained a valuation report in accordance with the law, a copy whereof was exhibited at Pages 36-57 of the Replying Affidavit; and that the injunction that the Plaintiff had been enjoying was given by **Kamau, J.** under **Section 162(4)** of the **Land Act**, on condition that a notice under **Section 96(1)** of the **Land Act** would be given before the 1st and 2nd Defendants could realize the security. It was therefore their contention that, having complied with the Order of the Court, this Court is *functus officio* and no other injunctive order can be granted.

[8] The Plaintiff filed a Supplementary Affidavit, with leave of the Court in response to the averments in the Replying Affidavit, contending that the Ruling of **Kamau, J.**, having been delivered in an interlocutory application, cannot be a final pronouncement on the issue as to whether the Defendant's right to realize the security has arisen, and therefore the application cannot be *res judicata*. He reiterated his posturing that he had not been served with a valid notice, or any notice at all, pursuant to **Section 96(5)** of the **Land Act**. With regard to the interest rate, it was averred by the Plaintiff that the Charge Instrument provided that any upward variation of interest would have to be agreed upon from time to time; and that no agreement was ever reached between him and the Bank to vary interest to the unconscionable rate of 47% per annum; as confirmed by the Interest Rates Advisory Centre vide their computation, marked **Annexure GWO 1** to the Supplementary Affidavit.

[9] The application was canvassed by way of written submissions, which were filed herein by Learned Counsel on **16 January 2017** and **30 March 2017**, respectively. In his written submissions, the Plaintiff proffered the argument, in respect of Prayer 5 of his Notice of Motion, that the provisions of **Section 96** of the **Land Act** are mandatory and that failure to comply therewith would have the effect of nullifying the sale. Counsel for the Plaintiff, **Mr. Wasuna**, relied on the case of **Trust Bank Limited vs. Eros Chemists Limited & Another Civil Appeal No. 133 of 1999** in support of this argument.

[10] It was further the submission of the Plaintiff that there being no agreement for the variation of interest rate from 35% to 47% per annum, the Bank ought to have complied with **Section 44** of the **Banking Act** before effecting any such variation. Additionally, the Plaintiff submitted that since the loan facility was granted in **1999**, any suit or claim for recovery ought to have been filed before **April 2005**, this being a claim in contract. It was submitted that there was no admission or acknowledgement by the Plaintiff in the intervening period from which a renewal of a cause of action may be inferred. Counsel relied on the case of **Divecon Limited vs. Samani [1995-1998] 1 EA 49**.

[11] The Plaintiff also urged the Court to note that, though the 1st and 2nd Defendants purported to have sold the suit property to the 3rd Defendant on **2 November 2012** for a sum of **Kshs. 14,500,000/=**, and while that purported sale has not been rescinded or set aside, the same property was again put up for sale, as has been adverted to at Paragraph 32 of the Draft Amended Plaint; thereby raising the question as to what became of the first sale. The Court was asked to infer from the foregoing that there is a fraudulent scheme afoot, and to have the

Defendants restrained in the manner sought by Prayer 5 of the Notice of Motion dated **6 June 2016**. Counsel submitted that, in the foregoing circumstances, the conditions set in the case of **Giella vs. Cassman Brown & Co. Ltd.** had been met by the Plaintiff to warrant the issuance of the orders sought.

[12] It was further the submission of the Plaintiff that he would suffer irreparable harm for which damages would not be an adequate remedy if his income generating property were to be sold by public auction before the hearing and final determination of his suit; which, according to him, has a good chance of success. The Court was accordingly urged to look at how the Bank had conducted itself, in that it sold the Plaintiff's motor vehicle for **Kshs. 2,000,000/=**, and did not promptly credit the money into the loan account, and only did so in four instalments between **May and July 2000**; and that the Bank's Managing Director was charged with forgery and fraud in respect of the sale of the said motor vehicle. The Court was further urged to note that in her Ruling dated **18 December 2014, Kamau, J.** found as a fact that the Bank and the Defendants had not satisfied the Court that the auction of the suit property actually took place on **2 November 2012**. On that basis, the Court was persuaded to find that the Defendants could not be trusted to conduct an honest sale. Additionally, it was argued that the Bank still has a Charge over the suit property and stands to suffer no prejudice should the injunction sought be granted, as ultimately, it will be able to realize the said security and recoup its monies. Thus, it was the postulation of the Plaintiff that the balance of convenience tilts in favour of maintaining the status quo pending the hearing and determination of this suit.

[13] The 1st and 2nd Defendants on the other hand drew the Court's attention to the decision of **Kimaru, J.** dated **29 October 2010**, in **HCCC No. 1217 of 2002: George W. Omondi vs. Guilders International Bank** dated as well as the decision of the Court of Appeal in **Civil Appeal No. 91 of 2012: George W. Omondi vs. Guilders International Bank Limited** and urged the Court to find that the instant application is *res judicata* from the standpoint of **Section 7** of the **Civil Procedure Act**. Counsel relied on the case of **North West Water Ltd vs. Binnie & Partners [1990] 3 ALLER 547** and **Kamunye and Others vs. Pioneer General Assurance Society Ltd [1971] EA 263** in support of the submission that, the issue of whether the Defendants' right to realize the security has arisen or not having been dealt with before, cannot be re-opened by way of the instant application.

[14] It was further the submission of the 1st and 2nd Defendants that the Plaintiff has not established a *prima facie* case as there are no rights shown to have been infringed, granted that all they are seeking is to exercise a statutory right that is due and which has been adjudged by the Court to be due in accordance with the agreement that they made with the Plaintiff. The cases of **Maithya vs. Housing Finance Co. of Kenya & Another [2003] 1 EA 133** and **Andrew Muriuki vs. Equity Building Society & Another [2006] eKLR** were cited to support the submission that, having charged the suit property, the same was intended to acquire a quantifiable commercial value; and therefore the argument that the Plaintiff stands to suffer irreparable harm cannot lie, as the loss of the property, from the Plaintiff's standpoint, is compensable by an award of damages.

[15] Counsel for the Defendant further urged the Court to consider the conduct of the Plaintiff and find that he is not deserving of the equitable order that he is seeking. In particular, the 1st and 2nd Defendants urged the Court to note that this dispute has been before the Court for over 19 years now in the form of multiple actions by the Plaintiff over the same subject matter, whose intention has been simply to ensure that the Defendants do not recover the sums advanced to him. On the authority of **Sharok Kher Mohamed Ali & Another vs. Southern Credit Banking Corporation Ltd [2008] eKLR**, it was submitted that the Plaintiff, as a party in contravention of the law, should not be rewarded for his contravention; and that his application ought therefore to be dismissed with costs.

[16] The factual background of the application does not appear to be contested. That background is that on or about the **9 April 1997**, at the request of the Plaintiff, the 1st and 2nd Defendants (the Bank) agreed to provide the Plaintiff with certain banking facilities which were secured by way of a Legal Charge over **the Lavington Property, LR No. 3734/311**. In the course of time, the Plaintiff, having defaulted in his repayments, approached the Bank with a proposal to have **the Lavington Property** discharged and substituted with the **Suit Property LR No. 209/4401/307, Makadara (the Makadara Property)**; which request was acceded to by the Bank. It was conceded by the Plaintiff at paragraphs 5 and 37 of the Supporting Affidavit that, due to financial constraints, he was unable to keep up with the loan repayment schedule, leading to an attempt by the Bank to exercise its statutory power of sale.

[17] As far as can be ascertained from the record, the Plaintiff, in a bid to stop the sale, filed **HCCC No. 2117 of 1998, HCCC No. 11 of 1999** and **HCCC No. 964 of 1999**; which suits were consolidated for purposes of hearing and determination. In his Judgment thereon dated **29 October 2010, Kimaru, J.** found in the Plaintiff's favour and issued the following orders:

[a] The Defendant is hereby ordered to forthwith release to the Plaintiff the duly discharged title in respect of the **Lavington property, LR No. 3437/311, Lavington**;

[b] The Defendant is permanently restrained by means of a permanent injunction from interfering with the Plaintiff's ownership and occupation of the **Lavington Property**;

[c] The Defendant shall be at liberty to exercise its statutory power of sale to sell the **Makadara Property, LR No. 209/4401/307**, in the event of failure by the Plaintiff to repay the debt, to recover the amount owed by the Plaintiff pursuant to the loan;

[d] The Plaintiff shall pay to the Defendant the amount he owes the Defendant which stood at **Kshs. 36,137,388.05** as at **10 February 2002**, together with the prevailing rate of interest of 18% per annum from that date until payment in full;

[e] The Plaintiff shall be paid 2/5th of the costs of the suits.

[18] Apparently, the Plaintiff was unable to redeem the property even after the Judgment aforementioned. Accordingly, the Bank again proceeded to initiate steps towards realizing the security, in line with the Judgment of **Kimaru, J.** It was the contention of the Bank that the proposed sale was duly advertised on **24 October 2012**; and that since there was no response or opposition to the proposed sale, the auction was conducted and the property sold to the 3rd Defendant herein. That auction is what provoked the filing of this suit; the contention of the Plaintiff being that the sale was illegal as no statutory notices were issued or served upon him; and that no Redemption Notice was issued as

required by **Rule 15** of the **Auctioneers Rules**. Thus, simultaneous with the filing of the Plaint, the Plaintiff filed the Notice of Motion dated **24 July 2013** under Certificate of Urgency, seeking an order of temporary injunction, to restrain the Bank and the 5th Defendant from transferring the property or effecting the registration of the Transfer in respect of the suit property to the 3rd Defendant.

[19] The Notice of Motion aforementioned was heard and determined by **Kamau, J.** vide the Ruling dated **18 December 2014**. The Court thereby dismissed the Plaintiff's application and vacated the interim orders that had been granted pending the hearing of the application. The Court further directed that the 1st and 2nd Defendants were at liberty to realize their security as envisaged under **Section 162(5)** of the Land Act. Nevertheless, the Court made the observation that the Defendants had not satisfied it that the auction of the Suit Property actually took place on **2 November 2012**. The Court having raised such a fundamental issue, it would be pointless for the Defendants to contend that the Plaintiff's assertion that the Defendant's statutory right of sale has not arisen is *res judicata*. It is indeed notable that the Plaintiff has now sought leave to amend its Plaint in terms of the Draft Amended Plaint annexed to his Supporting Affidavit as a corollary to the Ruling aforementioned; and as rightly pointed out by **Mr. Wasuna** for the Plaintiff, the prayers relative to the proposed amendment are not in controversy. In the premises, I would grant prayers 3 and 4 as prayed; and on the strength thereof, find that there is need to preserve the subject matter of this dispute in the interim pending the hearing and determination of this case on the merits.

[20] The foregoing being my view of the matter, I would allow the Plaintiff's application dated **6 June 2016** and grant Orders as hereunder:

[a] That leave be and is hereby granted to the Plaintiff to amend his Plaint in terms of the Draft Amended Plaint annexed to the application;

[b] That the Amended Plaint be filed and served on the Defendants within 14 days from the date hereof;

[c] That an Order of Temporary Injunction be and is hereby issued restraining the Defendants by themselves, their servants, agents or representatives or any one of them howsoever from offering for sale and from selling by auction or otherwise or disposing of, or in any other way interfering with the Plaintiff's property known as **LR No. 209/4401/307** pending the hearing and determination of this suit.

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

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 9th DAY OF FEBRUARY, 2018.

OLGA SEWE

JUDGE