



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

(CORAM: R MWONGO, J)

CIVIL CASE NO. 9 OF 2016

(Formerly Nakuru HCC. No 82 of 2016)

EQUIP AGENCIES LIMITEDPLAINTIFF

VS

I & M BANK LIMITED DEFENDANT

RULING

The Dispute

1. What I have before me is a notice of motion application by the Plaintiff/Applicant dated 1st February, 2018 filed under certificate of urgency. It seeks the following orders:

“1. Spent ...

2. That pending inter partes hearing and determination of this application this honorable court be pleased to grant a temporary order of injunction restraining the Defendant whether by itself, its employees, servants, agents or auctioneers from doing any of the following acts that is to say from evicting, advertising for sale, selling whether by public auction or private treaty, disposing of or otherwise howsoever completing by conveyance or transfer of any sale concluded by auction or private treaty, leasing, letting, charging or otherwise howsoever interfering with the ownership or quiet possession over those parcels of land known as L.R. No. Gilgil Township Block 2/210.

3. That the time for compliance and/or for rectifying any default to redeem L.R. No. Gilgil Township Block 2/210 be extended for a period of 24 months or for such other period as the court may determine fit pursuant to powers conferred on the court under Section 104 and 105 as read together with Section 90 of the Land Act, 2012.

4. That in the alternative to prayer 3 above, the Defendant/Respondent’s statutory powers of sale be suspended and/or postponed for a period of twenty four (24) months or for such other period as the court may determine to enable the Plaintiffs/applicants redeem L.R. No. Gilgil Township Block 2/210.

5. That in the alternative to prayer 3 and 4 above, the this honourable court be pleased to grant a temporary order of injunction restraining the Defendant whether by itself, its employees, servants, agents or auctioneers from doing any of the following acts that is to say from evicting, advertising for sale, selling whether by public auction or private treaty, disposing of or otherwise howsoever completing by conveyance or transfer of any sale concluded by auction or private treaty, leasing, letting, charging or otherwise howsoever interfering with the ownership or quiet possession over land known as L.R. No. Gilgil Township Block 2/210 pending the hearing and determination of Civil Application No. Sup. 5 of 2017 in the Court of Appeal.” (Underlining added)

2. The application is stated to be grounded on the provisions of **Sections 1A, 1B and 3A** of the **Civil Procedure Act** and **Order 50 Rule 1** of the **Civil Procedure Rules** in addition to **Section 103 and 105** of the **Land Act, 2012**. The grounding on the provisions of the **Land Act** is the new addition to the previous applications.

3. By way of background, it is clear from the record and from parties’ submissions at the hearing that the Plaintiff/Applicant had filed two prior applications for injunction seeking to restrain the Defendants or their agents from advertising, selling by auction or otherwise disposing of the Plaintiff’s property known as L R No. Gilgil Township Block 2/210.

4. The first was on 25th August, 2016, and was dismissed by a ruling dated 9th December 2016. The Plaintiff then filed an appeal to the ruling in the Court of Appeal at Nakuru (in Nakuru Civil Appeal No. 2 of 2017), and the same was also dismissed by the Court of Appeal's judgment dated 27th September, 2017. Being dissatisfied with that judgment, the Plaintiff filed Civil Application No. Sup 5 of 2017 in the Court of Appeal seeking leave to appeal to the Supreme Court and also seeking injunctive orders pending the hearing of the appeal. The Plaintiff was due to be heard on 29th January, 2018 but states that the Supreme Court did not have quorum and therefore the hearing did not take place hence the application in issue.

5. The second application was filed on 16th December, 2016. According to Meoli, J who heard and determined it, the application appeared to be a "hybrid" brought both under the Court's inherent power pursuant to **Sections 1A, 1B, 3A and 75(1)** but also invoking **Order 42 Rule 6 of the Civil Procedure Rules**. In prayers 3 and 4, the Applicant sought orders for temporary injunction restraining the Defendants from selling or otherwise dealing with or disposing the said property, LR No Gilgil Township Block 2/210, pending hearing and determination of an application before the Court of Appeal. In her ruling dated 24th March, 2017, Meoli J, declined prayer 4 and was un-persuaded to allow prayer 3, except to grant stay to the extent and for purposes of allowing the Applicant to agitate its application before the Court of Appeal.

6. The gravamen of the dispute is that the Defendants desire to sell the aforesaid property by public auction for non-payment of financial facilities granted to them by the defendant. In the present application now before the court, the Applicant argues: that it has obtained in a different suit in Judicial Review Miscellaneous Application No 55 of 2017, an order of mandamus compelling the Permanent Secretary to pay to it a sum in excess of Kshs 34 billion; that the said amount is more than sufficient to offset any debt that may be due from the defendant; and that accordingly, the defendant should be stopped from taking any precipitate action in respect of the aforesaid sale by foreclosure.

7. In outline, the Defendant/ Respondent's response to the application in the present case, is contained in a replying affidavit dated 7th day of February 2018. Opposing the application, the Respondent's Assistant Manager legal department asserts that the Applicant's application pending before the Court of Appeal seeking leave to appeal to the Supreme Court was taken out of the hearing on 29th January 2018. The Defendant further submits that the issue of the Plaintiff being owed Kshs. 34,290,484,620.70/= by the government has been raised several times in the Court of Appeal in support of the Applicant's bid to stop the defendant from exercising its statutory power of sale. Further, it is stated that the amount owing to the bank as at now is already extremely high and the Plaintiff is unable to pay. Thus, should the 24 months suspension sought, be granted, the amount would be excessively high making it impossible for the Plaintiff to pay hence prejudicial to the Defendant.

8. The Defendant also states that in the Court of Appeal having ruled on the appeal on the High Court decision in its Judgment of 27th September, 2017, the High Court has no jurisdiction to deal with that matter because it is now *functus officio*. Further, the Defendant contends that the stay/injunction orders that the Plaintiff is seeking are the same orders that he sought in the High Court and Court of Appeal. Both having been dismissed, the present application is *res judicata*, and an abuse of the Court's process.

The Hearing

9. At the hearing on 6th April, 2018, Mr Kingara for the Applicant submitted that what the Applicant was seeking under this application, is relief essentially under **Section 103** of the **Land Act**, and in particular under **Section 104** thereof. He asserted that the Applicant, having obtained judgment against the Government for Kshs 1.6 billion, this was sufficient ground for the Court to exercise its statutory power under the Land Act to stay or suspend the sale by statutory power of the Defendant upon reasonable grounds. In short, what the Applicant seeks is a suspension of the Defendant chargee's powers so that the Applicant has an opportunity to pay the Defendant's debt using the money received from the judgment debtor, the Government of Kenya.

10. The hearing was fairly brief, on account that Mr Kingara when asked by the Court if what he was seeking was an injunction in terms of the Civil Procedure Act, repeatedly conceded or asserted that the Applicant's application merely sought the exercise by the Court of its discretion under the Land Act to allow them opportunity to pay the debt due to the Defendant. This they would do using the monies payable to them under the Judgment made on 17th December, 2017 by Aburili, J obtained by them in a judicial review matter.

11. With regard therefore to the question of *res judicata* raised by the defendants, Counsel asserted that they have made no previous application **Section 103** or **104** of the **Land Act**. He was not pursuing an injunction properly so called. Pressed by the Court on the debt amount the Applicant was prepared to pay, Mr Kingara stated they could pay at least kshs 1,000,000,000/= if given the stay.

12. Mr Wawire for the Defendant opposed the application on the grounds that: Firstly the issue of commuting the debt upon being paid by the Government had been raised before in the Court of Appeal, and had been dismissed; Secondly that the ruling of Meoli, J, dated 9th December, 2016, at paragraph 50 rendered the application *res judicata*, the matter having been broached there; Thirdly, that the application was an abuse of the Court's process, the Applicant having raised the issue of injunction on several previous occasions;

Analysis

13. I have carefully considered the application and documentation before me and carefully listened to submissions by counsel for the parties.

14. As earlier noted, the application is grounded on **Sections 103(1)(a) & (3), Section 104(1)(2) &(3)** and **Section 105** of the **Land Act, 2012**. It is encapsulated in Paragraph h of the Applicant's grounds, which states:

“h. This honourable court has power under the provisions of Section 103(1)(a) & (3), Section 104(1)(2) &(3) and Section 105 of the Land Act for canceling, varying, suspending or postponing any scheduled sale or extending the period of time for compliance by the chargor substitution of a different remedy than outright sale”

15. Given that the Applicant has categorically submitted that in its present application all they seek is a remedy under the Land Act through the exercise of the Court's statutory power to stay a sale on reasonable grounds as aforesaid, and not an injunction, that is the only issue which is before me for determination. That is to say, the question for determination is: whether the Court is satisfied that it should, in the circumstances disclosed by the application, grant a relief against the exercise by the Defendant as charge of its statutory power of sale under the Land Act, 2012.

16. I start with **Section 105** of the **Land Act**. It provides as follows:

“Sec 105 (1) The Court may reopen a charge of whatever amount secured on a matrimonial home, in the interests of doing justice between the parties” (emphasis added)

This provision is not at all referred to in the substance of the application or in the submissions of the Applicant. Further, none of the documentation supplied makes reference to any matrimonial home or gives any suggestion that LR No Gilgil Township Block 2/210 is a matrimonial home. Accordingly, that provision cannot be relied upon in this application. It is inapplicable, and I so find and hold.

17. **Section 103 (1)(a) & (3)** of the Land Act provides as follows:

“103 (1) An application for relief against the exercise by the chargee of any of the remedies referred to in section 90 (3) may be made by—

(a) the chargor....”

And **Sub-section (3)** provides:

“(3) An application for relief may be made at any time after the service of a notice under section 90(1), section 91(2), section 94(1), section 95(1), or during the exercise of any of the remedies contemplated in those sections.” (emphasis added).

18. **Section 103** of the **Land Act**, provides an avenue for a chargor to seek relief from the exercise by the chargee of the remedies referred to in **Section 90 (3) (3)**. These include: the chargee's rights to sue the charger for any money due and owing; the chargee's right to appoint a receiver; the chargee's right to lease or sublease the land; the chargee's right to enter into possession of the charged land; and the chargee's right to sell the charged land.

19. Clearly, two avenues are available to the chargor under **Section 103(3)** which may be exercised either at any time *after service* of a notice or notices under **sections 90(1), 91(2), 94(1) and 95(1)**; or alternatively, the avenue may be invoked during the exercise of any of the remedies contemplated in those sections.

20. The Applicant did not exhibit any of the afore-stated notices under sections **90, 91, 94** or **95** as stipulated in **Section 103**. In the result, although it is probable that the said notices were issued, the Court cannot decide upon an assumption where a matter of this magnitude is under consideration. It behoved the Applicant to provide evidence of those notices in order for it to be entitled to apply for any of the reliefs sought or available under **Section 103** of the **Land Act**. I further note that the version or edition of the Land Act which the Applicant relied upon is outdated in that **section 103 (1)** which was relied upon by the Applicant was amended by deleting the reference to section **"85(3)(a) and (b)"** and substituting therefor section **"90(3)"**. The amendment was effected pursuant to the enactment of **section 75(i)** of the **Land Laws Amendment Act, No 28 of 2016**.

21. Under the second alternative, the chargor can seek the Court's relief during the exercise of any of the remedies contemplated in sections **90, 91, 94** or **95**. It is clear in the present case that the chargor/defendant is in the process of exercising one or more of the remedies under those sections. This is evident from the general tenor of the orders sought: that is, orders to stop the sale or interference with the quiet ownership or possession of LR No Gilgil Township Block 2/210.

22. What considerations must the court take into account in reaching its decision as to whether or not to grant the said relief? The answer is contained in **Section 104**, which the Applicant also invoked. **Section 104** provides that:

“(1) In considering whether to grant relief as applied for, a court—

a. shall, have regard to whether the remedy which the chargee proposes to exercise is reasonably necessary to prevent any or any further reduction in the value of the charged land or to reverse any such reduction as has already occurred if the charged land consists of agricultural land or commercial premises, and the remedy proposed is to appoint a receiver, or to take possession of or lease the land or a part thereof;

b. shall where the charged land consists of or includes a dwelling house, and the remedy proposed is to appoint a receiver, or take possession or lease the dwelling house or a part of it, have regard to the effect that the appointment of a receiver or the taking of possession or leasing the whole or a part of the dwelling house would have on the occupation of the dwelling house by the chargor and dependants and if the effect would be to impose undue disturbance on those owners, whether it is satisfied that

.....

(2) A court may refuse to grant an order under subsection (1) or may grant any relief against the operation of a remedy that the circumstances of the case require and without limiting the generality of those powers, may—

- a. Cancel, vary, suspend or postpone the order for any period which the court thinks reasonable;
- b. Extend the period of time for compliance by the chargor with a notice served under [section 90](#)
- c. substitute a different remedy or the one applied for or proposed by the chargee or a different time for taking or desisting from taking any action specified by the lessor in a notice served under [section 90](#);
- d. authorise or approve the remedy applied for or proposed by the chargee, notwithstanding that some procedural errors took place during the making of any notices served in connection with that remedy if the court is satisfied that
 - (i) the chargor or other person applying for relief was made fully aware of the action required to be taken under or in connection with the remedy; and
 - (ii) No injustice will be done by authorising or approving the remedy, and may authorise or approve that remedy on any conditions as to expenses compensation or any other relevant matter as the court thinks fit

(3) If under the terms of a charge, the chargor is entitled or is to be permitted to pay the principal sum secured by the charge by instalments or otherwise to defer payment of it in whole or in part but provision is also made in the charge instrument or any collateral agreement for earlier payment of the whole sum in the event of any default by the chargor or of a demand by the chargee or otherwise, then for purposes of this section the court may treat as due under the charge in respect of the principal sum secured and of interest on it only the amounts that the chargor would have expected to be required to pay if there had been no such provision for earlier payment” (Emphasis supplied).

23. Applying **section 104 (1)**, it is clear that sub-section (1)(b) is inapplicable, and that the remedy the Chargor /Plaintiff wishes to take is to obtain a stay of sale or possession of LR No Gilgil Township/ 2/210 for twenty four (24) months under **sub-section 1(a) of Sec 104** to enable it to rectify its default so that the Applicant can:

“[embark] on sourcing for funds and has obtained a Decree and Certificate of Order against the Government for the sum of Kshs 34,290,484, 620.70 together with taxed costs in the sum of Kshs 446, 073,972 and interest..”

as set out under **paragraph f** of its grounds in the application.

24. I have considered this line of reasoning. I am, however, not satisfied that the Applicant has obtained any indication or undertaking that the government will not appeal the decision on which the judgment debt is pegged; I am not satisfied that even if the payment were to be made, it would be paid all at once to enable redemption of the charged property. Further, the Court has not been shown the charge instrument or any other instrument in this application containing the agreement between the parties, nor has there been a disclosure in the application of the amount that is due to the defendant under such charge. Every day that passes, the interest on the unpaid and outstanding amount grows.

25. Further, I note from the Certificate of Order Against Government exhibited by the Applicant that it was dated 6th December, 2016, and arose from a court judgment dated 2nd December, 2011. In addition, I note that the order of mandamus issued by the court (Aburili, J) on 18th December, 2017 did not indicate a timeframe within which the judgment debt should be paid. So, in fact, the judgment debt has been pending for over five (5) years since judgement; and there is no telling when it will be paid.

26. This matter was first brought to court in August, 2016. It is almost 2 years since the defendant’s statutory power of sale was halted. This court is not a court of mercy but of Justice, and must balance the equities of the parties. In particular in respect of a commercial transaction such as this, the court should be reluctant to interfere with the effectuation of the terms of their contract.

27. Accordingly, I am not satisfied under the circumstances that this is a proper case for exercise of the court’s discretion under the cited provisions of the Land Act.

28. Accordingly, the application fails and is hereby dismissed with costs.

29. Orders accordingly.

Dated and Delivered at Nairobi this 17th Day of May, 2018

RICHARD MWONGO

PRINCIPAL JUDGE

Delivered in the presence of:

1. Mr. Wairegi holding brief for King'ara for the Plaintiff/ Applicant

2. Mr. Mburu holding brief for Wawire for the Defendant/Respondent

Court Clerk – Kamau