



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL DIVISION**

**HIGH COURT CIVIL CASE NO. 232 OF 2017**

**PETER MUTHOGA KIBE.....1<sup>st</sup> PLAINTIFF/APPLICANT**

**GOLDEN PEBBLES CONSTRUCTION LTD.....2<sup>nd</sup> PLAINTIFF/APPLICANT**

**VERSUS**

**NATIONAL BANK OF KENYA LTD.....DEFENDANT/RESPONDENT**

**RULING**

1. The application dated 21<sup>st</sup> November, 2017 seeks orders that

**“1. Spent**

**2. That a temporary injunction do issue restraining the Defendant/ Respondent by themselves, their servants or agents from selling by public auction or any other manner, disposing, advertising, interfering or attempting to evict the Plaintiff from the Title No. Ngong/Ngong 12277 situated in Ngong Municipality Nkoroi area, Kajiado County pending the hearing and determination of this application.**

**3. That in the alternative and without prejudice to prayer 2 above, the *status quo* regarding Title No. Ngong/Ngong 12277 situated in Ngong Municipality, Nkoroi area, Kajiado County do remain pending the hearing and final determination of this application and suit.**

**4. That an order of injunction do issue restraining the Defendant/ Respondent by themselves, their servants or agents from selling by public auction or any other manner, disposing, advertising, interfering or attempting to evict the Plaintiff from the Title No. Ngong/Ngong 12277 situated in Ngong Municipality Nkoroi area, Kajiado County pending the hearing and determination of this suit.**

**5. That the orders of the Honourable court be enforced by the O.C.S Ngong police station.**

**6. That the costs of this application be in the cause.”**

2. The application is predicated on the grounds stated therein and is supported by the affidavit sworn by the 1<sup>st</sup> Applicant who is also a director of the 2<sup>nd</sup> Applicant. It is stated that the 1<sup>st</sup> Applicant is the registered owner of a residential house on block Title No. Ngong/Ngong 12277. That the said property was used as a collateral for a loan obtained by the 2<sup>nd</sup> Applicant from the Respondent. That due to unforeseeable financial constraints, the 2<sup>nd</sup> Applicant has experienced challenges in the repayment of the instalments and has fallen into arrears. It is further deposed that pleas made by the Applicants to have the loan restructured and cleared by the end of April 2018 have not been heeded by the Respondent.

3. According to the Applicants, a total of Ksh.2,024,278/= out of the Ksh.4,952,333/= reflected as outstanding in the notification of sale by the auctioneers has been paid. It is argued that there is need to reconcile the outstanding amount and a current valuation report obtained.

4. It is further contended that the Respondent did not issue the Applicants with a Statutory Notice as required by the law. It is deposed that the Applicant only received the Notification of Sale from the auctioneers.

5. It is stated that the 1<sup>st</sup> Applicant lives at the property in question with his wife and children and will suffer irreparable loss that cannot be compensated by an award of damages, if the application is not allowed.

6. The application is opposed. It is stated in the replying affidavit that the 2<sup>nd</sup> Applicant is indebted to the Respondent in the sum of Ksh.3,242,383.80 so as at 27<sup>th</sup> November, 2017 which amount continues to accrue interest. That the property the subject matter herein was charged to secure loan facilities obtained by the 2<sup>nd</sup> Respondent. That following persistent default in the loan repayment, a demand notice was issued on 15<sup>th</sup> March, 2017 by the Respondent to the 2<sup>nd</sup> Applicant. That the Respondent thereafter issued a Statutory Notice requiring the payment of the outstanding amount of Ksh.4,555,857.50 within three months.

7. It is further averred that the three months elapsed without the Applicant making good the outstanding amount. That the Respondent proceeded to give the 1<sup>st</sup> Applicant a 40 days Notice to redeem the property before the commencement of the sale process. That the said Notice period expired without any payment. That the Respondent proceeded to instruct auctioneers that the property was valued by Ms Daytons Valuers at Ksh. 19,125,000/=.

8. It is the Respondent's position that the Applicants' case has not met the threshold for a grant of the orders sought. That the attempts made to restructure the loan are not acceptable to the Respondents who state that a similar proposal which was accepted by the Respondent was not honoured by the Applicants.

9. The application was canvassed by way of written submissions which I have considered.

10. On whether to issue the restraining injunctive orders sought, the principles applicable were well settled in the case of **Giella –Vs- Cassman Brown & Co. (1973) EA**. To succeed, the applicant must establish a *prima facie* case with a probability of success, that irreparable loss which cannot be adequately compensated by award of damages would be suffered and if in doubt, the court will decide on a balance of convenience.

11. As stated by the Court of Appeal in **Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] eKLR**:

**“.....a prima facie case” I would say that in civil cases 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.”**

12. It is not in dispute that the property herein was used as collateral for a loan facility. It is also not in dispute that the Applicants have defaulted in the repayments and are in arrears.

13. The 1<sup>st</sup> Applicant denies having been served with a statutory Notice as required Section 90 (1) and 96 (2) of the Land Act Note of 2012.

Section 90 (1) provides as follows:

**“ 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;**

Section 96 (2) provides as follows:

**“Before exercising the power to sell the charged land, the charge 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.”**

14. I have looked at the contents of annexure “MT 6” dated 17<sup>th</sup> May, 2017 which is said to have given the 1<sup>st</sup> Applicant three months Notice as per paragraph No. 3(j) of the replying affidavit. I have not seen any mention of three months Notice. Although annexure “MT 7” gives 40 days Notice for the redemption of the property before the sale. The same can only be valid if the three months statutory Notice was served. The notice (annexure “MT 6”) states the provisions of the law under which it has been issued but does not proceed to state the period notice or the consequences thereof.

15. Although the Applicant in his affidavit evidence raised the issue of the reconciliation of the statement of the account, the Respondent stated the amount of Ksh.3,242,383.80 was owing as at 27<sup>th</sup> November, 2017. This was not rebutted by any other evidence. The valuation carried out by the Respondent has also not been controverted by any other evidence. I find no merits in the assertions by the Respondent that

the account requires reconciliation and that the property requires to be re-valued.

16. The Applicants have stated in their affidavit evidence that they would pay the entire outstanding amount when the facility was set to expire in April 2018. However, by the time the case was reserved for the ruling herein in May 2018, the court was not informed of any such clearance. Whether the Applicants will continue to pay the loan under restructured terms will depend on the agreement reached between the parties.

17. The averment that the 1<sup>st</sup> Applicant's family lives in the house does not come to his rescue. The Applicants' property having been offered as security for the loan, the Respondent is entitled to sell the same. The property became a commodity for sale the moment it was used as collateral for the loan. (See for example **Kihara v Barclays Bank (1) Ltd 2001 EA**)

18. The falling into arrears has been admitted by the Applicants. Thus the Applicants have not established a *prima facie* case and can be compensated by way of damages in the circumstances of this case. However, the Respondent failed to exhibit any valid three months Notice, which renders the recovery process irregular. Consequently, I allow the application as prayed in prayer No. 2,3,4 & 6 with costs in cause. There is no evidence in support of prayer No. 5 which seeks the involvement of police in this civil matter. The Respondent is at liberty to start the recovery process afresh by the reissuance of a valid statutory Notice.

Date, signed and delivered at Nairobi this 28<sup>th</sup> day of June, 2018

**B. THURANIRA JADEN**

**JUDGE**