



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)

COMMERCIAL AND ADMIRALTY DIVISION

MISCELLANEOUS CIVIL SUIT OS NO.497 OF 2017

IN THE MATTER OF A CHARGE CREATED OF AN INFORMAL CHARGE CREATED BY DEPOSIT OF CERTIFICATE OF TITLE IN RESPECT OF FACILITY OF KSHS. 5,000,000 ADVANCED BY JAMII BORA BANK TO SOSPETER GITONGA NJIRU Trading as STEPPER ELECTRICAL & SUPPLIES

AND

IN THE MATTER OF APPLICATION FOR LEAVE TO SELL THAT PROPERTY KNOWN AS LAND REFERENCE NO.MAGUMONI/ITUGURURU/2423

BETWEEN

JAMII BORA BANK LIMITED.....CHARGEE/APPLICANT

SOSPETER GITONGA NJIRU *Trading as*

STEPPER ELECTRICAL & SUPPLIES.....CHARGOR/RESPONDENT

J U D G M E N T

The Applicant/Chargor herein filed this Originating Summons seeking leave to dispose of all that property known as Land Reference Number Mugumoni/Itugururu/2423 being subject of an informal charge between the parties herein.

Ground on the face of the application are that the Applicant advanced financial facilities to the Respondent which was secured by inter alia informal charge over all that property known as LR No. Mugumoni/Itugururu/2423.

That the Respondent has refused or neglected to pay the loan: that an outstanding sum of Kshs. 5,795,495.76 remain unpaid as at 7th June 2017. That the said loan continues to attract interest at 25.5%

That the Chargee who is holding the said title is desirous of recovering the outstanding amount by calling the security offered by the Chargor.

That the said property can only be sold with the leave of the Court.

The application is supported by the Affidavit of James Murage the Head of Legal of the Applicant herein.

He averred that the Applicant advanced to the Respondent a term loan facility of Kshs. 5,000,000 and Dhababu loan facility of Kshs. 3,000,000. He annexed to the Supporting Affidavit the loan application forms and letter of offer in respect of the two facilities; that the loan facilities were recoverable in a period of 36 and 12 months respectively.

He restated grounds on the face of the application.

In response, the Respondent filed Replying Affidavit sworn on 5th July 2018.

In paragraph 5 of the Replying Affidavit, the Respondent averred that he is aware of the two bank facilities and that it was secured by two motor vehicles registration numbers KBQ625S and KBM960F and LR No. Mugumoni/Itugururu/2423

He averred that he never executed a charge giving rise to statutory power of sale.

He averred that he repaid the loan up to the year 2017 when the bank intimated to exercise a statutory power of sale.

He averred that the Applicant's purported notice is invalid; that the notices issued are defective as they do not comply with Land Act 2012.

He averred that on several occasions the Respondent has refused and or neglected to communicate its acceptance of certain mutually agreed proposal despite having undertaken to do so occasioning prejudice on the Respondent.

He averred that the Respondent has failed to render a complete, true and accurate accounts.

He averred that he had already paid Kshs. 3,000,000 on the loan sum.

He opposed calling of security and urged the Court to restrain the Applicant from interfering with his quiet possession of the land.

Counsels herein did oral submissions.

Counsel for the Applicant restated the grounds on the face of the application and the averments in the Supporting Affidavit. He submitted that the Respondent has admitted in the Replying Affidavit that the loan is in arrears. He submitted that the total amount in deposit slips filed by the Respondent totals to Kshs. 270,000.

Counsel submitted that the Applicant is the holder of a charge by simple deposit and that the Applicant is seeking leave to issue notice for sale of the security. He submitted that the Applicant has demonstrated that a contract exists between parties herein and there is default.

In response, Counsel for the Respondent submitted that the Respondent has been repaying the loan but the dispute has been the handling of the two facilities. He submitted that there is no provision that the two facilities would be subjected to tracking under Section 82 of the Land Act; that the right to tacking has to be consented to by the borrower. He argued that the bank cannot consolidate two loans and issue one demand notice for the two loans.

He submitted that annexure SNG referred to by Counsel for the Applicant show that the as at 10th July 2018, the Respondent had paid almost 6 million. He stated that despite all that payment the Respondent has not been supplied with statements; that the Respondent is committed to paying the loan balance and that in the demand issued the Applicant purport to give 90 days under Section 90 of the Land Act.

He submitted that the Respondent seeks reconstruction of the loan and that if the accounts are reconciled the Respondent will be able to pay and that it would be premature to subject the Respondent's property to sale.

In a rejoinder Counsel for the Applicant submitted both letters of offer annexed donate to the bank to consolidate the two loans and that there is a memo of acceptance on each of the letters.

He further submitted that the letter dated 8th June 2017 is titled demand and notices will be issued if Court grants leave. He added that there is no letter to his client from the Respondent making proposal; that this matter was adjourned severally to enable them make proposals. He argued that this Court has been invited to restructure the loan and that it is not the jurisdiction of this Court to do so as the Court cannot rewrite contracts for parties.

On issue of right to property he submitted that the Respondent exercised his right to ownership of property by donating his right to the bank; that once you offer property as security, it becomes a commodity for sale.

ANALYSIS AND DETERMINATION

I have considered submissions by parties herein, perused documents annexed to the affidavits filed.

There is no dispute that loan was advanced by the Applicant to the Respondent. There is also no dispute that the loan is in arrears. The Respondent admitted having given two vehicles and the title herein as security. It is not disputed that the title was not formally charged as security but was deposited with the Applicant as one of the securities for the two loans advanced to the Respondent.

Both letters of offer provide for simple deposit of property title number Mugumoni/Tugururu/2423.

I have perused documents attached to the Replying Affidavit and confirmed that the letter dated 8th June 2017 is demand for payment of amount in arrears.

I have not seen any Statutory Notice issued as submitted by the Respondent.

There is no dispute that parties herein entered into a contract in respect of the loan. The Respondent has prayed for restructuring the loan; restructure of a loan would arise from an between parties involved; parties are expected to enter into contracts voluntary; it is not the business of the Court to rewrite contracts for parties.

There is no reason to deny the Applicant the opportunity to realize security for the loan which is not disputed as being in arrears.

FINAL ORDER

The Applicant is hereby granted leave to exercise its power of sale of LR No. Mugumoni/Itugururu/2423 through the process provided by law.

Judgment Dated and Delivered at Nairobi this 31st day of July, 2018

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RACHEL NGETICH

JUDGE

IN THE PRESENCE OF:

Catherine: Court Assistant

Ms. Lwila H/b For Luseno : Counsel For The Applicant

Mr. Kalundu H/b For Baraj : Counsel For The Respondent