



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION-MILIMANI

CIVIL CASE NO. 124 OF 2003

TRADE CIRCLES LIMITED PLAINTIFF/RESP

VERSUS

FAMILY BANK LIMITED 1ST DEFENDANT

LEAKEY'S AUCTIONEERS 2ND DEFENDANT

RULING

This is a ruling on the Plaintiffs application dated 26th March 2018. It seeks an order for retraction of the advertisement by the Defendant inviting the public for an auction of property known as Dagoretti/Kinoo/4927 Good Hopes Apartments.

It further seeks an order to restrain the Defendants from inviting offers or bids over the property or interfering with the use and enjoyment of the said property or selling, transferring, disposing off, alienating or wasting or in any manner interfering with the said property pending hearing and determination of this suit.

Grounds on the face of the application are that the Plaintiff charged its property 1st Defendant for loan advanced to the Plaintiff. On 19th March 2018 the property was listed for auction on the basis that the account was in arrears.

The applicant contends that he was not served with any notice by the 1st Defendant before the said advertisement. That the account has been regularized through deposit of Kshs. 7,730,293.62.

Further, that 1st Defendant has been charging inflated interest rates on the loan account from the date of inception of the loan to date.

The application is supported by Affidavit sworn by James Njoroge Kariuki the Director of the Plaintiff and registered owner of the property herein.

He averred that the charge provided that the loan amount was payable within 60 days from the date of disbursement which date expires in August 2020.

The construction of Good Hopes apartments commenced and were completed in October 2017; aggressive marketing for tenants followed this. He attached a photograph of the apartment; that due to difficult political and business environment occupancy of the said apartments was low making the Plaintiff experience challenge in making monthly payments.

He averred that despite the challenges the Plaintiff has made efforts to pay more than half of the amount payable.

He averred that the 1st Defendant gave the 2nd Defendant instructions to sell the property yet on the same day of advertisement he paid Kshs. 1,300,000.

The Plaintiff aver that the 1st Defendant began deducting loan repayment from the account without waiting for 6 months grace period prejudicing the Plaintiffs ability to repay the loan advanced.

Plaintiffs contention is that that the bank is required to issue statutory notices before moving to recover arrears from the chargor and that the auctioneer is required to issue notices to the chargor before publicly auctioning the property.

That as a result of failure to issue notices, the Plaintiff was not aware that the amount is in arrears; that 2 months before filing this application the Plaintiff paid Kshs. 7,730,293.62.

Plaintiff averred that it has no intention of defaulting and is capable of paying the arrears due without necessitating the sale.

The Plaintiff filed a further affidavit in which he averred that the account is no longer in arrears. He averred that Kshs. 6,143,988.96 was deducted from the account before the lapse of 6 months grace period.

Further, the statutory demand notice dated 9th June 2017 which sought arrears of 2,563,516.29 was regularized by deposit of Kshs. 5,075,591.87 which was done on 4th July 2017 thus being before the lapse of 3 months.

Parties herein filed written submissions and highlighted the submissions on 24th July 2018.

The Plaintiff submitted that the application is based on Section 90 and 96 of the Land Act.

Counsel restated the Plaintiff's averments that notices Plaintiff never received notices as required by Section 90 of the Land Act to rectify default. He submitted that the Section provide that the bank is required to inform the Plaintiff was default and that it cannot be inferred.

Counsel submitted after rectification of the default the bank was required to issue notices again. He added that the statement of accounts show that the Plaintiff is not a notorious defaulter; that the value is valued at Kshs. 84,900,000 and what the amount being demanded is Kshs. 36 Million.

While highlighting submissions, Counsel for the 1st Defendant referred Court to notices annexed to the Replying Affidavit. He further submitted that the charge executed by both parties indicate that notices can be served by hand or registered post. He submitted that notice required by section 90 is part of Annexure A03 (a). He added that at the end of the notice is a statement that payment shall be accepted without prejudice.

Further that the 3 months' notice was to lapse in September but there was still default in September.

I have considered rival submissions herein. It is not disputed that the loan advance to the Plaintiff fell in arrears. What I wish to consider is whether the Plaintiff was issued with notices as required by Section 90 of the Land Act.

The 1st Defendant has attached list of mails and certificate of posting. No dispute has been raised concerning the address used. I agree that service to a company can be done either by delivering documents to the registered office and sending he documents by Registered Post. Service by registered post having been done I find that the demand notice of 6th June 2017 was served on the Plaintiff as required by law.

What I now wish to consider is whether there was need to issue another notice before advertisement of 19th March 2018.

On perusal statutory demand issued on 9th June 2017, I note that arrears as at that date was Kshs. 2,563,516.29. In the demand the Plaintiff was given 3 months to rectify the arrears indicated above. The demand called for payment of the arrears not the total amount of loan that was owing from the Plaintiff to the 1st Defendant.

From the statement filed by the 1st Defendant I note that kshs 5,073,591.87 was deposited in the account on 4th July 2017. That count therefore had excess of over 3 Million. The monthly repayments being Kshs. 1,269,791.40. The excess amounts were therefore to cover the over 2 months two months. From the statement, there are other deposits of Kshs. 34,705.70 on 25th August 2017 and Kshs. 2,794,896.90 on 14th December 2018.

I note from record that 45 days redemption notice is dated 25th January 2018 and Notification of sale of property dated 3rd April 2018. Advertisement for sale was done on 19th March 2018.

This was done after rectification of arrears by the Plaintiff in the 3 months given by notice dated 9th June 2017.

The notice issued on 9th June 2017 was not recall of the whole amount owing from the Plaintiff to 1st Defendant; the amount in arrears having been rectified, the 1st Defendant ought to have issued another statutory demand notice before advertisement for sale of property was done.

FINAL ORDER

1. Advertisement of sale dated 19th March, 2018 is hereby set aside.
2. Costs in the cause.

Ruling Delivered, Dated and signed at Nairobi this 25th day of October, 2018

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RACHEL NGETICH

JUDGE

IN THE PRESENCE OF

LANGAT: **COURT ASSISTANT**

MS. NJOROGE H/B FOR KARUGA: **COUNSEL FOR APPLICANT**

MS. MUNGAI H/B FOR ONSARE: **FOR 1ST DEFENDANT**