



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCC NO. 9 OF 2018

CAROLINE NGINA MWONGELA.....APPELLANT

-VERSUS-

RAFIKI MICROFINANCE BANK LTD.....1ST RESPONDENT

KEYSIAN AUCTIONEERS.....2ND RESPONDENT

RULING

INTRODUCTION

1. The Plaintiff/Applicant by a motion dated 4th September, 2018 seeks orders for:-

i. spent.

ii.spent.

iii. Temporary injunction to restrain to the Respondent by themselves, their servants, employees agents or any other persons whomsoever claiming through them from advertising for sale and/or selling through public auction and/or private treaty or otherwise exercising their statutory power of sale, transferring and/or in any way whatsoever interfering with the Plaintiff's property namely LR nos. Makueni/Uona/2790, 2798, 2808 and 2811 pending the hearing and determination of this suit.

iv. Costs to application.

v. It is accompanied by the supporting affidavit of Caroline Ngina Mwangela dated 4th September, 2018.

2. Upon service of the said application, the Defendant filed a Preliminary Objection dated 18th September, 2018 and was ordered to file a Replying affidavit to the Plaintiff's/Applicant's application.

3. The application is supported by Affidavit of the applicant sworn on 04/09/2018 which reiterates the content of the grounds.

4. The Applicant also filed a Supplementary Affidavit which she swore and filed on 19/09/2018.

5. The Respondent/1st Defendant responded by filing Preliminary Objection dated 18/09/2018.

6. On 19/09/2018, and a Replying Affidavit sworn by Jane Warau and filed on 11/10/2018 in the notice of Preliminary Objection (P.O) the Respondent sets two grounds of Objection. Namely:-

i. This is a matter in court of appeal vide Civil Application no. 86/2018 of which the Plaintiff and 1st Defendant are ... and is on same subject matter.

ii. High Court case no. 4 of 2018 by ruling of 30/07/2018, declined to give stay orders and an injunction.

7. On 19/09/2018, the court on consent of parties directed that Respondent to file Replying Affidavit and submissions on both Preliminary Objections and application within 14 days and the Applicant to respond with further Affidavit and submissions within 14 days of service. Highlighting was fixed on 17/10/2018.

8. Come the said date, only Respondent No. 1 had complied. The court indulged Applicant by adding her 14 days to comply.

9. By the time of preparing the ruling, Applicant had not complied.

RESPONDENT NO 1 SUBMISSIONS

10. It is submitted that, the Applicant and the 1st Respondent herein are Defendants in Civil Appeal application No. 86 of 2018, where the Appellants filed an Appeal having been aggrieved with the High Court's ruling in ELC No. 331 of 2017 delivered on 1st March 2018.

11. The Plaintiff's in ELC No. 331 of 2017 sought to stop the 1st Respondent from causing the repossession, sale, and advertising for sale and or in any way interfering with the suit property themselves, their servants and/or employees.

12. The Plaintiffs claimed to be the beneficial owners and in occupation of Makueni/Uona/2790, 2798, 2808 and 2811 (hereinafter referred to as the "suit property") having bought the property as *bona fide* purchasers for valued consideration.

13. The matter is still pending in court and waiting to be fixed a hearing of the Appeal.

14. It is submitted that the applicant has chosen not to disclose the above to the Court, instead seeks to forum shop while having the same matter canvassed in different fora.

15. It is Respondent no1 submission that this application raises two matters in law:-

1. Res Judicata Rule:-

16. The prayers sought by the Applicant herein are *res judicata* in nature in that the same prayers have been sought, adjudicated and determined touching on the same subject matter in ELC 331 of 2017 and later in HCCC No. 4 of 2018.

17. That the Applicant is estopped in law from raising the same issue over the same subject matter herein the suit properties, where the orders sought have been previously been found to lack merit.

18. The defendant cites the case of **Joseph Gichuhi And Anor -Vs- Agnes Mwenesi Siteka Nakuru HCCA 180 Of 2014**, where court ruled that it had no jurisdiction to entertain the application for stay of execution while a similar application was pending determination in the lower court as that would be an abuse of the process of the court. Therefore filing of multiple applications over the same subject matter seeking similar reliefs is an abuse of the court process.

2. Sub-judice Rule:-

19. The Plaintiff's in HCCC No. 4 of 2018, being aggrieved and dissatisfied with the ruling of the court delivered on 1st March, 2018, filled an appeal with the court of appeal under Civil Appeal Application No. 86 of 2018 where they are seeking for stay of execution of the ruling and for the Respondent to be restrained from repossessing, selling, advertising for sale or in any way interfering with the suit property. The suit is still pending before the Court of Appeal as such this Court has no jurisdiction to hear the matter. The applicant having failed to disclose such material facts amounts to misleading the court while abusing the court process in itself.

20. The Respondent No. 2 submits that, in **HCCC No. 4 of 2018** in its ruling annexed and marked JW-11 in the replying affidavit sworn by Jane Warau, the trial Judge found the application to lack merit and dismissed it while advising the Plaintiff to seek remedies in the Court of Appeal.

21. The Applicant in **HCCC No. 4 of 2018** sought the same orders as she is seeking herein now. The trial Judges at both instances in **ELC 331 of 2017** and **HCCC No. 4 of 2018**, found the orders sought to lack merit and further dismissed the application and orders sought.

22. The Respondent No 1 submits that, the Applicant had placed the suit property as security against the loan facility that was issued by the 1st Respondent and as such she was aware of what consequences may attach in her default of payment of the monthly instalments to the bank.

23. The Applicant did default on the loan repayments thus necessitating the 1st Respondent to issue a demand and notification of such default. That despite the demand and notification of default, the Applicant continued being in default which necessitated the issuance of statutory notices and redemption notices.

24. All these were attempts by the 1st Respondent to accord the Applicant a chance to redeem her property, which chances she blatantly disregarded leaving the 1st Respondent no other option other than realizing the property so as to recover what was advanced to the applicant.

25. That in both circumstances the Courts took cognizance of the fact that the Applicant was accorded a chance to redeem her property but she sought not to do so and only rushed to court once the Respondent sought to realize the property an action which is well within its right.

26. The Court urged to find the application lacks merit and an abuse of the Court process and thereby should be dismissed.

27. The 1st Respondent submits that, at paragraph 2 and 3 of Applicant supporting affidavits admits to having taken a loan facility with the 1st Respondent herein amounting to Kshs.10,000,000/= which was secured by registering a charge over the suit properties herein.
28. It was a term of the loan agreement that the Bank reserves the right to realize the security in the event of default in serving the loan. The Applicant did default on the payment of the monthly instalments in satisfaction of the loan facility advanced at which point the bank did issue a formal demand of the outstanding sum, which demand is annexed and marked JW-3 in their replying affidavit.
29. That despite having made a demand the applicant failed, refused and/or neglected to settle her account with the 1st Respondent, which then necessitated in the institution of recovery proceedings prior to exercising the statutory power of sale.
30. The applicant's continued default and failure to settle her account has left her account in arrears as is evidenced by the Applicant's current account statements annexed and marked JW-14 in their replying affidavit which prompted the realization of the security by the 1st Respondent.
31. It is thus contended that, the requisite statutory notices as provided by law by having been served, by the Respondent No.2, its statutory power of sale crystalized and hence the Applicant's application amounts to an abuse of process of the Court process and should be dismissed with costs.
32. It is further urged that, the moment the Applicant charged her said parcels of land to the Respondent No.2 to secure the said loan facility, she willingly and voluntarily converted the property into a commercial commodity to be dealt with as such in case of any default.
33. In support of their submission on this point, it cites the case of **NBI 134 of 2008 (UR) 86/2008) Mukua Tutuma –Vs- Cooperative Bank of Kenya Ltd (2008) eKLR** at page 4 of the Ruling, the Court of Appeal stated:-
- “.....As the superior court rightly stated, the subject property was a business premises offered by the Applicant as a security for a loan. The Applicant, in doing so, knew very well that he was turning the premises into a commercial commodity and he knew the possible consequences of the same, one of which was that on his being unable to service the loan, the property could be put on sale to recover the balance. This is what happened and he cannot turn around to read any ill in that”***
34. Respondent No.1 also relies on **Maithya –Vs- Housing Finance Company Of Kenya (2003) EA 133** where Nyamu, J observed:
- “Charged properties are intended to acquire or are supposed to have a commercial value otherwise lenders would not accept them as securities.***
- The sentiment of ownership which has been greatly treasured in this country over the years has in many situations given way to commercial considerations.***
- Before lending many renders, banks and mortgage houses are increasingly insisting on valuations being done so as to establish forced sale values and market values of the properties to constitute the securities for the borrowings or credit facilities.***
- The lending in most cases given on the basis of the commercial value of the securities or as a percentage of the value. These are commercial values which are established by valuers on the instructions of borrowers or the banks.***
- Loss of the properties by sale is clearly contemplated by the parties even before the security is formalized”***
35. The 1st Respondent upon default by the Applicant in making her monthly payments in satisfaction of the loan facility advanced wrote to the Applicant informing her of such default and demanding that she settled her account by making payments of the sum due.
36. The Applicant despite receipt of the demand letter continued being in default and failed to make payments to the 1st Respondent. Subsequently, the 1st Respondent did issue the Applicant with a statutory notice which after the lapse of three (3) months and the Applicant didn't rectify the default issued a second statutory notice.
37. The Respondent No1 submits that, its actions were in compliance with Section 90 (1), (2) and (3) of the Land Act No. 6 of 2012, which actions gave the Applicant a chance to exercise her right or equity of redemption over the charged property as set out by law.
38. However, despite the numerous chances accorded to the Applicant to redeem her property she remained in default of the terms of the loan agreement.
39. As a result of the continued default, the 1st Respondent had no other option other than exercising its statutory power of sale.
40. The 2nd Respondent upon receiving the instructions from the 1st Respondent issued a redemption notice together with a proclamation notice to the Applicant, which notices were ignored by the Applicant.
41. The 2nd Respondent went ahead to advertise the property for sale vide public auction in the daily nation on 27th August, 2018.

42. That on 6th September, 2018 the 2nd defendant did carry out the intended sale over Makueni/Uona 2790 & 2798 as was advertised in the dailies. They successful got bids of Kshs.1,400,000.00/= and Kshs.4,600,000.00/= over the two parcels of land which proceeds of sale went into settling part of the balance held with the 1st Respondent.

ISSUES, ANALYSIS AND DETERMINATION

43. After going through the pleadings, affidavits and submissions on record, I find the issues are;

1. *Whether the P O has merit?*
2. *If above in negative, whether the application has merit?*
3. *What is the order as to costs?*

44. The law on the two grounds raised in the P O is as hereunder;

Section 6 of the CPA cap 21 states that,

No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

Explanation.—The pendency of a suit in a foreign court shall not preclude a court from trying a suit in which the same matters or any of them are in issue in such suit in such foreign court.

Section 7. On Res judicata states;

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

Section 8. On Bar to further suit states that;

Where a plaintiff is precluded by rules from instituting a further suit in respect of any particular cause of action, he shall not be entitled to institute a suit in respect of that cause of action.

45. In the case of **Joseph Gichuhi and Anor -Vs- Agnes Mwenesi Siteka Nakuru HCCA 180 of 2014**, the court ruled that it had no jurisdiction to entertain the application for stay of execution while a similar application was pending determination in the lower court as that would be an abuse of the process of the court. Therefore filing of multiple applications over the same subject matter seeking similar reliefs is an abuse of the court process.

46. This Court in the HCCC No. 4 of 2018 in its ruling annexed and marked JW-11 in their replying affidavit sworn by Jane Warau, found the application to lack merit and dismissed it while advising the Plaintiff's to seek remedy in the Court of Appeal.

47. The Applicant in HCCC No. 4 of 2018 sought the same orders as the Applicant herein is seeking. In both instances in i.e. in ELC 331 of 2017 and HCCC No. 4 of 2018, found the orders sought to lack merit and further dismissed the applications and orders sought. All these applications sought same orders as in the instant application.

48. The Applicant with others in HCCC No. 4 of 2018, being aggrieved and dissatisfied with the ruling of the court delivered on 1st March, 2018, filed an appeal with the court of appeal under Civil Appeal Application No. 86 of 2018 where they are seeking for stay of execution of the ruling and for the Respondent to be restrained from repossessing, selling, advertising for sale or in any way interfering with the suit property.

49. The suit is still pending before the Court of Appeal as such this Honourable Court has no jurisdiction to hear the matter.

50. In the premise the court upholds the Preliminary Objection and makes the following orders;

- i. **The application herein is struck out.**
- ii. **The costs are awarded to the Respondent No 1.**

DATED, DELIVERED, SIGNED THIS 17TH DAY OF DECEMBER, 2018 IN OPEN COURT.

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HON. C. KARIUKI

JUDGE