



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & TAX DIVISION
CIVIL SUIT NO. 240 OF 2014 (O.S.)

EQUATORIAL COMMERCIAL BANK LIMITED.....PLAINTIFF

-VERSUS-

PICKWELL AND DEAL LIMITED.....1ST DEFENDANT

PETER FRANCIS MBUGUA KIMANI.....2ND DEFENDANT

ANNE WAMBUI KIMANI.....3RD DEFENDANT

RULING

[1] The Plaintiff/Applicant moved the Court by way of the Originating Summons dated **13 February 2014**, pursuant to **Sections 96 and 98(1)(d)** of the **Land Act** and **Sections 74 and 77** of the **Registered Land Act** (now repealed), **Sections 1A, 1B, 3A** of the **Civil Procedure Act, Chapter 21** of the **Laws of Kenya** and **Order 37 Rules 4 and 8** of the **Civil Procedure Rules, 2010**, for orders that:

[a] **The Plaintiff be allowed to sell the suit property, comprising of all that parcel of land known as Land Reference No. Kiambu/Escarpment Jet Scheme/8, by private treaty.**

[b] **The subsequent buyer be registered as the owner of all that parcel of land known as Land Reference No. Kiambu/Escarpment Jet Scheme/8.**

[c] **The Title Deed owned by the Defendant be cancelled and a new one be issued and registered in favour of the subsequent buyer.**

[d] **Costs of the application be provided for.**

[2] In support of the application, it was deponed by the Plaintiff's Legal Officer, **Mr. Brian Asin**, that on or about the **4 October 2007**, upon the request of the Defendants, the Plaintiff offered the **1st Defendant** (the Borrower), credit facilities of up to **Kshs. 2,000,000** on the security of a Legal Charge over the suit property. The property was at the time registered under the name of **Peter Francis Mbugua**, the **2nd Defendant**, who, together with the **3rd Defendants** are Directors of the **1st Defendant**. The **2nd** and **3rd** Defendants provided Personal Guarantees to the Plaintiff of up to **Kshs. 2,608,000** each.

[3] It was further averred on behalf of the Plaintiff that since **3 October 2008**, the 1st Defendant had neglected and or refused to service the facility, thereby suffering it to fall into arrears; and that in spite of demand for the repayment of the outstanding balance and arrears, the 1st Defendant had not taken any steps to rectify its default. In addition to the demand notice, it was the Plaintiff's case that the Defendants have been served with various Statutory Notices, copies of which were annexed to the Supporting Affidavit and marked **BA-4 to BA8**; and that even those notices elicited no reaction from the Defendants. The Plaintiff thereupon instructed **Dalali Traders** to auction the suit property, and that the suit property was indeed advertised twice for sale by public auction, which was scheduled for **14 July 2011** and **24 August 2011**, but no bids were forthcoming for the property. It was therefore the contention of the Plaintiff that attempts to sell the security by public auction have failed, hence the prayer for leave to sell the same by private treaty.

[4] The application was accordingly served on the Defendants. The first such service was effected for the purpose of the mention that was scheduled for **27 September 2016**. The second service was effected in respect of the hearing date of **4 November 2016**. On both occasions service was effected in accordance with the provisions of **Order 5 Rule 3 of the Civil Procedure Rules** and a return made in terms of the Affidavits of Service sworn by **Charles Mwathi Njagi**, which were filed herein on **26 September 2016** and **14 October 2016**, respectively. Needless to say that neither was the application responded to, nor did any of the Defendants make an appearance herein in defence of the application.

[5] The Plaintiff has accordingly presented credible evidence that by a Charge Instrument registered on **25 October 2007**, signed by the 2nd Defendant on behalf of the 1st Defendant, the suit property was charged to the Plaintiff to secure a financial facility provided by the Plaintiff to the 1st Defendant. It is also uncontroverted that the Defendants failed to satisfactorily service the security, with the result that to date, the 1st Defendant is still indebted to the Plaintiff, notwithstanding the calling in of the Guarantees, and attempts at realizing the charged security by way of public auction.

[6] There is no gainsaying that, apart from sale by way of public auction, a chargee has the option, under **Section 98(1)(d) of the Land Act**, of selling the charged property by private treaty; and **Annexures BA10 and BA 11** confirm the averments of the Plaintiff as to the efforts that had been made to sell the suit property and the reason for the failed attempts, namely that the property was located in the interior part of the countryside, and that efforts to market the same were frustrated as all the posters would be promptly removed by detractors and saboteurs. In the premises, I would allow the Notice of Motion dated **13 February 2014** and grant the orders prayed for therein as hereunder:

[a] That the Plaintiff be and is hereby allowed to sell the suit property, comprising of all that parcel of land known as Land Reference No. Kiambu/Escarpment Jet Scheme/8, by private treaty.

[b] That thereupon the buyer be registered as the owner of all that parcel of land known as Land Reference No. Kiambu/Escarpment Jet Scheme/8.

[c] That upon such sale, the Title Deed now held by and in the name of the Defendant be cancelled and a new one be issued and registered in favour of the buyer.

[d] Costs of the application be paid by the Respondents.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF FEBRUARY 2017

OLGA SEWE

JUDGE