



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 40 OF 2017

PATRICK MUNYAO.....1ST PLAINTIFF/1ST APPLICANT

KENYA HAULAGE AGENCY LTD.....2ND PLAINTIFF/2ND APPLICANT

VERSUS

STANDARD CHARTERED BANK (K). ...DEFENDANT/RESPONDENT

RULING

1. The applicants filed a Notice of Motion on 6th April, 2017 under the provisions of Order 40 Rules 1 and 2 of the Civil Procedure Rules, 2010, Sections 1A, 1B and 3A of the Civil Procedure Act, the inherent jurisdiction of the court and all other enabling provisions of the law. The applicants seek the following orders:-

(i) Spent;

(ii) Spent;

(iii) That pending the hearing and determination of the suit an injunction be issued restraining the defendant by itself, its servants and/or agents from selling or in any other way dealing with the property known as sub-division No. MN/1/6007 (Orig. No. 5679/35) Section I Mainland North; and

(iv) That costs of the application be provided for.

2. The application is premised on the grounds on the face of it and the supporting affidavit of Patrick Munyao sworn on 6th April, 2017. The respondent through Boniface Machuki filed a replying affidavit on 19th April, 2017 to oppose the application. The court scheduled the highlighting of submissions to 13th July, 2017 by consent of the Counsel for the parties. Come the said date, Counsel for the respondent did not attend court. Counsel for the applicant proceeded to highlight his written submissions. This court in making its decision will consider the written submissions of the respondent's Counsel as well.

3. Mr. Gikandi, Learned Counsel for the applicant submitted that the duty of a chargee is to prove through evidence that proper notices were served on the chargor. He argued that it is the duty of the chargee to prove service of the notices. He stated that the replying affidavit has attachments of postage slips and letters. He added that under sections 107 and 108 of the Evidence Act, the duty of proving service lies on the respondent. Counsel contended that the second applicant was not served with the 45 day notice before the auction.

4. It was further submitted that the chargee has a mandatory obligation to carry out a valuation exercise to establish the forced sale value of the property. Counsel informed the court that the 1st applicant and his family live on the said family property.

5. Mr. Gikandi, relied on the case of **Giella vs Cassman Brown & Co. Ltd** [1973] EA 358 in stating that the 1st applicant will suffer irreparable loss if the property is sold and if the court is in doubt, the benefit should be accorded the applicants.

6. It was submitted the respondent did not come to court to submit that the value of the loan was about to outstrip the value of the property. Counsel relied on the case of **Kisimani Holdings Ltd. & Another vs Fidelity Bank Ltd** [2013] eKLR which provides for safeguards on the sale of charged property and the provisions of section 97 of the Lands Act.

7. On the issue of service of notices, Mr. Gikandi relied on the case of **Cleave Odhiambo & Others vs Uchumi Contractors Limited** [2016] eKLR and **Albert Mario Cordeiro & Another vs Vishram Shamji** [2015] eKLR.

ANALYSIS AND DETERMINATION

The issue for determination is if the 1st and 2nd applicants have established a prima facie case against the respondent.

8. The 2nd applicant does not deny having been advanced 3 loans by the respondent. The 1st applicant's property known as sub-division No.MN/I/ 6007 (ORIG No. 5769/35) Section I Mainland North was charged to secure the loans. The charge was executed on 14th February 2012 whereby the chargor, Patrick Nduva Munyao (1st applicant) signed the charge document.

9. In paragraph 4 of his affidavit sworn on 6th April, 2017, the 1st applicant deposes that he is aware that the 2nd applicant has been making payments towards repayments of the loan facility but due to financial constraints, it has delayed a few payments.

10. In paragraph 6 of the said affidavit, the 1st applicant avers that the notification of sale dated 24th March, 2017 was not served on the 2nd applicant which ought to have known why the suit property was being sold.

11. A perusal of the annexure attached to the respondent's replying affidavit and marked as BM6 shows that the notice of the intended sale of the 1st applicant's property by Garam Auctioneers dated 5th February, 2016 was addressed to the 1st applicant but no copy was sent to the 2nd applicant. A similar scenario obtains to the notification of sale dated 27th January, 2016 which was addressed to the 1st applicant by the Advocates for the respondent with no copy being sent to the 2nd applicant. The applicants have therefore rightly stated that the 2nd applicant was not informed of the impending sale of the 1st applicant's property. This court takes judicial notice of the fact that the 1st applicant and the 2nd applicant are different legal entities.

12. This court however notes that contrary to the 1st applicant's averment that valuation of the suit premises was not carried out prior to the advertisement of the same for sale by public auction, I am satisfied that valuation was undertaken and a report thereof dated 17th March, 2017 is exhibited as BM13 to the respondent's affidavit.

13. I am also satisfied that statutory notices dated 6th October, 2015 issued to both the 1st applicant with a copy to the 2nd applicant were received by the said parties. The letter from the applicant's Advocates dated 4th February, 2016 attached to the respondent's affidavit as annexure BM5 attests to that fact. The said notices also complied with the provisions of section 90 of the Land Act which provides as follows:-

“1. If a chargor is in default of any obligation, fails to pay interest or any other period 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;

(c) If the default consists of the failure to perform or observe any covenant, express or implied, in the charge, the thing the chargor must do or desist from doing so as to rectify the default and the time, being not less than two months, by the end of which the default must have been rectified;

(d) The consequence that if the default is not rectified within the time specified in the notice, the chargee will proceed to exercise any of the remedies referred to in this section in accordance with the procedures provided for in this sub-part; and the right of the chargor in respect to certain remedies to apply to the court for relief against those remedies.”

14. The applicant in his affidavit does not dispute the amounts being claimed by the respondent in the notice issued pursuant to the provisions of section 90 of the Land Act, but cites financial constraints as the cause for default. In paragraph 13 of his affidavit, he deposes that he is ready and willing to pay any outstanding balance hence the action taken by the respondent is not reasonable.

15. The respondent in paragraph 6 of its affidavit refers to an email attached thereto marked as BM3 and avers that the 1st applicant sought a meeting to negotiate the facilities and expressed willingness to clear the entire bank debt within 2 months.

16. The statutory notice under Section 90 was to be followed by notification of sale of the charged property under the provisions of Section 96 of the Land Act. The said section provides as here under-

“1. Where a chargor is in default of the obligations under a charge and remains in default at the expiry of the time provided for the rectification of that default in the notice served on the chargor under section 90(1), a chargee may exercise the power to sell the charged land.

2. Before exercising the power to sell the charged land, the chargee shall serve on the chargor a notice to sell in the prescribed form and shall not proceed to complete any contract for the sale of the charged land until at least forty days from the date of service of that notice to sell.”

17. In the present case, a notification of sale was duly issued by the respondent to the 1st applicant through a letter dated 27th January, 2016. The said letter was responded to by Counsel for the applicants on 4th February, 2016. It was received by Counsel for the respondent on 15th March, 2016. The respondent deposes in paragraph 8 of its affidavit that the letter from the applicant's Advocates dated 4th February, 2016 bore the wrong date as an advance copy sent to the respondent by email was received by them on 17th February, 2017. It is my finding that correspondence from the applicants' Advocates on the statutory notice and notification of sale is sufficient evidence to show that the said documents were received by the two applicants in respect to the statutory notice and the 1st applicant in respect to the notification of sale.

18. Counsel for the applicant submitted that the notice under Section 96 of the Land Act was not served on the 1st applicant's wife. The court takes judicial notice that not all the general adult human populace have spouses and no affidavit was filed by the 1st applicant's spouse as proof of her existence which would validate the allegation of lack of service of the statutory notice and notification of sale of the suit property on her.

19. The Auctioneers notice dated 5th February, 2016 under the provisions of rule 15 of the Auctioneers Act was issued a few days after the issuance of the notification of sale by the respondent. This then means that the 1st applicant was not given an opportunity to redeem his property within 40 days of the issuance of the notice for sale before the Auctioneer could issue a notice. In **Yusuf Abdi Ali Co. Ltd vs Family Bank Ltd** [2015] eKLR, when faced with a similar situation, Judge Kamau stated as follows:-

“It would therefore be surprising to the court and hardly equitable for a chargee to instruct an auctioneer to advertise the property for sale before a chargor has had full opportunity to pay. An Auctioneer would essentially be in a position of a football player who is in an off side position and catches the chargor by surprise as he would be waiting in the wings and hoping the chargor does not pay the outstanding sum so that he can sell the property. In fact, if the two notices were to be issued concurrently a charger would not be certain whether or not he should redeem his property by paying the outstanding sums on the fortieth (40th) day of the notice under Section 96(2) of the Land Act or the forty fifth (45th) day when the notice issued by the Auctioneer would be expiring.”

20. The court in the above case was of the firm position that the notification of sale by Auctioneers ought to be issued after the elapse of the forty (40) days' notice under section 96(2) of the Land Act and not before that. This court is persuaded by position taken by Judge Kamau in the said case. Does this therefore entitle the applicants to an interlocutory injunction? Mr. Gikandi relied on the case of **Giella vs Cassman Brown & Co. Ltd** (supra) among others, which he cited in his written and oral submissions. He was of the view that he had demonstrated that this case falls within the purview of the principles laid out in the said case.

21. The respondent's counsel in her written submissions was of a divergent view and relied on **Mrao vs First American Bank & 2 Others**, CA Civil Appeal No. 39 of 2002, **Yusuf Abdi Ali Co. Ltd vs Family Bank Limited** (supra), **Githunguri vs Jimba Credit Corporation Ltd** [1988] KLR 825. In one of the cases cited by Counsel for the respondent of **Jopa Villas LLC vs Private Investment Corporation & 2 others** [2009] EKLJ Judge Lenaola (as he then was) stated thus:-

“I am clear in my mind that the applicant is running away from the obligations lawfully imposed and with his knowledge and participation. Courts should not aid it in that quest but will instead uphold the rights of the 1st defendant to recover the monies lawfully advanced Our courts must uphold the sanctity of lawful commercial transactions.”

22. The circumstances surrounding this application is indicative of a chargor who is trying to escape from the liability of having the chargee realize its security. The 1st applicant in his affidavit deposes that the property the subject of this suit is of great value and attachment to him as his family resides therein, thus he stands to suffer irreparable damages if it is sold as his family will be displaced and his property sold at a price below the market value. In **Maithya vs Housing Finance Co. of Kenya & Another** [2013] 1 EA 133 at 139, Nyamu J (as he then was) held as follows:

“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 lenders, 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.....loss of the properties by sale is clearly contemplated by the parties even before the security is formalized.”

23. Similarly, Odunga J in the case of **Thomas Nyakamba Okongo vs Cooperative Bank of Kenya Ltd** [2012] eKLR stated as follows:-

".....Once a property is given as security, it becomes a commodity for sale and there is no commodity for sale to which a value cannot be attached. Otherwise financial institutions would be reluctant to extend financial accommodation to genuine borrowers....."

24. It is thus evident that courts are not blind to the sentimental attachment that chargors have for their properties, especially their homes, but a borrower who offers his property as security does so willingly and eagerly at the prospects of the realization of the grand plans such a loan portends in the advancement of his financial status or growth of his business. Such a willing participant to a freely negotiated contract can thereafter not cry wolf unless a term of the contract has been breached or due process has not been followed as legally provided in realization of the charge.

25. In the circumstances of this case, I am not persuaded that the applicant has met the principles set out in the case of **Giella vs Cassman Brown** (supra) for the grant of an interlocutory injunction. However, due to the respondent's non-compliance with the provisions of section 96 of the Land Act and Rule 15 of the Auctioneers Act with regard to the 2nd applicant, I hereby issue the following orders:-

(i) The respondent shall issue the 1st and 2nd applicants with fresh notices as provided under the provisions of Sections 90, 96 of the Land Act and Rule 15 of the Auctioneers Act;

(ii) The said notices shall be issued within different timelines as provided in law with no notice overlapping the other on the sequence of issuance; and

(iii) Since the applicants have partly succeeded in their application, they are awarded half the costs.

It is so ordered.

DELIVERED, DATED and SIGNED at MOMBASA on this 17th day of November, 2017.

NJOKI MWANGI

JUDGE

Ms Murage for the plaintiffs/applicants

Mr. Onyango holding brief for Ms Njeri Mucheru for the defendant/respondent

Mr. Musundi - Court Assistant