



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

CIVIL SUIT NO. 206 OF 2017

ELIZABETH WANJIKU KARIUNGI.....PLAINTIFF

VERSUS

EQUITY BANK (KENYA) LIMITED.....DEFENDANT

RULING

1. The plaintiff's application dated 15th May 2017 seeks an interlocutory injunction to restrain the defendant from selling, transferring, alienating or in any other manner, howsoever, interfering with the suit property, **L.R. No. KAJIADO/KITENGELA/2763**.
2. It is the contention of the plaintiff, **ELIZABETH WANJIKU KARIUNGI**, that the chargee's statutory power of sale had not yet accrued. In the circumstances, the plaintiff reasoned that the attempt by the defendant, **EQUITY BANK (K) LIMITED**, to sell the suit property was unlawful.
3. In her supporting affidavit, the plaintiff said that the bank had not served her with the requisite Notices, required under Sections 90 and 96 of the Land Act.
4. Secondly, the plaintiff complained that the Auctioneers appointed by the bank, had not served her with a valid Redemption Notice.
5. Thirdly, the bank proposed to sell-off the suit property at a gross under-value of Kshs. 10,500,000/- whilst the true value of the said property was Kshs. 20,000,000/-.
6. In answer to the application, the bank filed a Replying Affidavit which was sworn by Kelvin K. Mwendwa, a Credit Manager at the bank's Corporate Branch.
7. The bank provided a copy of a Demand Notice dated 18th December 2015, indicating that the arrears were then Kshs. 439,247.55. The said demand Notice was served by Registered Post, and the Certificate of Posting was exhibited by the bank.
8. Thereafter, the bank issued a Notice to the plaintiff, that it would exercise its Statutory Power of Sale. The said Notice was dispatched by Registered Post, and it was expressly cited as a notice under Section 96 of the Land Act.
9. After the lapse of 3 months, the bank served a Redemption Notice dated 28th September 2016. Through that notice, the chargor was allowed 40 days, from the date of service, to pay the principal sum

together with interest.

10. When the chargor did not pay-off the outstanding sums, the Auctioneers who had been instructed to sell-off the suit property, served the chargor with a Notification of Sale dated 25th November 2016.

11. The Notification of Sale informed the chargor that the suit property would be sold by public auction on 8th February 2017.

12. Having given due consideration to the evidence before me, I am satisfied, on a *prima facie* basis, that the bank did serve the appropriate notices upon the plaintiff.

13. On its face, the Statutory Notice herein, met the requirements of Section 90 of the Land Act. The notice informed the plaintiff that her loan repayments were in arrears amounting to Kshs. 439,247.55.

14. The bank also informed the plaintiff that if the said arrears were not cleared before the expiry of 3 months, the bank would take the following actions;

a. Exercise its statutory power of sale;

b. Forward the plaintiff's file to the Credit Reference Bureau, for default listing;

c. Demand the repayment of the entire loan amount which was outstanding, if the default persisted.

15. The bank also drew the plaintiff's attention to the fact that the plaintiff reserved the right to apply to court, to seek relief against any of the remedies which the bank had told her, it could take under the Charge.

16. In this case, the Notice under Section 90 of the Land Act is dated 18th December 2015.

17. Thereafter, it was not until 28th September 2016 that the bank issued the 40 days notice pursuant to Section 96 of the Land Act.

18. That was followed by 45 days notice dated 25th November 2016, which was served through registered post on 30th November 2016.

19. In the case of **PETER KURIA MUNYUIRA Vs. HOUSING FINANCE COMPANY of KENYA LIMITED & ANOTHER Hccc No. 457 of 2006**, Warsame J. (*as he then was*) said;

“A notice sent through registered post takes effect after the collection of the registered mail of the chargor from the Postal Corporation of Kenya. It is therefore incumbent upon the chargee to ensure the registered mail sent through any process is received and there must be evidence of receipt and the date it was collected or received by the addressee”.

20. Whilst I do share the view expressed by my learned brother concerning the fact that service of a valid statutory notice of sale on the chargor is a condition precedent to the exercise of the chargee's statutory power of sale, I am unable to find the legal basis for the contention that the chargee has an obligation of ensuring that the chargor collected or received the notice which was sent by registered post.

21. In my considered view, when the court imposes upon the chargee the obligation of demonstrating knowledge of when the chargor received or collected the notice which had been dispatched by registered post, that constitutes an extra burden, which was not anchored in statute.

22. The chargor has an obligation to dispatch the notice to the correct postal address.

23. The chargor's other duty is to ensure that the contents of the notice meet the requirements set out in the Land Act.

24. My considered opinion is that the chargee does not have any control over the chargor, so as to be able to ensure that the chargor collects or receives the notice.

25. In this case the plaintiff told the court that she paid Kshs. 650,000/- in the year 2016. She said that that sum was equivalent to instalments payable over 7 months.

26. Considering that every calendar year has 12 months, it means that when the plaintiff remitted payments equivalent to instalments for 7 months, there was a default in remitting instalments for 5 months, in 2016.

27. The plaintiff also told the court that in the year 2017, she had paid Kshs. 80,000/- between May and October 2017.

28. Considering that the plaintiff had executed a contract pursuant to which she bound herself to be paying monthly instalments of Kshs. 88,054/-, that implies that the plaintiff had fallen into further arrears.

29. It is well settled that he who comes to equity must come with clean hands. When coming to court, seeking the equitable relief of an interlocutory injunction, the plaintiff should demonstrate that he or she was performing their part of the bargain.

30. It is iniquitous for a plaintiff who was failing to meet his or her contractual obligations to seek the protection of the court.

31. In the result, I find no merit in the plaintiff's application for an interlocutory injunction to restrain the bank from realizing the security until the suit was heard and determined.

32. If anything, I find that, on a *prima facie* basis, the bank has complied substantially with the obligations as to the issuance of Notices to the Chargor.

33. If the court were to stop the auction in the circumstances in which the plaintiff was in arrears, that would actually not provide any assistance or protection to the plaintiff.

34. When the chargee's actions are generally in keeping with the law, whilst the chargor was in arrears, it would follow that the costs incurred in the course of an auction which was put-off by the court, would be lawfully debited against the chargor's account. If therefore, the chargor was already struggling before the costs were loaded to his or her account, the situation would only be made worse.

35. My take is that when a borrower or a chargor is aware that he or she is in arrears, it is much more prudent to engage the lender in negotiations, hoping to achieve a mutually acceptable re-scheduling of the loan payments, than engaging the borrower in litigation.

36. Of course, when a chargor or a borrower is convinced that he or she is meeting obligations under the contract, and that the chargee or lender was clearly wrong to try and exercise the statutory power of sale irregularly, the court would also be ready to accord justice.

37. Meanwhile, the plaintiff's application herein is dismissed, with costs to the defendant.

DATED, SIGNED and DELIVERED at NAIROBI this 14th day of December 2017.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Miss Kageni for the Plaintiff

Omino for Miss Rweya for the Defendant

Collins Odhiambo – Court clerk.