



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC CASE NO. E013 OF 2021

JOSEPH KAIMENYI MARETE PLAINTIFF

VERSUS

PITCHCARE MARKETING DIVISION 1ST DEFENDANT

FAMILY BANK LTD..... 2ND DEFENDANT

VIEW LINE AUCTIONEERS 3RD DEFENDANT

RULING

1. This ruling relates to the applications dated 16.4.2021, 29.9.2021 and the preliminary objection dated 1.11.2021.

FIRST APPLICATION

2. In the application dated 16.4.2021, the plaintiff/applicant seeks for temporary orders of injunction restraining the defendants from selling, auctioning, trespassing or in any other way disposing the suit land pending hearing and determination of this suit. The application is supported by an affidavit of Joseph Kaimenyi Marete sworn on 16.4.2021.

3. The grounds of the application are the plaintiff guaranteed the 1st respondent a loan of **Kshs. 6,500,000/=** from the 2nd respondent through his parcels of land; the 1st respondent fell into arrears and both respondents failed to update the applicant of non-compliance; the applicant only came to know of the issue when his properties were put up for auction sale; there was no service of the requisite statutory notices hence contrary to **Section 97 (1) of the Land Act**; the intended auction is invalid and hence the applicant stood to suffer grave loss and damage.

4. The 2nd respondent opposes the application through a replying affidavit sworn by Mary Wangui Wanjohi on 27.9.2021.

5. The 1st ground is the applicant has failed to disclose material facts that he was nominated as a guarantor so as to secure the loan using **L.R Ontulili/Ontulili/Block 1 Katheri/461** for **Kshs. 1,500,000/=**, wherein he executed a deed of guarantee on 15.4.2021 stating he would procure the punctual performance by the principal debtor of his obligations as per the loan facility agreement.

6. Secondly, the respondent states that **Kshs. 6,500,000/=** was disbursed to the 1st respondents account on 6.5.2021 and not Kshs. 4.6 million as alleged by the applicant.

7. Thirdly, it is averred the 1st respondent was quick to borrow the money but slow or reluctant in servicing the loan hence the 2nd applicant had no other option but to take remedial measures in line with the charge and the deed of guarantee and in particular clause 3 of the guarantee which required the applicant to pay to the 2nd respondent on demand all monies and to discharge all obligations and liabilities owing to the 2nd respondent by the 1st respondent and; in the alternative sale of the suit properties. A statutory notice of sale was duly given on 17.6.2017 plus a 40 days' notice dated 15.9.2016 in default of which the 3rd respondent gave a 45 days notification of sale upon the applicant.

8. Fourthly, the 2nd respondent states a valuation of the properties was done indicating a forced sale value of Kshs. 2,650,000/= subsequent to which an advertisement was done on 29.3.2021 for a public auction for 13.4.2021 and out of courtesy the applicant was also notified vide a letter dated 29.3.2021.

9. Fifthly, the 2nd respondent states the public auction took place as scheduled and the property was sold for Kshs. 1,650,000/= hence the application is overtaken by events after the equity of redemption was extinguished and that the only remedy available was general damages if the court were to establish the public auction was unlawfully undertaken.

SECOND APPLICATION

10. Coming to the application dated 27/9/2021, the 2nd defendant seeks under Order 45 rule 1 for the review and substitution of the orders granted on 19.7.2021 dismissing the notice of motion dated 16.4.2021. The application is supported by an affidavit sworn on the even date by Mary Wangui Wanjohi.

11. The grounds are that, the court heard the applicant in the absence of the 2nd defendant's counsel, that new and important evidence has arisen which was not within the knowledge of the court at the time it made the adverse orders given the applicant failed to disclose information which was within his knowledge but deliberately withheld it, so as to mislead the court.

12. Lastly the 2nd defendant filed a preliminary notice dated 1.11.2021 on the basis that the court lacks jurisdiction to hear and determine the matter since the dispute before it is not one of land but of a commercial nature as held in **Cooperative Bank of Kenya Ltd –vs- Patrick Kangethe Njuguna & 5 Others [2017] eKLR.**

13. The court record shows the application dated 16.4.2021 was filed on 19.4.2021. It was certified urgent on 19.4.2021 and given an interpartes hearing for 5.7.2021. On 5.7.2021 parties appeared in court except the 2nd and 3rd defendants wherein the court was informed the auction had not taken place. The court ordered for status quo to be maintained.

14. On 28.9.2021 the matter was mentioned at 11.30 a.m. when Miss Wairimu advocate for the 2nd defendant appeared after the matter had been called out and given another date of 3.11.2021. She sought for and was granted leave to file replies to the application.

15. On 7.10.2021 the court certified the application dated 27.9.2021 urgent and listed it for hearing an interpartes on 3.11.2021. When the parties appeared on 3.11.2021, the court directed the pending application to be canvassed by way of written submissions to be filed by 10.11.2021.

PRELIMINARY OBJECTION

16. On 29.11.2021, the parties once again appeared to confirm compliance and the issue of a preliminary objection was raised regarding the jurisdiction of the court to hear the suit. The court extended the interim orders stopping any transactions over the suit land.

17. Parties did not file any written submissions as directed. Similarly, the plaintiff has not replied to the application dated 27.9.2021.

18. From the court record, it is evident the 2nd defendant filed a memorandum of appearance dated 23.4.2021 on 15.7.2021.

JURISDICTION

19. The jurisdiction of this court is set out at **Article 162 (b) of the Constitution** as read together with **Section 13 (2) of the Environment and Land Court 2011 Sub rule 2 (2)** grants this court the powers to handle inter alia matters on contracts, choses in action or other instruments granting any enforceable interests on land and, any other disputes relating to environment and land. **Section 2 of the Land Registration Act** defines a court as an ELC established by the **Environment and Land Court Act 2011** and other courts having jurisdiction on matters relating to land.

20. **Section 56 – 59 of the Land Registration Act** grants the ELC courts powers to deal with dispositions to prejudice creditors, charges, and inhibitions. In particular **Section 101 of the Land Registration Act** provides:

“The Environment and Land Court established by the Environment and Land Court 2011 and subordinate courts have jurisdiction to hear and determine disputes, actions and proceedings concerning land under this Act.”

21. **Section 2 of the Land Act** defines a court as the ELC established under the **Environment and Land Act** while **Sections 78 – 106** thereof deals with charges, equity of redemption, right and obligations of both the charge and the chargor and the role of court in respect of remedy and reliefs..

22. In **Margaret Muthoni Njoroge –vs- Housing Finance Company Limited & Another [2020] eKLR** Munyao J. took the view the ELC have jurisdiction to hear and determine matters falling within its jurisdiction and held the Court of Appeal in **Cooperative Bank Ltd –vs- Patrick Kangethe Njuguna & 5 Others [2017] eKLR** was purely dealing with the taking of accounts.

23. In the instant case, the dispute relates to matters falling under **Section 78, 89, 90, 91, 96, 97, 103, 104, 105 of the Land Act**. The 2nd defendant has already filed a defence, list of documents and list of witnesses. The applicant has properly invoked the jurisdiction of court regarding its powers both under the **Land Act** as well as the **Land Registration Act**. The preliminary objection is therefore made under misconception and ignorance of the law and is hereby dismissed with costs.

24. Turning to the application dated 27.9.2021, the applicant states new and important evidence which was not within the court's possession at the time the interim prayers were granted is now available but, was withheld from the court so as to mislead it and that the matter was heard in the absence of the 2nd defendant.

25. As indicated above, the memorandum of appearance by the 2nd defendant is dated 23.4.2021 though filed in July 2021. The 2nd defendant has not disputed the service of the notice of motion dated 16.4.2021 and the summons to enter appearance. There is no

explanation why the 2nd defendant did not appear in court on 19.7.2021 yet they had already entered appearance.

26. Secondly the court merely allowed prayer No. 2 of the application dated 16.4.2021. The rest of the prayers are yet to be allowed. The 2nd defendant filed a replying affidavit to the application sworn on 27.9.2021. In my view no prejudice at all has been occasioned since the application is still pending hearing and determination. In the premises, I find the application lacking merits. The same is dismissed with no orders as to costs.

27. Turning to the application dated 16.4.2021, for an applicant to be entitled to a grant of temporary injunction, he must establish a prima facie case with a probability of success, that there will be irreparable damage unless the orders sought are granted and that the balance of convenience tilts in favour of granting the injunction.

28. The applicant's complaints are that the properties he guaranteed a loan facility to the 1st defendant were put up for a public auction without proper notification to him in line with the law.

29. The applicant does not deny he guaranteed the loans, offered his parcels of land as securities for the loan executed a legal charge and a deed of guarantee in favour of the 2nd defendant and lastly that he knew his obligations to 1st and 2nd defendants.

30. To establish a prima facie case, the applicant has to satisfy this court that the 2nd and 3rd respondents are unlawfully and or irregularly exercising the statutory powers of sale contrary to **Section 89, 90, 96, 97, 98 of the Land Act**.

31. The applicant executed the letter of offer dated 24.3.2016 and submitted his original title deed to the 2nd defendant. Subsequently he executed the charge dated 11.4.2016 binding himself to pay the loan and the interests. He also agreed to clause 9 and 10 of the charge over the 2nd defendant's remedies on account of default.

32. Similarly the applicant executed the letter of guarantee dated 15.4.2016. At clause 2 thereof he agreed to the punctual performance by the principal debtor under clauses 3 and 8 to pay on demand any arrears to the 2nd defendant. At clause 31, the applicant agreed on the modalities of communication in the event the 1st defendant defaulted over any repayment of instalments through the address he supplied to the 1st and 2nd defendants.

33. The applicant's claim is that he was never notified at all over any default as agreed and the subsequent intended exercise of the statutory power of sale.

34. The 2nd respondent in its replying affidavit insists the statutory 90 days' notice dated 17.6.2017 was duly issued, followed with a forty days' notice dated 15.9.2017, subsequently the requisite 45 days' redemption notice and notification of sale together with a forced valuation dated 4.3.2021. Further, a public advertisement was made on the **Daily Nation Newspaper** of **29.3.2021** for a public auction scheduled for 13.4.2021.

35. The letter of offer gives the address for the 1st defendant as Popman House Nyakach Lane, P.O. Box 16512 00620 whereas the charge documents indicates the applicant's address as P.O. Box 31786 00600 Nairobi.

36. Similarly the particulars in the letter of guarantee gives the address of the principal debtor as P.O. Box 16512 00620 Nairobi while that of the guarantor (plaintiff) is P.O. Box 31788 00600 Nairobi.

37. The statutory notice dated 17.6.2017 was sent to P.O. Box 16512 - 00600 as per the certificate of posting dated 23.6.2017. This is the same address used in the notification of sale dated 15.9.2016 and the certificate of posting dated 29.9.2017 and the notification of sale dated 20.6.2019.

38. The 45 days' redemption notice was sent to the said address though no certificate of posting has been attached.

39. In my view the 2nd and 3rd respondents have given no explanation why they mis-posted the notices to the wrong address contrary to the information and particulars held by the 2nd defendant.

40. **Sections 90 (3) and 96 (2) and (3) of the Land Act** sets out the law on the issuance and service of statutory notices before a power of sale can be exercised and before the **Auctioneer Rules 1997** sets in.

41. **Rule 15** of the Rules requires the notice in writing to be given so as to redeem the property.

42. **Rule 15** requires a 45 days' notice to be issued and thereafter a 14 days advertisement notice to issue.

43. In **Zadrack Oyaro Ochoki & Another -vs- Consolidated Bank of Kenya Ltd. [2013] eKLR**, the court granted an injunction where there was no proof of service of a notification of sale.

44. In my view the court cannot turn a blind eye on the issue of the issuance and service of the requisite statutory notices bearing in mind the implications of non-delivery of the said statutory notices to the plaintiff. See **Bii -vs- Kenya Commercial Bank Ltd [2001] eKLR, Mrao Ltd -vs- First American Bank of Kenya Ltd [2003] eKLR, Shah -vs- Shah [1996] C.A 91, Emrre Global Investors Ltd -vs- Housing Finance Company Of Kenya Ltd & 2 Others [2014] ECLR.**

45. The defendants were under an obligation to convince this court that the applicant/plaintiff was duly notified of the impending public auction of his properties. They had to explain why they used the wrong address. See *Francis Wisitsa Gyideya –vs- Kenya Commercial Bank Ltd [2014] eKLR.*

46. In *Obel Omuom –vs- Kenya Commercial Bank Ltd [1996] eKLR* the court held where a chargor alleges non-receipt of a statutory notice, the burden shifts to the chargee to demonstrate prima facie that the statutory notice was indeed served upon the chargor.

47. In the instant case, the defendants have brought no material to show the notices were ever received or acknowledged by and or must have reached the chargor. Having entertained a doubt as to the proper service of the statutory notices, I am inclined to find the applicant has established a prima facie case with a probability of success and the balance of convenience tilts in favour of granting the injunction. See *Moses Kibiego Yato –vs- Eco Bank Kenya Ltd [2014] eKLR, Robert Kipyegon Chepkony –vs- Barclays Bank of Kenya Ltd. & Another [2019] eKLR, Mrao Ltd. –vs- First American Bank of Kenya Ltd. [2003] eKLR.* The applicant has rights which appear to have been infringed by the respondents while exercising the statutory power of sale and hence it would be fair and in the interest of justice to preserve the properties pending the hearing and determination of this suit.

48. I proceed to issue the orders sought. The plaintiff to comply with **Order 11 within 45 days** and set the main suit down for hearing within **six months** otherwise the orders shall stand vacated.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 26TH DAY OF JANUARY, 2022

In presence of:

Omondi for 2nd defendant

No appearance for plaintiff

Court Assistant - Kananu

HON. C.K. NZILI

ELC JUDGE