



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 122 OF 2016

PETER CHOMBA GACHINA PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LTD DEFENDANT

RULING

1. The Application herein is a Notice of Motion Application dated 14th April 2016 and filed in Court on the same day. It is brought under section 3A of the Civil Procedure Act, Cap 21 Laws of Kenya, and Order 40 Rules 1 (a) and 4 of the Civil Procedure Rules and all the enabling Provisions of the Law.
2. The Application is supported by an Affidavit sworn by **PETER CHOMBA GACHINA** dated the 14th April 2016. It is also based on the grounds stated on the face of it.
3. The undisputed facts herein, are that the Respondent granted the Applicant a mortgage facility of Kenya Shillings Seventeen million, Eight Hundred and Twenty Thousand (Kshs.17,820,000) secured by a charge over all that property known as L. R. No. **KIKUYU/KIKUYU BLOCK 1/547 KIDFARMACO ESTATE, KIKUYU TOWN; KIAMBU** registered in the Applicant's name. The terms of contract were that, the Applicant was to repay the loan facility within a period of Ten years (10) years with monthly instalments of Kenya Shillings Three Hundred and Seven Thousand, Seven Hundred and Seven (Kshs.307,707).
4. The Applicant defaulted on making of the repayment instalments and as at 15th June 2015, the Applicant was in arrears of Kenya Shillings One Million, Three Hundred and Fifty Eight Thousand, Seven Hundred and thirty Three and Forty Five Cents (Kshs.1,358,733.45). On the 15th June 2015, the Respondent wrote to the Applicant informing him of the arrears, and requiring him to clear the said arrears by the 30th June 2015. He did not. As at 18th July 2015, the Applicant had not cleared the arrears, which by then stood at Kenya Shillings One Million, Six Hundred and Ninety One Thousand, Three Hundred and Eighty Three and Sixty Two Cents (Kshs.1,691,383.62). As a consequent the Respondent served the Applicant with a Statutory Notice, pursuant to section 90 (1) (2) (3) (c) of the Land Act 2012. Despite the Notice, the Applicant remained in default. As at 6th November 2015, the Applicant's account was in arrears in the sum of Kenya Shillings Three Million, One Hundred and Nineteen Thousand and Eighty Eight, Twenty Cents (Kshs.3,119,088.20) the total outstanding debt, was at Kenya Shillings Nineteen Million, Five Hundred and Fifty Three Thousand, Four Hundred and One, Forty Three Cents (Kshs.19,553,401.43). Despite several demand and notices from the Respondent, the Applicant failed to

pay the arrears and the outstanding debt, which as at 15th April 2016, stood at Kenya Shillings Four Million, Nine Hundred and Twenty Thousand, Four Hundred and Sixty Five, Sixty Seven Cents (Kshs.4,920,465.67) and Kenya Shillings Twenty Million, Six Hundred and Twenty Six Thousand, Seven Hundred and Ninety, Sixty Three Cents (Kshs.20,626,790.63) respectively. It continues to accrue and attract interest.

5. Upon the Applicant's failure to repay the loan facility, the Respondent's statutory right of sale crystallised and Respondent pursuant to section 96 (2) (3) of the Land Act 2012 issued the Applicant with a Statutory Notice of sale dated 9th November 2015. At the expiry of the period given therein for the Applicant to remedy the default, and the Applicant having failed to do so, the Respondent instructed Kang'ethe enterprises Auctioneers to facilitate the realisation of the security. The Auctioneers then sent the Applicant a Forty five (45) days notice of sale of the security. Despite that Notice, the Applicant still did not make good the default. The property was then advertised for sale on 15th April 2016. That advertisement provoked the Application herein.

6. The Applicant seeks for the following orders in this Application:

- ***That, the auction on the Applicant's property, KIKUYU/ KIKUYU/BLOCK 1/547 – KIDFARMACO ESTATE, KIKUYU TOWN, KIAMBU scheduled for Friday 15th April 2016, be immediately stopped from proceedings.***
- ***That, pending the hearing and determination of this suit, the Respondent and it's agents, servants or any other person be barred from selling, leasing, renting or transferring or disposing off the property in any other manner.***
- ***That the costs of this Application be in the cause.***

7. The Applicant's depones in the Affidavit in support of the Application that, he has been making repayments of the loan since 2013. That on the 28th day of January 2016, he entered into a sale agreement with **KEFA NDENGA ATICHI** for the sale of land No. **KAJIADO/ELANGATA WUAS/2020 KAJIADO** for a price of Kenya Shillings Thirty Five Million (Kshs.35,000,000), the proceeds of

which he awaits, and which he intends to use to clear the arrears. He states that, he wrote to the Respondent informing them that there would be a delay in repayment of the loan facility for the month of March 2015. Unfortunately on the 25th January 2016, he received Notification of sale of his property by public auction. He therefore argues that, it is unfair to allow the Respondent to proceed with the auction when he has been making regular payments and has made efforts to notify them of a delay in repayment. He terms the steps taken by the Respondent to auction his property as malicious, in bad faith and unlawful. He argues that, he will suffer great loss and injury if the property is sold and therefore it is in the interest of justice and fairness for the Court to grant an order to stop the public auction.

8. In response to the averments in the Supporting Affidavit, and the Application in general, the Respondent filed a Replying Affidavit sworn by **FREDRICK MUNG'ATHIA** dated 10th May 2016. He is a credit support Manager in charge of Mortgages, employed by the Respondent Bank. He denied the allegation by the Applicant that, he has been servicing the loan facility regularly. He deponed that, Applicant did not write a letter to the Respondent in the month of March as stated, but wrote to them on 12th January 2015, seeking to be added time to clear all the arrears. That, the Applicant was seeking for time to clear the outstanding arrears as at 26th January 2015 including the instalment of that month. Unfortunately, he did not clear the arrears. Thus, it is manifestly clear, that the Applicant has no intention whatsoever in settling the arrears or repaying the Loan facility. The Respondent argued that, the continued indebtedness of the Applicant and the deliberate default to repay the loan facility, based on several notices issued and not complied with, it is inescapable conclusion that:

- ***The Respondent statutory right of sale has crystallised.***
- ***The Applicant has failed to establish a prima facie case to warrant the grant of an***

injunction by this Honourable Court.

- ***The Applicant's Application lacks merit and is merely an attempt to unjustly obstruct the Respondent from realizing its statutory right of sale which has crystallized on account of the Applicant's default.***

9. That, at the time of filing the Replying Affidavit, the Applicant has failed to initiate negotiation on settlement of the arrears and the outstanding debt, despite receiving Kshs.7,000,000 as a deposit from the sale of land which he alleges will enable him to repay the loan. As a consequence of the aforesaid, the Respondent argued that, the Application herein lacks merit and should therefore be dismissed with costs to the Respondent.

10. At the conclusion of the factual issues as stated by the parties, and considering the orders sought for in the Application, the grounds and Affidavit in support, and the Replying Affidavit, I find that the issues for determination herein are basically.

- ***Whether the Applicants has satisfied the general legal principles for grant of an interlocutory injunction.***
- ***Whether the costs should be in the cause.***

11. The celebrated case of ***Geila vs Cassman Brown & Co. Ltd (1973) EA*** set down clear legal principles for grant of Injunctive orders. In a nutshell, they are that:

- ***The Applicant must show That he has a prima facie case with a probability of success.***
- ***An interlocutory injunction will not normally issue or be granted unless the Applicant will otherwise suffer irreparable injury which will not adequately be compensated by an award of damages.***
- ***If the Court is in doubt, it will decide the Application on the balance of convenience.***

12. Has the Plaintiff demonstrated, that he has a prima facie case, with probability of success? In the instant case, the Applicant has admitted that, he was advanced the loan facility in the sum of Kenya Shillings Seventeen Million, Eight Hundred and Twenty Thousand (Kshs.17,820,000). He has admitted, he was to repay the loan in a period of 10 years at a monthly instalments of Kenya Shillings Three Hundred and Seven Thousand, Seven Hundred and Seven (Kshs.307,707). He has admitted that, in deed in the months of March 2015 he wrote to the Respondent, expressing his difficult in repaying the monthly instalment on time and informing the Respondent of the delay in repayment. He has not generally denied that todate, he is in arrears in the repayment of the loan.

A prima facie case, is one which on the material placed before the Court, leads to a conclusion that there exists a right which has apparently been infringed, and hence the need for an explanation or rebuttal from the other party. This was the holding in the case of ***Mrao Limited vs First American Bank of Kenya Limited and 2 Others (2003) eKLR***. The counsel for the Applicant submitted that, the Law on injunctive relief just like all the others is not cast in stone, and continuous to grow to greater levels of refinement. It also expands to cover new situations as seen in the case of ***Amir Suleiman vs Amboseli Resort Limited (2004) eKLR***.

14. However, my opinion is that, an issue is refined to develop and add impetus to the law. It's not refined in the negative and/or retrorespectively. If an Applicant wants the Court to assist him or her then, the Applicant must have been upright in the performance of his or her legal and/or contractual duties or responsibility. The Law cannot be invoked to assist an indolent, defaulting or guilty party. **He who goes to Equity must go with clean hands.** Be it as it were, the Applicant having admitted default and/or indebtedness, cannot be deemed to establish the existence of prima facie case.

15. Is Damages an adequate remedy in the given circumstances? An injunction will not normally be granted where damages are an adequate remedy and where the Applicant will not suffer irreparable injury. I find it hard to see how a litigant will suffer irreparable loss when he has breached a contractual obligation and the other party against, whom he seeks an injunctive order against is merely enforcing him,

her, or it's contractual right. In this case, the Respondent is merely exercising it's Statutory Power of sale under section 90 (1) (2) (3) (e) of the Land Act 2012.

16. The Applicants pleads that, he should be treated with sympathy and mercy, as the property to be sold, is a matrimonial home. That, the disposal thereof will deny him and his family shelter, a home and safe environment. As a consequence, it will cause him untold suffering and injury, which cannot be compensated adequately by an award of damages. A submission which was opposed by the Respondent arguing that a statutory right of sale cannot be defeated by the claim of the property being a matrimonial property. I concur with the Respondent's position. In deed, the only circumstance under which a chargor can exercise the Right of Redemption is upon full repayments of the Debt. Even a spouse cannot defeat realisation of a matrimonial property. That is informed by the requirement, that the spouse, in whose name the Property is not registered, gives consent to the chargee, and charging of the security. Thus, subordinating his or her interest to that of the chargee. I find that the plea to preserve the Matrimonial property does not hold.

17. Indeed, when a party is in default upon default, the security can only be realised, and not released. As was held in the case of ***Elizabeth Nthenya Wambua vs Philip Wambua Masila, and 3 Others 2013 eKLR*** a Matrimonial property offered as a security for a loan facility from a Commercial Financial Institution will be treat for all intent as a commercial property.

18. In whose favour does the balance of convenience tilt. The question can only be answered if one considers the disadvantages and advantages that will accrue to the parties if the injunction order sought is, or is not granted. I shall start by examining the Applicant's position. If the injunction order is not granted, obviously the property will be sold. However if the injunction order is granted, then, firstly, the Plaintiff will still remain liable to repay the arrears and the loan, and secondly the loan will continue to attract interest, inclusive of the usual penalty charges for delayed payment to the disadvantage of the Applicant.

19. A consideration of the facts herein reveal that, the progress on the loan as follow:

- On **5th September 2013**: the initial loan granted was Kenya Shillings Seventeen Million, Eight Hundred and Twenty Thousand (Kshs.17,820.00).
- On **15th June 2015**: Arrears, Kenya Shillings One Million Three Hundred and Fifty Eight Thousand, Seven Hundred and Thirty Three, Forty Five Cents (Kshs.1,358,733.45).
- On **8th July 2015**: Arrears Kenya Shillings One Million, Six Hundred and Ninety One Thousand, Three Hundred and Eighty Three, Sixty Two Cents (Kshs.1,691,383.62).
- On **6th November 2015**: Arrears, Kenya Shillings Three Million, One Hundred and Nineteen Thousand and Eighty Eight, Twenty Cent (Kshs.3,119,088.20). Loan outstanding Kenya Shillings Nineteen Million, Five Hundred and Fifty Three Thousand, Four Hundred and One, Forty Three Cents (Kshs.19,553,401.43).
- On **15th April 2016**: Arrears Kenya Shillings Four Million, Nine Hundred and Twenty Thousand, Four Hundred and Sixty Five, Forty Seven Cents (4,920,465.47). Outstanding amount, Kenya Shillings Twenty Million, Six Hundred and Twenty Six Thousand, Seven Hundred and Ninety, Sixty Three Cents (Kshs.20,626,790.63).

20. Thus, injuncting the Respondent is not beneficial to the Applicant. It only denies the Respondent an opportunity to realize the security and it increases interest and penalty charges. Any further delay in realisation of the security may render the value of the property too low, if the loan amount is allowed to exceed, the value of the security. I make a reference to the cited case of ***American Cynamid vs Ethicon Ltd (1975) E A ER 504***.

21. I do indeed appreciate the submissions to the effect that, the power of the Court to grant an interlocutory injunction is discretionary. However, I am equally aware that, it is a Judicial function in its exercise. That discretion of power should be exercised within the precincts of the law procedures, and in the interest of the parties and justice. It should not be used arbitrarily. I refer to the case of **Cosl**

Ronning vs Societe Navale Chargens Delmax Vielfeux (The Francols vielfeux) 1984 KLR.

22. I wish to make general observation in this matter before I pen off. It's in relation to the conduct of the Applicant. The Applicant has pleaded with this Honourable Court to spare and preserve his matrimonial property. I have already observed that, he who goes to Equity must go with clean hands. May I also make a further observation, justice is a double edge sword, that cuts from or on both sides. I note from the Applicants own affidavit that, he sought for indulgence to repay the loan as far as March 2015. That is over a year ago. He started selling the alternative property as early as 28th January 2016. That is six months ago. It's alleged he has received a deposit of Kenya Shillings Seven Million (Kshs.7,000,000) from the sale of other property. A fact he has not denied or rebutted. He is completely silent on how, and where, he has taken that money. Yet, he comes to Court for the Court to shut out the Respondent from exercising it's statutory and contractual right.

23. The Applicant has not even offered a proposal on how he intends to repay the outstanding amount. There is no evidence on how the alleged pending sale of the other property is progressing. In the given circumstances, I find no room in the heart of the Court to extent any mercy to the Applicant. I may feel morally sorry for him and the family, as they may be evicted them from, their affectionate family and matrimonial home. But the rain starting falling when the same was offered for a commercial venture or transaction. It's fully rained in. We cannot hold he clouds anymore. As a Court, I must enforce the contract between the parties.

24. Having said all that, I arrive at the conclusion that, the Notice of **Motion Application dated 14th April 2016** has no merit and I dismiss the same with costs to the Respondent.

25. In that regard, the injunction order issued herein on the 15th April 2016, are hereby vacated. Order 3, issued herein is thus vacated. If anything, and as a matter of fact order 2 orders thereof, has been overtaken by events, as the date of the alleged auction is long passed.

26. Those, then, are the orders of the Court. Orders accordingly.

G. L NZIOKA

DATED, AND DELIVERED IN OPEN COURT ON THIS 21ST DAY OF JULY 2016

Before:

Ouma for Odundo for Defendant/Respondent

Miss Mweu hb for Oporo for Plaintiff/Applicant

Teresia – C/C

G. L NZIOKA