



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**CIVIL SUIT NUMBER 91 OF 2014**

- 1. BRIDGE MASTERS LIMITED.....PLAINTIFF/APPLICANT**
- 2. TRUCKLINE LIMITED.....PLAINTIFF/APPLICANT**
- 3. GULF RENOVATORS AND DECORATIONS LTD.....PLAINTIFF/APPLICANT**
- 4. PETER N. KAMAU MITUNGI .....PLAINTIFF/APPLICANT**

**VERSUS**

**CHASE BANK (K) LTD..... DEFENDANT/RESPONDENT**

**RULING**

1. By a Notice of Motion dated 15<sup>th</sup> December 2014 the Applicant/Plaintiffs approached the court for an order of injunction to restrain the defendants, Chase Bank (K) Limited from advertising for sale by public Auction of their property title **No. Nakuru Municipality/Block 17/244** pending hearing and determination of this application.

2. The application is premised on the grounds that the applicants were not served with any statutory notice of intention to sale the security upon which some financial over draft facility was advanced nor had the Bank sch.edule of repayment of the facility been accepted.

In their supporting affidavit sworn by the 4<sup>th</sup> plaintiff, Peter N. Kamau Mutungi on the 5<sup>th</sup> December 2014, It is deponed that the amount advanced is not disputed save the rates of interest applied to the said facility at 25% and 27% per annum which are contrary to the rates of 17% per annum as stated in the letters of offer, that upon recalculation the Interest Rates Advisory Centre found to be excessive by Kshs.8,465,584/65 in favour of the Third Applicant and Kshs.1.26 Million in favour of Truckline Limited the first plaintiff. Due to the differences in the rates of interest applied by the bank, it is stated that it would be prejudicial to sell the security.

3. The application is opposed by a Replying affidavit sworn by the **Manager recovery unit, one Alex Thande**. He deposes that the conditional officer of the banking facility of Kshs.6,000,000/= was guaranteed by the directors of Gulf Renovators Limited and a corporate guarantee and indemnity form Truckline Limited for a similar amount. He denies that the facility was paid in full as no evidence of such payment was tendered and as a result of default, the bank initiated recovery of the loan through its advocates.

He avers that a demand letter was sent out by its Advocates, Muriu Mungai Advocates on the 1<sup>st</sup> August 2014 and thereafter a statutory notice dated 5<sup>th</sup> September 2014, and a redemption notice of 40

days dated 5<sup>th</sup> December 2014 were duly served upon the plaintiffs/Applicants.

He further states that the applicants continued in default even after the 40 days redemption notice was served and lapsed. He therefore states that the suit and application by the plaintiffs is premature and unmerited and ought to be dismissed with costs.

4. On the matter of interest, it is his disposition that it was in accordance with the charge interest, and further that is not a sufficient ground to restrain a chargee from exercising its statutory power of sale. He urges the court to legitimise and enforce the agreement between the parties which is the essence of contractual relations.

5. The Respondent filed its written submissions on the 12<sup>th</sup> May 2016. It is submitted that the necessary 90 days statutory notice was served upon the chargor by its letter dated 5<sup>th</sup> September 2014 and the **Redemption Notice** pursuant to **Section 96 of the Land Act 2012** served by letter dated 5<sup>th</sup> December 2014, and further it is admitted by the Applicants that there is default in the loan repayment and is in arrears.

**6. The only issue for the court to determine is whether the plaintiffs were served with the statutory notices as provided by law and under the provisions of Land Act, 2012.**

It is submitted that the demand letters dated 1<sup>st</sup> August 2014 sent to the plaintiffs were duly received because the plaintiffs **Advocates S. Gichuki Waigwa & Associates** by their Advocates letter to the Defendant dated 12<sup>th</sup> August 2014 responded to the same and requested to be supplied with account statements. It is stated that the statutory notice dated 5<sup>th</sup> September 2014 was sent to the plaintiff via their known address as stated in the charge document.

Further, on the 5<sup>th</sup> December 2014, the defendant sent out a Redemption notice of 40 days as required by Section 96(2) of the Land Act and that after 3 days, the current application was filed.

It is therefore submitted that the application before the court is an attempt to frustrate the defendant from exercising its statutory power of sale, and it ought to be dismissed, on the grounds that no *prima facie* case with a probability of success has been established and no irreparable loss and damage have been demonstrated should the order of injunction be denied, and further that the balance of convenience tilts in favour of the defendant.

7. I have considered the application, the affidavit evidence and annexures and counsel submissions.

As stated above, there is no dispute that the plaintiffs have defaulted in repayment of the loan. Their complaint is that they were not served with the necessary statutory notices beside the interest rates being disputed. I have looked at the notices issued by the respondent. I am satisfied that the demand letter to the respondents dated 1<sup>st</sup> August 2014 was received as it was replied to by the applicants advocates. The 90 days statutory notice as provided under Section 96(1) Land Act as well as the Redemption Notice of 40 days required under Section 96(2) Land Act and dated 5<sup>th</sup> December 2014. This is so because the demand notice that was replied to was sent through the applicants Box No. 7422-20100 Nakuru. The statutory notice and the Redemption notice too were sent via post office Box Number 7422 – 20100 Nakuru. This is the post office Box Number appearing on the Letter of offer dated 12<sup>th</sup> May 2011 and it appears on the Memorandum of acceptance of the officer, and appears on the charge document in respect of Truckline Limited, and all other correspondence exchanged between the parties Including Interest rates Advisory Centre letters to the applicants on the variance of interest rates. To that extent, it cannot be said that the applicants have established a *prima facie* case with probability of success, the main complaint having been lack of service of the statutory notices.

8. In the **Case Kyangaro -vs- KCB (2004) e KLR**, it was held that an injunction is an equitable remedy, that he who seeks must come with clean hands. It is evidence that the plaintiffs were not sincere

in their averments that no service was effected of the statutory notices. Their hands are tainted with falsehoods and untruths. Further, having admitted that they are in arrears in the loan repayment, they ought to pay the same, at least to the extent of their admission.

To buttress the principles of equity, the court in **Palmy Company Ltd -vs- Consolidated Bank of Kenya (2014) e KLR** held that a plaintiff should not be granted an injunction if he does not have clean hands and no court of equity will aid a man to derive advantage from his own wrongs by asking the court to protect him from consequences of his own default.

9. To be granted an equitable remedy of injunction, the plaintiff must demonstrate that he would suffer irreparable injury that cannot be compensated by damages. From the circumstances of the present case, it is evident that it is the defendant who would suffer a more serious injury than the injury the plaintiffs would suffer. The property offered as security was converted into a commodity whose value is ascertained in monetary terms. Its sale would not cause irreparable damage that cannot be compensated by money as its value could easily be ascertained. No averments have been put forth that Chase Bank Limited cannot meet such a financial obligation when called upon to.

See **Andrew Muriuki Wanjohi -vs- Equity Building Society and 2 Others (2006) e KLR**, the court observed that in the event that a suit property is to be sold off by a chargee, the chargor cannot be heard to complain that his loss was incapable of being compensated in damages. That being the case, should then the chargee be restrained from exercising its power of Sale? **Mrao Limited -vs- First American Bank Ltd & 2 Others (2003) e KLR** stated that:

*“a mortgage will not be restrained from exercising its power of sale because the amount due is in dispute or because the mortgagor has begun a redemption action, or because the mortgagor objects to the manner in which the sale is being arranged. He will be restrained however, if the mortgagor pays the amount claimed into court, that is, the amount which the mortgagee claims to be due to him, unless on the terms of the mortgage the claim is excessive.”*

10. In the present case, the chargor claims that there is a variance in the amount due to the chargee due to the interest rates applied by the Bank as opposed to what was indicated in the charge instrument.

The difference resulting from the variance in interest rates.

The applicant ought then to have paid the loan arrears less the disputed amount due to the interest rates, and leave the court to determine which interest rates ought to be applied.

## 11. **Findings**

The court finds that the necessary statutory notices were duly served upon the plaintiffs and that the sums due and owing as at the date the statutory notices were served the 30<sup>th</sup> July 2014, was Kshs.29,980,017/25.

According to the Interest Rates Advisory Centre, the variance in interest rates as at 1<sup>st</sup> August 2014 were as follows:

1. Gulf Renovators & Decorations Ltd (third Plaintiff)

Kshs.8,465,584/65 in favour of Chase Bank

2. Truckline Ltd - Second plaintiff

Kshs.1,260,000/= in favour of Chase Bank Ltd

3. Bridge Masters Limited - First Plaintiff

Kshs.1,295/02, in favour of Bridge Masters Limited

The total amount going by the above calculations, and being in dispute is Kshs.9,726,879/67.

If this sum is deducted from the total arrears due to the defendant as at 1<sup>st</sup> August 2014, the balance would be Kshs.20,253,137.58. If the sum of Kshs. 1,295/02 in favour of Bridge masters – the first plaintiff is reduced from the above indebtedness there would be a balance of Kshs.20,251,842.56 in favour of the chargee, Chase Bank Limited.

The above sums do not include accrued interest from the 1<sup>st</sup> August 2014, that of necessity ought to be applied while computing the final amount outstanding to the defendant/chargee.

## **12. Determination**

Having come to the above findings, the court proceeds to make the following orders pursuant to the application dated 15<sup>th</sup> December 2014.

- 1. That the Defendant is restrained from selling the plaintiffs property title No. Nakuru Municipality/Block 17/244 by public Auction on condition that the plaintiffs pay to the defendant, within a period of 40 days of this order, the sum of Kshs.20,251,842/56.***
- 2. That the balance of Kshs.9,728,174.67 as at 1<sup>st</sup> August 2014 shall go for full trial for the court to determine the appropriate interest rates that ought to have been applied.***
- 3. That the plaintiffs shall take urgent steps to fix the hearing of the balance of the claim and in any event not later than 90 days from the date hereof.***
- 4. If there is none compliance of the above orders, the plaintiffs application dated 15<sup>th</sup> December 2014 shall stand dismissed and the Defendant shall be at liberty to proceed with recovery process.***
- 5. Costs of this application shall be borne by the plaintiffs/Applicants.***

Dated, signed and delivered in open court this 22<sup>nd</sup> day of September 2016

JANET MULWA

**JUDGE**