



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & TAX DIVISION
CIVIL CASE NO 196 OF 2014

MANASSEH DENGA PLAINTIFF

VERSUS

ECO BANK KENYA LIMITED.....1ST DEFENDANT

SAID AHMED.....2ND DEFENDANT

RULING

INTRODUCTION

1. The Plaintiff's Notice of Motion application dated 10th June 2014 and filed on 11th June 2014 was brought pursuant to the provisions of Article 159 of the Constitution of Kenya, Sections 1A, 1B, 3A, 63 (c) and (e) of the Civil Procedure Act, Order 40 Rule 1 (a) and Order 51 Rule 1 of the Civil Procedure Rules and Section 97 (3)(b) of the Land Act. Prayer Nos (1) and (2) of the said application were spent. It sought the following remaining orders:-

1. **Spent.**
2. **Spent.**
3. **THAT the Defendant and its agents including Valley Auctioneers, be restrained from effecting a registration of House no One(1) on L.R. No 3734/815 (Original number 3734/808/7) from the Plaintiff's name to the 2nd Defendant and/or interfering with the Plaintiff's occupation and possession of the same pending the hearing and determination of this suit.**
4. **THAT the costs of this Application be provided for.**

THE PLAINTIFF'S CASE

2. The Plaintiff swore Supporting and Further Affidavits on 10th June 2014 and 3rd August 2014 respectively. His written submissions were dated 11th August 2014 and filed on 14th August 2014 while his Reply to the Defendants' written submissions were dated 24th September 2014 and filed on 25th September 2014.
3. The Plaintiff was the registered owner of L.R. No 3734/815 (Original number 3734/808/7) (hereinafter referred to as "the subject property") having purchased the same for a sum of Kshs

- 47,000,000/= in the year 2011. He was advanced a sum of Kshs 40,745,317/= by the 1st Defendant which was secured by a Charge and Further Charge over the said subject matter for a period of twenty five (25) years.
4. It was his contention that he had made payments amounting to the sum of Kshs 24,500,000/=, which was more than half of the principal sum, despite having more than twenty two (22) years left for him to repay the said loan and that the 1st Defendant had debited his accounts with illegal entries, penalties and interest that were unjustified.
 5. He denied ever having been issued with the mandatory ninety (90) days Statutory Notice under Section 90 of the Land Act Cap 280 (Laws of Kenya) which thus interfered with his proprietary and redemption rights over the said subject property. He was categorical that his postal address in the Lease, Charge and Further Charge had been given as Post Office Box Number 9893-00200 Nairobi to which all statutory notices were to be sent to but that the 1st Defendant had purportedly sent the statutory notices to Post Office Box Number 34154- 00100 Nairobi and other unknown addresses which were not his.
 6. It was his contention that although the property was currently valued at Kshs 75,000,000/=, the Defendants had conspired to dispose of the same at a gross undervalue in sum of Kshs 46,000,000/=, which was lower than the amount he paid when he had purchased the said property in 2011.
 7. It was his averment that it was in the best interests of justice that the prayers he had sought in his application be granted as his family would be rendered homeless.

THE 1ST DEFENDANT'S CASE

8. In opposition to the said application, on 17th June 2014, 1st September 2014 and 11th September 2014, Jack Kimathi, the 1st Defendant's Legal Officer in the Early Warning Recoveries and Remedial Department swore Replying, Supplementary and Further Supplementary Affidavits that were filed on 11th June 2014, 2nd September 2014 and 11th September 2014 respectively on behalf of the 1st Defendant herein. On 16th July 2014, Samuel Mutahi Gathogo, the proprietor of M/S Valley Auctioneers also swore a Replying Affidavit of even. Its written submissions were dated 15th September 2014 and filed on 16th September 2014.
9. The 1st Defendant contended that the court had no jurisdiction to grant the orders that had been sought by the Plaintiff within the ambit of the provisions of law he had invoked in the present application for the reason that the subject property was not in dispute as between the parties herein, that the main suit did not seek to restrain the Defendants from committing a breach of contract or injury of any other kind, that the Plaintiff had sought orders against a party who was not party to the suit and that injunctive orders could be sought in a vacuum.
10. The 1st Defendant confirmed that it had created the Charge and Further Charge as had been pointed by the Plaintiff and added that it restructured the loan which was extended for a further five (5) years. However, the Plaintiff defaulted in payment of the monies as a result of which it issued the mandatory statutory notices in accordance with the law, in exercise of its Statutory Power of Sale.
11. It pointed out that all the three (3) addresses to which the notices were sent were "disclosed" to it by the Plaintiff and that the forty (45) days Notification of Sale by the auctioneers was sent both by registered mail and personally served upon the Plaintiff and that since the Plaintiff communicated to it thereafter, it was proof that the Plaintiff had indeed received the said notices.
12. It was its averment that the Plaintiff's right of redemption was extinguished when the 2nd Defendant was declared the highest bidder of the subject property in the sum of Kshs 46,000,000/= who subsequently signed the Memorandum of Sale dated 14th May 2014 and paid the entire purchase price. The auctioneer was emphatic that he issued the mandatory statutory notices and carried out the auction of the subject property as was provided for by the law.
13. The 1st Defendant further contended that the Plaintiff validated the auction that took place when he withdrew the balance of the proceeds from his bank account as was evidenced in the Plaintiff's Bank statement running from 3rd- 31st July 2014 and thus granting an injunction in this matter would amount to unjustly enriching the Plaintiff herein.

LEGAL ANALYSIS

14. It was not in contention that the Plaintiff was advanced financial accommodation which was secured by a Legal Charge and Further Charge over the subject property as aforesaid. What was in dispute was whether the Plaintiff was in arrears as had been contended by the 1st Defendant and if so, whether the 1st Defendant fully complied with the provisions of the law before it exercised its statutory power of sale. It did therefore appear that the following were really at the core of the issues to be determined by the court:-

a. **Was there a valid sale of the subject property?**

b. **If not, was the Plaintiff entitled to the orders sought?**

15. At the heart of the challenge by the Plaintiff was the issue of the postage of the statutory notices which he contended, were never sent to him as was required under Section 96 of the Land Act and that if the same were indeed sent to him, he did not receive the same as they were never sent to his postal address.

16. He was categorical that his postal was Post Office Box Number 9893 00100- Nairobi as had been indicated in the Charge and Further Charge. He pointed out that the 1st Defendant, M/S Majanja & Luseno Advocates and M/S Valley Auctioneers all used different addresses to send the statutory notices to him. He expressed doubt whether the 1st Defendant sent him the Statutory Notice as no Certificate of Postage had been annexed thereto.

17. He referred the court to the case of **Moses Kibiego Yator vs Eco Bank Kenya Limited [2014] eKLR** where Munyao J stated at follows:-

“... but I am unable to see the certificate of postage of the Postal Code via which the letter was sent. It could be very well that it was sent to the wrong postal address and benefit of such doubt must be given to the Plaintiff. In instances where a chargor alleges that he did not receive the statutory notices, the burden shifts to the chargee, to demonstrate prima facie, that the statutory notice was served...”

18. He also referred the court to several other cases where the sale of property was declared a nullity for failing to comply with the requirement of serving the mandatory statutory notices as was mandated by the law.

19. On its part, the 1st Defendant argued that it used Post Office Box Number 31454 00100 Nairobi that was in the Letter of Offer restructuring the Plaintiff's facility and consequently, the Statutory Notice that was sent by M/S Majanja & Luseno Advocates was the correct one. The 2nd Defendant's averment was that he was an innocent and *bona fide* purchaser of the subject property and he could not therefore be dragged into the dispute between the Plaintiff and the 1st Defendant.

20. M/S Majanja & Luseno Advocates and M/S Valley Auctioneers sent the Statutory Notice and Notification of Sale dated 11th November 2012 and 15th March 2013 respectively marked as Exhibits “JK 6(a)” and “JK 6 (c) to the Plaintiff at Post Office Box Number 34154 00100 Nairobi. The 1st Defendant further argued that the said Auctioneers delivered the said Notification of Sale at the Plaintiff's home.

21. The 1st Defendant argued that that was the postal address that was given in the Letter of Offer dated 7th February 2012 annexed to its Replying Affidavit Exhibit marked “JK 4” and it was therefore right when it sent the requisite notices to the said postal address. However, the 1st Defendant would face several challenges in making such an assertion.

22. As was correctly submitted by the Plaintiff, the 1st Defendant was required to send any notices to the postal address that was given in the Charge Instrument and in the manner that was provided therein. The same expressly provided as follows:-

“THIS CHARGE is made on the 12th day of May 2011

BETWEEN:-

1. **MANASSEH DENG** of Post Office Box Number **9893 00100** (emphasis court) **Nairobi**

(hereinafter called “the Chargor” which express includes its personal representative, heirs and estates);

AND...

(30.3) Any notice required or authorised by law or by this Charge shall be deemed to have been properly served by the Bank on the Chargor if left at the Charged property or at the principal place of business of the Chargor or sent by registered post to the Chargor at the Chargor’s last known postal or sent by telex or facsimile to the Chargor’s last known relevant address....Any notice or demand sent by telex or facsimile shall be deemed to have been served at the time of transmission.”

23. Firstly, it is clear from the Charge, Lease and the Further Charge all dated 12th May 2011 that the Plaintiff’s postal address was given as Post Office Box Number 9893 00200 Nairobi. The explanation that Post Office Box Number 34154 00100 belonged to the Plaintiff because it was contained in the Letters of Offer would not hold any water for the reason that the letters dated 9th March 2010 and 7th February 2012 marked as Exhibits “JK 1” and “JK 2” emanated from the 1st Defendant.
24. There was no evidence that was presented before the court to show that the Plaintiff had ever written to the 1st Defendant claiming that that was his Postal Address. It was also not clear to the court where the 1st Defendant obtained Post Office Number 53457 00200 Nairobi to which it addressed its letter dated 15th April 2013 Exhibit marked “JK 6b” giving the Plaintiff fourteen (14) days to settle the outstanding sum of Kshs 43,879,486.93.
25. Additionally, the Notification of Sale sent by M/S Valley Auctioneers dated 20th March 2014 annexed to the 1st Defendant’s Replying Affidavit and marked Exhibit ‘JK 8 (b)’ was purportedly addressed to the Plaintiff at Post Office Box Number 49584 00100 Nairobi, the Postal Address that belonged to the 1st Defendant as shown in the 1st Defendant’s Letter to the Plaintiff dated 9th March 2010 Exhibit marked “JK 1” and also in the Lease, Charge and Further Lease.
26. Evidently, both parties were bound by the terms of the Charge, Further Charge and Lease that clearly stipulated to which postal address the notices were required to be sent. All notices had to be sent to that address. However, the Statutory notices were not sent to the Postal Address that had been contracted between the Plaintiff and the 1st Defendant . Such notice sent to any other address therefore have no legal basis. It therefore followed that the notices M/S Majanja & Luseno Advocates, the 1st Defendant and M/S Valley Auctioneers purportedly sent to the Plaintiff were therefore null and void *ab initio*.
27. On this ground, the court therefore agreed with the Plaintiff’s submissions and case law that it had relied upon that the 1st Defendant could not exercise its statutory power of sale based on invalid, irregular and unlawful notices- See **Moses Kibiego Yator vs Eco Bank Kenya Limited**(Supra) amongst several other cases. The mandatory Statutory Notices purportedly issued to the Plaintiff were therefore for all purposes and intent invalid and unlawful and any purported sale of the subject property was a nullity *ab initio* and could not be allowed to stand.
28. Going further, the court noted that the 1st Defendant’s three (3) months’ Statutory Notice was 13th December 2012 by which time the current Land Law Act had been passed. The 1st Defendant was therefore required to comply with the provisions of the law before it exercised its statutory power of sale.
29. Section 90 of the said Land Act provides as follows:-
 1. **If a chargor is in default of any obligation, fails to pay interest or any other periodic 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 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
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- 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;**

30. In its Statutory Notice dated 11th December 2012, M/S Majanja & Luseno Advocates wrote as follows:-

“ ...you have refused, neglected and/or otherwise failed to make the scheduled repayments as and when they fell due such that the outstanding amounts of your Account Number... as at 30th November 2012 stood at Kshs 40,959,962.04 which amount continues to accrue interest at the rate of 18.75% per annum ...

... our client will exercise its Statutory Power of Sale over the mortgaged property, if after THREE (3) MONTHS from date of service of this Notice upon yourself, the aggregate sum of Kshs 40,959,962.04 together with interest as aforesaid is NOT paid to our client in full...”

31. Reading the contents of the said Statutory Notice against the provisions of Section 90 of the Land Act, it is evident that the said notice did not indicate what the outstanding amount of arrears was but actually called for the whole outstanding sum of Kshs 40,959,962.04.

32. If one was to assume that the mandatory Statutory Notices were valid and lawful, the Plaintiff did not appear not to have been given an opportunity to rectify the default before the Defendant exercised its statutory power of sale, a right he was entitled to. This was not an issue that was picked up by the Plaintiff but nonetheless the court deemed it necessary to raise the same so as to uphold the law.

33. Turning to Section 96 of the Land Act, the same stipulates as follows:-

“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 have elapsed from the date of the service of that notice to sell.”

34. Evidently, the 1st Defendant did not issue the Plaintiff with a Notice under the provisions of Section 96 (2) of the Land Act which once again made the purported sale of the subject property null and void *ab initio*. The 1st Defendant was not expected to proceed to complete any contract for the sale of the charged land until forty (40) days had elapsed from the date of the notice to sell in the prescribed form which was not the case herein.

35. A reading of Section 96 (1) of the Land Act shows that these forty (40) days would be in addition to the three(3) months’ notice and different from the Notification of Sale to be issued by an auctioneer. No evidence was provided by the 1st Defendant to demonstrate that it had complied with the provisions of Section 96 (2) of the Land Act.

36. The court therefore finds that the sale of the subject property to the 2nd Defendant to have been unlawful and had no legal basis. The failure by the Defendant to comply with the provisions of Section 90 (2)(b) and Section 96 (2) of the Land Act were serious issues that automatically invalidated the sale to the 2nd Defendant at the public auction on 14th August 2014. If the sum that was demanded by the Defendant was the whole outstanding sum of the loan that it had advanced to the Plaintiff, this would definitely have denied the Plaintiff an opportunity to first rectify the default.

37. Notably, in its Statutory Notice of Sale, M/S Majanja & Luseno Advocates stated that as at 30th November 2012, the outstanding amounts due to the 1st Defendant from the Plaintiff stood at Kshs 40,959,962.04. In its Statement of 17th June 2014 on page 101 of the 1st Defendant’s Replying

Affidavit, it stated that as at 30th November 2012, the outstanding balance was Kshs 41,319,709.56.

38. Appreciably, the Plaintiff argued that the 1st Defendant had debited him illegally, he did not demonstrate how this came about. If this was the only ground under which the Plaintiff had been relying upon, it would have been difficult to get injunctive orders.
39. Indeed, in the case of **Civil Application No 108 of 2005 Francis J.K Ichatha v Housing Finance Company of Kenya Ltd**, the Court of Appeal had held that a dispute in computation of interest was a mathematical error that did not warrant restraining a chargee from exercising its statutory power of sale.
40. It would be too risky for the court to rely on the affidavit evidence that had been submitted before the court to make a finding on what really the Plaintiff owed the 1st Defendant as the figures were not clear. There was need for the 1st Defendant to prove its case at trial and also justify the sale of the subject property in the sum of Kshs 46,000,000/= considering the amount the Plaintiff purchased it in 2011 and the value of the said property at the time of sale at the auction.
41. The 1st Defendant did not provide sufficient proof that the Plaintiff withdrew monies from his account after the sale of the subject property. It only annexed copies of a Bank Statement but it did not guide the court on the same. In any event, this was a matter for trial and could not be dealt with on the basis of affidavit evidence.
42. Be that as it may, any transfer to the 2nd Defendant would cause the Plaintiff great injustice as he would have been denied his right of redemption which he was entitled to until the fall of the hammer at the public auction. It was not enough for the 2nd Defendant to have contended that he was an innocent and *bonafide* purchaser of the subject property for the reason that the whole transaction was tainted with illegality *ab initio*.
43. Although the court should and ought not to re-write the contracts that have been entered into by parties, it must always have at the back of its mind that the sale of a person's property is not a matter that should be taken casually because it deprives a party of right to own property, a right that is enshrined in Article 40 of the Constitution of Kenya, 2010. The importance of not depriving a person of his or her property was an issue that was considered in the case of **Alice Awino Akello vs Trust Bank Limited LLR No 625 (CCK)**.
44. In this regard, the court associates itself with the holding in the case of **Kwanza Estates Limited vs Dubai Bank Kenya Limited (2013) eKLR** where the court held as follows:-

“I am satisfied that a party deprived of his property through an illegal process would suffer irreparable loss and or damage...”

45. Indeed in Halsbury's Laws of England Vol 32. (4th Edition) Paragraph 725 it is stated as follows:-

“The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute or because the mortgagee has began 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 which the mortgagee claims to be due to him, unless, on the terms of the mortgage, the claim is excessive.”

46. The court also wishes to associate itself with the holding in the case of **Joseph Siro Mosioma v Housing Finance Company of Kenya Ltd & 3 Others (2008) eKLR** where Warsame J had held that damages were not an automatic remedy when deciding whether or not to grant an injunction and that the same could not be a substitute for loss occasioned by a clear breach of the law. This was the same position that was taken in the case of **Sharok Kher Mohamed Ali v Southern Credit Banking Corporation Limited (2008) eKLR** which was cited, with approval, in **Kwanza Estates Ltd v Dubai Bank Kenya Ltd** (Supra).
47. Indeed, in **Muri Coffee Estate Limited vs Kenya Commercial Bank [2009] eKLR**, Khaminwa J (as she then was) quoting from the decision of Ringera J (as he then was) in the case of **Lucy Njoki Waithaka vs ICDC** observed as follows:-

“It is not an invariable rule that where damages may be an appropriate remedy an interlocutory

injunction should never be granted. If that were the rule, the law would unduly lean in favour of those rich enough to pay damages for all manner of trespassers. It would be unjust and be seen to be unjust.”

48. The fact that the 2nd Defendant purchased the subject property at the auction would not validate the purported sale of the same. Title had not passed to him as no transfer had been effected in accordance with Section 37 (2) of the Land Registration Act Cap 300 (laws of Kenya) which stipulates as follows:-

“A transfer shall be completed by-

a. filing the Instrument; and

b. registration of the transferee as proprietor of the land, lease or charge. (emphasis court)”

aw. Accordingly, having considered the pleadings, the affidavit evidence and oral and written submissions and the case law in support of the parties’ case, the court found that the Plaintiff had made out a *prima facie* case with a probability of success. In view of the illegality of the process as aforesaid, the Plaintiff would suffer loss that would not be compensated by way of damages if the interlocutory injunction was not granted pending the hearing and determination of the suit herein. The balance therefore tilts in the Plaintiff’s favour as the 1st Defendant’s right to exercise its Statutory Power of Sale had not crystallized. It was irrelevant and immaterial that the Plaintiff emailed the 1st Defendant after the purported issuance of Statutory notices.

ax. The court wishes to point out that it did not it necessary to analyse the cases that had been relied upon by the 1st and 2nd Defendants to support their cases why the Plaintiff was disentitled to the orders sought herein for the reason that it had already found, in the first instance, that the mandatory Statutory Notice were invalid, unlawful and having been irregular, the sale was a nullity *ab initio* and that the Plaintiff had established a *prima facie* case with a probability of success.

ay. The court was thus satisfied that the Plaintiff had met the threshold set out in the case of **Giella v Cassman Brown (1973) EA 360** in which it was held as follows:-

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

DISPOSITION

52. Accordingly, the court found that the Plaintiff’s Notice of Motion application dated 10th June 2014 and filed on 11th June 2014 was merited and the same is hereby granted in terms of Prayer No (3) therein. Costs shall be in the cause.

53. It is so ordered.

DATED and DELIVERED at NAIROBI this 30th day of January 2015

J. KAMAU

JUDGE