



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
(COMMERCIAL & ADMIRALTY DIVISION)
CIVIL CASE NO 386 OF 2014

GITIMU JAMES GATHU.....1ST PLAINTIFF

CATHERINE WANGECHI GITIMU.....2ND PLAINTIFF

EXPRESS PIONEER SUPERMARKETS LIMITED.....3RD PLAINTIFF

VERSUS

BUSINESS PARTNERS INTERNATIONAL KENYA LIMITED.....DEFENDANT

RULING

INTRODUCTION

1. The Plaintiff's Notice of Motion application dated 4th September 2014 and filed on 5th September 2014 was brought pursuant to the provisions of Section 3A of the Civil Procedure Act Cap 21 of the Laws of Kenya, Order 40 Rules 1, 2, 3, 4 and 5 of the Civil Procedure Rules, Section 96(2), (3) (c) and (f), 97 (2) of the Lands Act No 6 of the Land Act, the Inherent jurisdiction of this Honourable Court and all other enabling provisions of the law. Prayer Nos (1) and (2) were spent. It sought the following remaining orders:-

1. Spent.

2. Spent.

3. **THAT the Honourable Court be pleased to issue an order of temporary injunction to restrain the Defendant/Respondent, by itself or through Garam Investments (auctioneers), or any of its agents, employees, nominees and/or servants from selling by public auction or selling in any other manner the Applicants' parcel of land known as Ruiru/Kiu Block3/1185 on 9th September 2014 or on any other day until this suit is heard and determined.**

4. **THAT IN THE ALTERNATIVE AND WITHOUT PREJUDICE to the foregoing, the Honourable Court be pleased to issue and order to restrain the Defendant/Respondent by itself or through Garam Investments (auctioneers), or any of its agents, employees, nominees and/or servants from selling by public**

auction or selling in any other manner the Applicants' parcel of land known as Ruiru/Kiu Block3/1185 on 9th September 2014 for 90 days from the date of such to enable the Applicants finalise negotiations with Credit Bank Limited to buy off the loan by the Respondent.

5. THAT the Defendant/Respondent be restrained by itself, its agents, employees, nominees and/or servants from interfering with the Plaintiff's (sic) quiet occupation and/or enjoyment of the Parcel of Land known as Ruiru/Kiu Block3/1185 on 9th September 2014 for 90 days or any other day until this suit is heard and determined.

6. THAT an order be issued compelling the defendant to render statement of accounts of monies received and the balance outstanding.

7. THAT the Defendant/Respondent be ordered to pay the costs of this application.

THE PLAINTIFFS' CASE

2. The Plaintiffs' application was premised on several grounds which were restated in the Supporting Affidavit of the 2nd Plaintiff on her own behalf and that of the 1st and 3rd Plaintiffs. The same was sworn on 4th September 2014. On 16th September 2014, she also swore a Supplementary Affidavit that was filed on the same date. The Plaintiffs' written submissions were dated 30th October 2014 and filed on 31st October 2014.

3. The 1st and 2nd Plaintiffs were the registered owners of all that parcel of land known as Ruiru/Kiu Block3/1185 (hereinafter referred to as "the subject property") at Kahawa Sukari Estate. On 27th July 2012, they executed Deeds of Guarantee in favour of the Defendant for financial accommodation in the sum of Kshs 12,000,000/= that was advanced to the 3rd Plaintiff and secured by a charge over the said subject property.

4. Due to financial difficulties, the 3rd Plaintiff fell into arrears and its last payment of the loan made in June 2014. Despite its spirited efforts to clear the said loan, the Defendant instructed M/S Garam Investments to sell the said subject property by public auction on 9th September 2014, which action would render the 1st and 2nd Plaintiffs, children and family destitute.

5. The Plaintiffs disputed the amount of Kshs 11,861,961.73 that had been shown in the Notification of Sale as they said they had repaid the loan in excess of Kshs 5,000,000/=. It was their averment that they had been negotiating with Credit Bank Limited to buy off the loan by the Defendant at better repayment terms but the actual buy off had not succeeded due to the discrepancies in the exact outstanding amounts.

6. They contended that the Defendant was bound by the relevant laws in conducting auctions and in the circumstances they prayed that their application be allowed failing which they would suffer irreparable damages.

THE DEFENDANT'S CASE

7. In opposition to the said application, on 15th September 2014, the Defendant filed a Replying Affidavit that had been sworn by Sally Gitonga, its Country Manager for Kenya on even date. She swore a Further Affidavit on 24th September 2014. The same was filed on the same date.

8. The Defendant's case was that the loan it advanced to the 3rd Defendant was to be repaid in monthly instalments in the sum of Kshs 332,249.94. The 3rd Defendant was also to pay the Defendant a Royalty of 1.1 % on the higher of the actual or projected monthly turnover. A sum of Kshs 600,000/= towards the

payment of Technical Assistance fees for the services of a Retail Specialist Mentor was not to accrue any interest. This sum was to be repaid in monthly instalments of Kshs 12,500/=.

9. When the 3rd Plaintiff defaulted in paying the loan, the Defendant's advocates issued a Statutory Notice. However, both parties entered into a payment arrangement the Plaintiffs to settle arrears of Kshs 1,164,253.38 that had accrued. The last payment in the sum of Kshs 50,000/= was made on 30th June 2014. Following further default by the 3rd Defendant, Garam Investments who had been instructed by the Defendant, issued a Notification of Sale. The Defendant contended that the Redemption Notice had been duly issued.

10. The Defendant was emphatic that the Plaintiffs were furnished with the monthly statements and that a dispute on interest or the amount owed was not a sufficient ground to injunct a chargee from exercising its Statutory Power of Sale and that in any event, the Plaintiffs had not denied the debt. It therefore prayed that the Plaintiffs' present application be dismissed with costs to it.

LEGAL ANALYSIS

11. The Plaintiffs submitted that a chargee must follow all the steps in the Land Act before it could exercise its Statutory Power of Sale. They referred the court to the provisions of Section 86 (1) of the Land Act which provides as follows:-

“A chargor or any person referred to in subsection (2) may, at any time, other than a time when the chargee is in possession of the charged land, in writing, request the chargee to transfer the charge to a person named in the request.”

12. They stated that the Defendant's insistence on disposing of the subject property after having received such a request to transfer the Charge to Credit Bank Limited offended the provision of Section 86 (3) of the Land Act which stipulated as follows:-

“The chargee shall, on receiving a written request made under subsection (1) and on payment by the person or persons making the request of all money that would have been payable if discharge of the charge had been made under section 102, and the performance of all other obligations secured by the charge, transfer the charge to the person named in the written request.”

13. Notably, the Defendant did not submit on this issue. The court concurred with the Plaintiffs' submissions in this regard because a chargor could transfer a charge to another person. To ascertain whether or not the Plaintiffs could enjoy the benefit of Section 86 (1) and (3) of the Land Act, the court perused Exhibit marked “CWG 1” annexed to the Supporting Affidavit of Catherine Wangechi Gitimu which the Plaintiffs contended were items Credit Bank Limited had requested so as to buy off the loan facility from the Defendant herein.

14. However, save for the said document, there was no formal communication between Credit Bank Limited and the Plaintiffs demonstrating that indeed the said financial institution had indicated that it would take over the loan facility from the Defendant. There was no covering letter showing what this document was. It did appear to be a list that any person could collect from the said financial facility for whatever purpose that it was intended for.

15. The Plaintiffs' failure to annex any documentation in writing to the Defendant under the provisions of Section 86 (1) of the Land Act automatically led this court to come to the conclusion that they had not written to the Defendant as they had purported to argue.

16. The onus lay on them to furnish the court with such intimation in writing. An intention based on oral communication or anticipation to have Credit Bank Limited take over the loan from the Defendant, if at all were not adequate and/or sufficient to discharge the burden that lay the Plaintiffs. Indeed, annexing an untitled document from the said financial institution fell short of the standard that would have been required for a chargor to rely on the provisions of Section 86 of the Land Act.

17. In the absence of evidence of exchange of correspondence between the Plaintiffs and Credit Bank Limited in which the latter would have unequivocally accepted to take over the said loan from the Defendant, the court came to the conclusion that the Plaintiffs could not rely on the provisions of Section 86 of the Land Act and they would therefore not have been entitled the granting of Prayer No (4) of their present application. Their arguments in this regard therefore fell by the wayside.

18. In respect of the Notification of Sale, the Plaintiffs contended that M/S Garam Investments did not give them notice of the impending sale that was scheduled on 9th September 2014, which they said, was a violation of Rule 11 of the Auctioneers Rules, 1997. However, they did not furnish the court with the court warrant or letter of instruction to show that the same was not in accordance with the provisions of Rule 11 of the Auctioneers Rules as they had argued.

19. Indeed, Sale Form 1 in the Second Schedule of the Auctioneers Rules that was alluded to in Rule 11 of the Auctioneers Rules was a matter between an instructing client and the auctioneers who were to be instructed. It had nothing to do with a chargor. There was no legal requirement that a chargee had to furnish a chargor with Sale Form 1. The mandatory statutory notices that had to be issued before a chargee exercised its statutory power of sale was well set out in the Lands Act and the Auctioneers Rules.

20. Notably, the Plaintiffs did not ventilate what their argument was or how this violation of Sale Form 1, if at all, prejudiced their interests when the subject property was advertised for sale. The court was therefore unable to comprehend how the deficiency of the Sale Form 1 came to the Plaintiffs' knowledge, it at all. They, however, seemed to connected their argument about the letter of instruction to the Notification of Sale to which were quite distinct and served different purposes.

21. A perusal of the Notification of Sale dated 7th July 2014 showed that it had indicated the names of the parties, the amount that was outstanding, the description of the property that was to be disposed, the details of the instructing client, the place, time and venue of sale, the statute under which the sale was being conducted and the consequence for failure to redeem the subject property.

22. These were the same details that were required to be included in Sale Form 4 in the Second Schedule of the Advocates Rules. The court was thus satisfied that the Notification of Sale that was issued by M/S Garam Investments was in accordance with the provisions of the Auctioneers Rules and that the advertisement that was carried out in the Daily Nation dated 25th August 2014 Exhibit marked "CWG 13" was proper. The court therefore rejected the Plaintiffs' submissions that the failure by the said auctioneers to set down the contents of an instruction letter would justify their case that injunctive orders as they had sought in their application ought to be granted by the court.

23. It was not lost to the court that the mandatory statutory notices were sent to the Plaintiffs to their postal address Post Office Box Number 1017 00618 Nairobi by way of registered mail. The Defendant annexed copies of the Certificates of Postage that were annexed to its Replying Affidavit Exhibit marked "SG 6(a). The dates on the said certificates were illegible. However, as the fact of service of the said mandatory notices upon the Plaintiffs was not disputed fact, the court did not find it necessary to consider the said submissions.

24. What was of concern to the court was whether or not the Statutory Notice the Defendant said it had issued to the Plaintiffs had strictly complied with the provisions of the Land Act. The Defendant relied on the case of **Mrao Limited vs First American Bank Limited & 2 Others [2003] KLR 125** amongst several other cases in support of its submissions that the Plaintiffs had not established a *prima facie* case with probability of success, that they would not suffer irreparable damage that would not be compensated by an award of damages if the interlocutory injunction was not granted or that balance of convenience tilted in their favour.

25. To establish whether or not the Defendant's notices had complied with the provisions of the law, the court looked at the demand letters of 6th and 25th February 2014 respectively.

26. In the letter of 6th February 2014 by M/S Sichangi & Co Advocates that was annexed to the Defendant's Replying Affidavit Exhibit marked "SG 5" it was stated thus:-

"...It is therefore our instruction to demand from you, as we hereby do, payment in the sum of KShs. 1,066,580.53 within seven (7) days (emphasis court) of receipt hereof..."

27. Section 90 of the Land Act Cap 280 (laws of Kenya) 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. the nature and extent of the default by the chargor;

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) **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;**

28. Evidently, the Defendant did in its letter of 6th February 2014 inform the Plaintiffs that they were required to pay arrears in the sum of Kshs 1,066,530.53. However, it did not indicate that the Plaintiff was required to rectify the default in three (3) months. Instead, it demanded that the Plaintiffs make the payment of the said sum of Kshs 1.066,530.53 within seven (7) days from date of service of the said demand contrary to the provisions of Section 90 of the Land Act.

29. The consequences if the Plaintiff defaulted in paying the arrears or the Plaintiff's right in respect of certain remedies that it could apply to the court for relief against those remedies or that the Plaintiff in accordance with Section 90 (2) (b), (d) and (e) of the Land Act were also not indicated in the said demand letter. For all purposes and intent, this Statutory Notice. Thought sent to the correct address for the Plaintiffs was invalid and null and void *ab initio*.

30. 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 was invalid for all purposes and intent and could not be allowed to stand as the required notice under the said section.

31. The Defendant's Statutory Notice dated 25th February 2014 that was annexed to the Defendant's Replying Affidavit and marked as Exhibit "SG 6b" gave the Plaintiffs' three (3) months' notice to pay a sum of Kshs 16,174,882.03. The same was issued pursuant to the provisions of Section 96 of the Land Act. It stated as follows:-

"TAKE NOTICE that in the event that the Borrower will have failed to pay the Lender, the outstanding amount of Kshs 16,174,882.03 being the full outstanding balance and future royalties as at 21st February 2014 owing to it, then the Lender shall after the expiry of three (3) months from the date of service of this notice, in exercise of its Chargor's (sic) power of sale, sell the property known as L.R. RUIRI KIU BLOCK 3/1185 which you charged to its favour by way of a duly registered charge."

32. Appreciably, in this demand of 25th February 2014, the three (3) months' notice was for the Plaintiffs to pay to the Defendant the whole outstanding sum of Kshs 16,174,882.03. The Charge dated 27th July 2012 Exhibit marked "CWG 3" in the Supporting Affidavit showed that the loan facility was for an

amount of Kshs 8,000,000/=. In the Statutory Notice issued on 27th February 2014, a sum of Kshs 16,174,882.03 was shown as having been the full outstanding balance and future royalties as at 21st February 2014.

33. In light of the provisions of Section 90 (2) of the Land Act, neither of the two (2) demand letters by the Defendant to the Plaintiff complied with the provisions of the Land Act. At no time should the Defendant have issued a demand letter asking the Plaintiff to rectify the default within seven (7) days from the date of the letter.

34. As it was not clear which letter the Defendant intended to serve as the Statutory Notice under Section 90 (2) of the Land Act, the court found that neither the demand letter of 7th February 2014 nor that of 25th February 2014 were valid.

35. Going further, the letter of 25th February 2014 was said to have been issued under the provisions of Section 96 of the Land Act was defective. Section 96 (1) of the Land Act provides 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.”

36. Evidently, after the expiry of whichever notice the Defendant intended to be that under Section 90 (2) (b) of the Land Act, the 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 in accordance with the provisions of Section 96 (2) of the Land Act. The Defendant did not exhibit any such notice or in its remotest form or demonstrate that they had complied with the provisions of Section 96 (2) of the Land Act.

37. 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.

38. Failure by the Defendant to have complied with the provisions of Section 90 (2) (b) and Section 96 (2) of the Land Act were serious issues that convinced this court that the Defendant’s statutory power had not crystallised. Indeed, the calling of the whole outstanding sum of the loan that it had advanced to the Plaintiffs, without having been asked to rectify the default within the time lines that were provided in the Act, would definitely have denied them an opportunity to first rectify the default.

39. The proper procedure would have been for the Defendant to have issued the Plaintiffs with a demand to rectify the default of Kshs 1,066,580.53 within three (3) months from the date of the notice noting to include all the details stipulated in Section 90 of the Land Act and thereafter issue a notice under Section 96 of the Land Act if the Plaintiffs defaulted in rectifying the default .

40. Whereas a chargee ought not to be restrained from exercising its statutory power of sale if a chargee is in default and more so because parties are bound by the terms of contracts they enter into and must keep their bargain as was rightly submitted by the Defendant when it relied on the case of **National Bank of Kenya vs Alfayo Onyango Riako [2012] eKLR**, the court 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 that person right to own property, a right that is enshrined in Article 40 of the Constitution of Kenya, 2010.

41. The importance of not depriving a person 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)**. Appreciably, the Plaintiffs

would suffer great injustice as they would be denied its right of redemption which it was entitled to until the fall of the hammer at a public auction.

42. In this regard, the court associated 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...”

43. Again, 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 Waitthaka 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.”

44. Having considered the pleadings, the affidavit evidence, written submissions and case law that was relied on by the respective parties herein, the court found that in view of the invalidity of the Statutory Notice as aforesaid, the Plaintiffs would suffer loss that would not be compensated by way of damages if they were not given an opportunity to exercise their right of redemption.

45. However, the Plaintiff did not establish a *prima facie* case with a probability of success as was 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.”

46. It must be appreciated that courts are not inclined to grant an interlocutory injunction pending the hearing and determination of suit on the ground that there was a dispute as to the figures. As was held by the Court of Appeal in the case of **Civil Application No 108 of 2005 Francis J.K Ichatha v Housing Finance Company of Kenya Ltd**, a dispute in computation of interest was a mathematical error that did not warrant restraining a chargee from exercising its statutory power of sale.

47. Evidently, the Plaintiffs were truly and justly indebted to the Defendant if their arguments about having Credit Bank Limited taking over the loan from the Defendant were anything to go by. This indebtedness was clearly set out in Paragraph 11 of the Plaintiffs' Supplementary Affidavit. It was stated as follows:-

“THAT we have already instructed our advocates on record to write and reply to the Defendant and inform the Defendant that we are agreeable to the payment mode stipulated in that letter save for paying the proposed amount monthly instead of weekly.”

48. As a chargee ought not to be restrained from exercising its statutory power of sale once it had crystallised, the court found that the Defendant was therefore at liberty to re-issue the Statutory Notices that strictly complied with the provisions of the Land Act including conducting a forced sale valuation of the subject property in accordance with Section 97 of the Land Act, if the same had not been done. Notably, neither the Plaintiffs nor the Defendants addressed themselves to this issue. The court's mention of this requirement was merely a reminder to the Defendant herein of the need to obtain such valuation and was not intended to be a determination as the issue was not one that had been placed before the court.

49. The Plaintiffs may very well take advantage of this time to reconcile their accounts with the

Defendant. As can be seen above, a dispute as to figures is not a ground for a court to grant injunctive orders. Due to the time it has taken for this matter to be heard and determined, the court expects that the Plaintiffs had had sufficient time to organise their financial affairs as they had sought in the application herein.

50. There was no evidence that was placed before the court to suggest that the Plaintiffs had been not been furnished with statements of accounts. Appreciably, copies of statements were annexed in the Defendant's Replying Affidavit and marked Exhibit "SG 16" which clearly showed that the same were sent to the Plaintiffs to their Postal Address 1017 00618 Nairobi which was the same postal address shown in the Certificate of Lease annexed in the Supporting Affidavit Exhibit marked "CWG 1", the Charge and in the Affidavits that the Plaintiffs filed herein to support their case.

51. Indeed, the Plaintiffs did not dispute the correctness of this address . The court thus found that granting Prayer No (6) of their application was superfluous. The Court was more persuaded by the Defendant's submissions that it furnished the Plaintiffs with the monthly statements.

DISPOSITION

52. For the foregoing reasons, the upshot of this court's ruling was that the Plaintiffs' Notice of Motion application dated 4th September 2014 and filed on 5th September 2014 was not merited and the same is dismissed with costs to the Defendant.

53. For the avoidance of doubt, the Defendant is at liberty to exercise its Statutory Power of Sale provided it strictly complies with the provisions of the law.

54. It is so ordered.

DATED and DELIVERED at NAIROBI this 23rd day of February 2015

J. KAMAU

JUDGE