



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL & AMIRALTY DIVISION**  
**CIVIL CASE NO 250 OF 2013**

**FRANCIS NJUGUNA GIKONYO.....PLAINTIFF**

**VERSUS**

**FAMILY BANK LIMITED.....1<sup>ST</sup> DEFENDANT**

**JOSEPH KARIUKI T/A JOSRICK MERCHANTS.....2<sup>ND</sup> DEFENDANT**

**RULING**

**INTRODUCTION**

1. The Plaintiff's Notice of Motion application dated and filed on 17<sup>th</sup> June 2013 was brought pursuant to the provisions of Order 40 Rule 1, Order 50 Rule 1 of the Civil Procedure Rules, (sic) Sec.1A, 3 and 3A of the Civil Procedure Act Cap 21 Laws of Kenya. Prayers Nos (1) and (2) were spent. He sought the following remaining orders:-

1. **Spent.**
2. **Spent.**
3. **THAT pending the hearing and determination of this suit, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants be restrained either by themselves, their servants from advertising, selling, transferring, leasing or in any way dealing with property L.R. No. 27903/75.**
4. **THAT the costs of this application be paid by the Defendants.**

2. The 2<sup>nd</sup> Defendant did not participate in the proceedings herein. The dispute for determination by the court was therefore between the Plaintiff and the 1<sup>st</sup> Defendant.

3. Both the Plaintiff and the 1<sup>st</sup> Defendant waived their right to highlight their written submissions when the matter came up in court on 4<sup>th</sup> February 2015. The ruling herein was therefore based on the written submissions they had each filed.

**THE PLAINTIFF'S CASE**

4. The application was premised on several grounds and the Plaintiff's Supporting Affidavit that was sworn on 17<sup>th</sup> June 2013. His Written Submissions were dated 13<sup>th</sup> November 2014 and filed on 20<sup>th</sup>

November 2014. His Bundle and List of Documents was dated 9<sup>th</sup> December 2013 and filed on 10<sup>th</sup> December 2014.

5. On 18<sup>th</sup> May 2011, the Plaintiff applied for a loan from the Defendant for purposes of undertaking construction on his property namely L.R. No 27903/75 (hereinafter referred to as “the subject property”). In a letter of offer that was dated 23<sup>rd</sup> June 2013, the 1<sup>st</sup> Defendant advanced him a sum of Kshs 8,500,000/=. Vide his letters of 25<sup>th</sup> January 2012 and 14<sup>th</sup> March 2012, he applied for an additional sum of Kshs 3,000,000/= bringing the total to Kshs 11,500,000/=.

6. He defaulted in payment of the loan and on 18<sup>th</sup> December 2012, he was served the three (3) month’s Statutory Notice. The 2<sup>nd</sup> Defendant also issued him with a forty five (45) days’ Notification of Sale on 16<sup>th</sup> March 2013. The sale of the subject property was scheduled for 19<sup>th</sup> June 2013.

7. He did not want the subject property sold by way of public auction as he had found a person who could purchase the same for Kshs 32,000,000/=. However, the 1<sup>st</sup> Defendant had refused him to dispose of the said subject property by way of private treaty. He had therefore sought intervention of the court so that he could sell the subject property whose value he placed at Kshs 24,300,000/= because he would suffer loss if the same was sold at an under value in an auction.

### **THE 1<sup>ST</sup> DEFENDANT’S CASE**

8. In opposition to the Plaintiff’s application, Benjamin Ikenye, the 1<sup>st</sup> Defendant’s Head and Debts Collection swore a Replying Affidavit on 23<sup>rd</sup> August 2013. The same was filed on 28<sup>th</sup> August 2013. Its Written Submissions were dated 17<sup>th</sup> March 2014 and filed on 14<sup>th</sup> May 2014.

9. The 1<sup>st</sup> Defendant confirmed the amount of the financial facility as had been contended by the Plaintiff and added that the said financial accommodation was secured by a mortgage over the subject property and rental income accruing from the said property.

10. It stated that it issued the mandatory statutory notices when the Plaintiff defaulted in payment of the loan, which as at 30<sup>th</sup> June 2013, stood at Kshs 14,602,420.77 and that there was nothing in the Charge or the Loan Agreement showed that the Plaintiff could dictate how it could dispose of the subject property.

11. It averred that the Plaintiff had come to court with unclean hands. It urged the court to dismiss his application as the same smacked of an abuse of the court process.

### **LEGAL ANALYSIS**

12. It was not in dispute that the Plaintiff had defaulted in paying the mortgage monies. From a perusal of the documents herein, it did appear to the court that the Plaintiff’s main concern was that the 1<sup>st</sup> Defendant had refused to allow him to dispose of the subject property by way of private treaty at a sum of Kshs 32,000,000/= but had instead, intended to sell the said subject property for a sum of Kshs 14,000,000/=.

13. The Plaintiff relied on the case of **Giella vs Cassman Brown** (citation not given) as did the 1<sup>st</sup> Defendant who gave the complete citation as **Giella vs Cassman Brown Limited [1973] EA 358**. While the 1<sup>st</sup> Defendant submitted that the Plaintiff had not established a *prima facie* case with a probability of success, the Plaintiff held a contrary view.

14. He averred that the balance of convenience tilted in his favour as the 1<sup>st</sup> Defendant stood to suffer no prejudice. Further, he argued that he would suffer irreparable loss if his application was not allowed because the subject matter had been purchased through his “**life long**” earnings.

15. The court agreed with the 1<sup>st</sup> Defendant that the mere fact that the Plaintiff admitted owing it the monies aforesaid clearly showed that the Plaintiff had not demonstrated a *prima facie* with a probability of success. In this regard, the court was in agreement with the holding in the case of **Patrick Waweru & Another & Another vs Housing Finance Company of Kenya Limited [2013]** in which Havelock J (as he then was) referred to the case of **Kyangaro vs Kenya Commercial Bank Limited & Another (2004) 1 KLR 126**, which the 1<sup>st</sup> Defendant relied upon, where Njagi J stated as follows:-

**“...He admits he is in default, and yet he is also in possession. He can’t have it both ways. Either he pays the loan, or allows the bank to realize its security. He who comes in equity must fulfill all or substantially all his outstanding obligations before insisting on its rights...”**

16. In the same vein, the Plaintiff could not admit owing the 1<sup>st</sup> Defendant the debt and hope to keep the subject property by stopping the 1<sup>st</sup> Defendant from realising the same. The issue of him and his family suffering irreparable loss was immaterial and could not hold water. Indeed, a party who offers his subject property as security to secure a loan must be prepared to face the dire consequences of defaulting in repaying the financial accommodation that has been advanced to him.

17. The subject property the Plaintiff had voluntarily given to the 1<sup>st</sup> Defendant as security was now a commodity that was open for sale in the public market. There was also risk of the arrears herein outstripping the value of the subject property if the 1<sup>st</sup> Defendant was prevented from realising its security. A similar observation was made in the case of **Andrew Muriuki Wanjohi vs Equity Building Society Limited & 2 others[2006] eKLR** where Ochieng J stated as follows:-

**“... In my considered view, if the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were restrained from selling off the property until the suit was heard and determined, there is a very real risk that the debt may outstrip the value of the property as the borrower has not made repayments for more than three years...”**

18. While the Plaintiff may have preferred to dispose of the subject property by way of private treaty, the court must never deviate from the intentions of a contract that parties have freely and voluntarily entered into. As was rightly submitted by the 1<sup>st</sup> Defendant, there was nothing in the Charge or the Loan Agreement that showed that the Plaintiff could dictate how it could dispose of the subject property. The Plaintiff and the 1<sup>st</sup> Defendant were bound by the terms of their contract and consequently, the Plaintiff could not dictate the terms of how he intended to dispose of the subject property.

19. Appreciably Clause 28 of the Mortgage dated 9<sup>th</sup> August 2007 annexed to the Plaintiff’s Supporting Affidavit marked “FNG 2”, it is stipulated as follows:-

**“Where the consent of the Bank is required under any of the provisions of this Mortgage, the Bank shall be entitled to withhold its consent in relation to any such matters without assigning any or any sufficient reason therefore and the Bank may give such consent upon and subject to such terms and conditions as the Bank in its sole discretion shall think fit (emphasis court).”**

20. The 1<sup>st</sup> Defendant was, however, required to bear in mind that any sale of subject property had to be disposed of in a public auction after fully complying with the provisions of Section 97 of the Land Act Cap 280 (Laws of Kenya).

21. Section 97 of the Land Act provides as follows:-

- 1. A chargee who exercises a power to sell the charged land...owes a duty of care to the chargor...to obtain the best price reasonably obtainable at the time of sale.**
- 2. A chargee shall, before exercising the right of sale, ensure that a forced sale valuation is undertaken by a valuer.**
- 3. If the price at which the property is sold is twenty five per centum or below the market value**

at which comparable interests of land of the same character and quality are being sold in the open market-

- a. **There shall be rebuttable presumption that the chargee is in breach of the duty imposed by subsection (1); and**
- b. **The chargor whose charged land is being sold for the price may apply to a court for an order that the sale be declared void; but the fact that a plot of charged land is being sold by the chargee at an undervalue being less than twenty five per centum below the market value shall not be taken to mean that the chargee has complied with subsection (1).**

22. The 1<sup>st</sup> Defendant thus had to be certain that the forced sale value it had attached to the subject property in the sum of Kshs 18,500,000/= as shown in the Notification of Sale forwarded by the 2<sup>nd</sup> Defendant's letter dated 11<sup>th</sup> April 2013 and evidenced in the Report and Valuation by M/S Prestige Management Valuers Ltd both attached to the Plaintiff's Supporting Affidavit and marked "FNG 4" and "FNG 5" respectively, would not be in breach of the provisions of Section 97 (1) of the Land Act.

23. Going further, the court also noted the Plaintiff's argument that his application sought to protect the subject property as against the maximum interest chargeable by the 1<sup>st</sup> Defendant in recovering a non-performing loan. Although he referred the court to the provisions of Section 44 (sic) of the Banking Act Cap 488 (Laws of Kenya) and attached the case of **Kenya Commercial Bank Limited vs Rupa (K) Limited & 2 Others [2014] eKLR** in respect of Section 44A of the Banking Act, he did not advance his submission on this issue.

24. Appreciably, the court must be very hesitant to make an assumption of what it thinks a party intends to submit in respect of a particular issue. It must at all times remain a neutral arbiter in any dispute by not descending into the arena particularly in an adversarial system such as that in our jurisdiction. On that ground, the court attached no weight to the Plaintiff's submissions regarding the provisions of Section 44 A of the Banking Act as he did not remotely demonstrate how the same was applicable in the circumstances of his case.

25. As the court's power to grant an interlocutory injunction is a discretionary one and must be based on the law and evidence, an applicant seeking such an interlocutory injunction, is expected to satisfy the criteria set out in the case of **Giella vs Cassman Brown Company Limited** (Supra) in which it was held that:-

**"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."**

26. In addition to the holding in the case of **Giella vs Cassman Brown Ltd** (Supra), the court noted the several cases the 1<sup>st</sup> Defendant had attached to its written submissions and was satisfied that the Plaintiff had not demonstrated a *prima facie* case with a probability of success. The question of him suffering irreparable loss that could not be compensated by an award of damages if interlocutory injunction was not granted or that the balance of convenience tilted in his favour therefore fell by the wayside. In fact the court found that the balance of convenience tilted in favour of the 1<sup>st</sup> Defendant.

27. Having said so, the court observed that the Plaintiff did not address himself to the validity of the statutory notice that was issued to him. The court nonetheless found it necessary to consider the issue and make a determination on the same.

28. Section 90 of the Land Act provides as follows:-

**90. (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;**

**(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;**

**(d) The consequence that if the default is not rectified within the time specified in the notice, the chargee will proceed to exercise any of the remedies referred to in this section in accordance with the procedures provided for in this sub-part; and**

**(e) The right of the chargor in respect of certain remedies to apply to the court for relief against those remedies.**

**(3) If the chargor does not comply within two months after the date of service of the notice under, subsection (1), the charge may—**

**(a) Sue the chargor for any money due and owing under the charge;**

**(b) Appoint a receiver of the income of the charged land;**

**(c) Lease the charged land, or if the charge is of a lease, sublease the land;**

**(d) Enter into possession of the charged land; or**

**(e) Sell the charged land;**

29. In the 1<sup>st</sup> Defendant's Statutory Notice dated 18<sup>th</sup> December 2012 annexed to the Plaintiff's Supporting Affidavit and marked "FNG 4", it was stated thus:-

**"...Following default in payment of the said loan advanced, you are indebted to us in the sum of Kshs 12,955,321.35 (emphasis court) as at 30<sup>th</sup> November, 2012. The same amount continues to attract interest at the rate of 24.5% per annum compounded with monthly rests until paid in full, In addition please note that the amount demanded will continue to attract a penalty rate of 6% per annum above the rate specified in the offer letter.**

**TAKE NOTICE therefore pursuant to section 90 of the land act (sic) that we shall exercise our remedies over the charged property namely TITLE NO. GATURI/NEMBURE/7991 (emphasis court) within THREE (3) MONTHS of the service of this notice so as to recover the amount owed to us and secured by the said charge together with all interest accrued thereon and costs charges and expenses, unless the amount owed to us is paid in full before then..."**

30. There were several issues that made the court very uneasy about the said Statutory Notice. The court pored over the application forms, Letters of Offer, Mortgage dated 9<sup>th</sup> August 2007, Further Mortgage and Deed of Rent Assignment both dated 30<sup>th</sup> April 2012 and noted that they all referred to L.R. No 27903/75. The court did not see any relation of this property to L.R. No Gaturi/Nembure/7991 that was mentioned in the aforesaid Statutory Notice of Sale. If there was any relation, then the 1<sup>st</sup> Defendant

failed to demonstrate the same. It therefore follows that the said Statutory Notice was invalid as it did not require the Plaintiff to redeem the subject property herein. Instead, it referred to a completely different property that was not subject of the mortgage herein.

31. The said Notice was also invalid as it was not in compliance of the provisions of Section 90 (2) (a) and (b) of the Land Act. It did not specify the nature and extent of the default by the Plaintiff or amount that must be paid to rectify the default which had to be rectified within three (3) months. Instead, the 1<sup>st</sup> Defendant demanded for the entire outstanding amount. This was a clog or fetter to the Plaintiff's right of redemption.

32. The correct procedure was for the 1<sup>st</sup> Defendant to issue a notice under Section 90 of the Land Act and thereafter issue another notice under the provisions of Section 96 of the Land Act.

33. Section 96 of the Land Act 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. 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 his or her property was an issue that was considered in the case of **Kwanza Estates Limited vs Dubai Bank Kenya Limited (2013) eKLR** where it was held as follows:-

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

35. Evidently, if the Statutory Notice had been properly issued, then the three (3) months were to expire on 17<sup>th</sup> March 2013. Bearing in mind the provisions of Section 96 (2) of the Land Act, the Defendant would not have been 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.

36. 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 under Section 90 (2) (b) of the Land Act and different from the Notification of Sale to be issued by an auctioneer. No evidence was provided by the Defendant to demonstrate that it had complied with the provisions of Section 96 (2) of the Land Act.

37. In the absence of any evidence that the requisite statutory notices were issued in accordance with the provisions of Sections 90 and 96 of the Land Act, the court could only come to the conclusion that the 1<sup>st</sup> Defendant had not fully complied with the provisions of the law. Consequently the 1<sup>st</sup> Defendant's statutory power of sale had not crystallised by the time it advertised the sale of the subject property herein by public auction. For all purposes and intent, the notice of 18<sup>th</sup> December 2012 was invalid, null and void *ab initio*.

38. Having considered the parties' affidavits, the written and oral submissions and the case law in support of the parties' respective cases and having applied the principles of granting interlocutory injunction pending the hearing and determination of the suit herein, this court was not satisfied that this was an appropriate case for it to exercise its discretion in favour of the Plaintiff herein. On the other hand, the

court found and held that the 1<sup>st</sup> Defendant was at liberty to exercise its statutory power of sale provided that it fully and strictly complied with the provisions of the Land Act as aforesaid as the Plaintiff had admitted that he had defaulted in repayment of the loan.

**DISPOSITION**

39. Accordingly, the Plaintiff's Notice of Motion application dated and filed on 17<sup>th</sup> June 2013 was not merited and the same is hereby dismissed with costs to the 1<sup>st</sup> Defendant. For the avoidance of doubt, the *status quo* orders issued herein on 18<sup>th</sup> June 2013 are hereby vacated and set aside.

40. It is so ordered.

**DATED and DELIVERED at NAIROBI this 23<sup>rd</sup> day of April 2015**

**J. KAMAU**

**JUDGE**