



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ELC CIVIL SUIT NO 1419 OF 2014

PETER KAMAU MUNENE.....PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LIMITED.....DEFENDANT

RULING

The matter coming up for determination is the Notice of Motion dated **7th November 2014**, brought under **Order 40 Rules 1, 2, 3 & 4 of the Civil Procedure Rules and Sections 3 and 3A of the Civil Procedure Act, Cap 21 Laws of Kenya** and all other enabling provisions of the Law.

The applicant herein, **Peter Kamau Munene** has sought for these orders against the Defendant, Kenya Commercial Bank Ltd;-

1. *That the Court be pleased to issue a temporary injunction restraining the Defendant whether acting in person or through agents, servants or employees from selling, disposing off or in any way alienating the property comprised in Title No. **Dagoretti/Riruta /5810**, situate at **Kawagware** , Nairobi or in any way interfering with the Plaintiff's rights and interests pending the hearing and determination of this suit.*
2. *That cost of the application be provided for.*

The application is premised on the grounds stated on the face of the application and on the affidavit of **Peter Kamau Munene** . These grounds are;

That the Respondent through M/s Watts Auction Ltd has advertised for sale of the property comprising of Title No.**Dagoretti/Riruta 5810** situate at **Kawagware**, Nairobi on which stands a block of residential units (herein referred to as the suit property) in a public auction scheduled for **13th November, 2014** alleging a sum of **Kshs.6580,851** is due as at **10th September, 2014** and employing a rate of interest undisclosed to the Plaintiffs herein; Further that the Plaintiff charged the land parcel with the Defendant on a facility of **Kshs. 6,230,000/=** and it was a condition precedent that before granting of the facility, the Plaintiff had to pay **Kshs.2, 670,000/=** to the Vendor; Further, that the Plaintiff has since May 2014 to-date paid **Kshs.2,850,000/=** which the Defendant has not taken into account and has capriciously resorted to invoke statutory power of sale without properly reconciling the mortgage accounts; Again that the Defendant is clogging the Plaintiff's right of redemption of suit property and abusing the statutory power of sale to demand sums not due under the lending agreement; Further that the Statutory Notice and proposed resale value of the property offend the **Land Act 2012** and is an illegality that should the auction scheduled for **13th November, 2014** proceeds , the Plaintiff would suffer irreparable loss and damage and it is in the best interest of justice that the orders sought herein should be

granted.

In his supporting Affidavit, the applicant acknowledged that he took a mortgage with the Defendant on or around **17th February 2012** and executed a charge instrument in favour of the Defendant and secured a mortgage facility of **Kshs 6230,000/=** . He used his property **Dagoretti /Riruta 5810**, the suit property as security. It was his contention that he continued to service the mortgage account but due to high cost of development, he was unable to pay the loan as regularly as expected. He averred that as at the date of filing this application, he had paid a total of **Kshs.2,850,000/=** as per annexure **PKM2**. The deponent contended that despite the payment, the Defendant instructed Watts Auctions pursuant to the powers under the charge to sell by public auction the suit property. Thereafter Watts Auctions advertised for sale by public auction the suit property scheduled for **13th November**, as per annexure **PMK3**.

That the Defendant was demanding payment of **Kshs. 6,580,851/=** and the inclusion of interest by the Defendant is arbitrary and unreasonable and clearly demonstrates that the Defendant is hell bent on frustrating his equity of redemptions. Further that the Defendant has acted capriciously and arbitrarily failed to disclose in good time the interest imposed on the sums due. Further, the Defendant is in clear abuse of the statutory power of sale and therefore the public auction slotted for **13th November, 2014** was unlawful. It was his contention that he stands to suffer irreparable loss and damage should the suit property be sold as the investment now stands at **Kshs. 30,000,000/=**. He urged the Court to allow the application.

The application was vehemently opposed by the Defendant, **Kenya Commercial Bank Ltd**, who filed grounds of opposition and averred that the application herein is incompetent, bad in law and should be dismissed with costs. The grounds of opposition were;

(i) *The application does not meet the principles for the grant of a temporary injunction for the following reasons:-*

- a. *Having charged the property as security, for a loan on the basis that on the event of a default will be sold, the damages were foreseeable. Therefore, the loss that the Plaintiff stands to suffer should he succeeded in the main suit is capable of being adequately compensated.*
- b. *A dispute as to the amount due / paid cannot be a ground for an injunction since the injury can be compensated in damages.*
- c. *Since he who comes to equity comes to equity, the applicant's failure to service the loan takes him outside the realm of the exercise of this Honourable Court's discretion.*
- d. *The balance of convenience tilts in favor of the Defendant since should the injunction be granted , the security might prove insufficient to satisfy the ultimate balance due at the conclusion of the suit while on the other hand , the Defendant would be able to satisfy whatever Decree is passed against it .*

(ii) *Further, that the applicant is guilty of laches having waited until the very last moment to approach this honourable Court i.e with the expiry of all statutory notice issued to him inclusion the penultimate auctioneers notification of sale and newspaper advertisement to sell by public auction*

The Notice of motion was canvassed by way of written submissions. The Court has carefully considered the pleadings generally, the annexures thereto and the written submissions and the Court make the following findings:-

The applicant herein is seeking for injunctive orders. These are equitable remedies which are granted at the discretion of the Court. However, such discretion must be exercised judiciously. See the case of **East Africa Development Vs Hyudai Motors Kenya Ltd Civil Appeal No. 194 of 2004 (2004) LLR 6121** ; where the Court held that:-

“What was before the learned Judge was an application for equitable remedy of injunction and the conditions are; first an applicant must show a prima facie case with 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”. See also Giella Vs Cassman Brown and Company (1973) EA 358; EA Industries Vs Trufoods (1972) EA 420.

Since the applicant has come to Court seeking for the above equitable remedy, he had a duty to satisfy the Court that he so deserves them. He therefore had to demonstrate that he has satisfied the principles set out in the three named cases to warrant him obtain injunctive Orders.

From the facts of this case, there are some undisputed facts. There is no doubt that the Plaintiff herein is the registered owner of **Dagoretti/Riruta /5810** as evidenced by the title deed dated **20th March 2012**, being document No.2 in the Plaintiff’s list of documents. There is also no doubt that the Plaintiff took a mortgage facility with Kenya Commercial Bank, the Defendant herein for **Kshs. 6,230,000/-** to complete purchase of the suit property **LR No. Dagoretti /Riruta /5810**, and used the title for the suit land as security. The said letter of offer to the applicant was signed by him on **21st February 2012**. The applicant was to repay the loan at **Kshs. 181,756/=** per month for a period of 5 years at a variable interests of 24% per annum.

There is no doubt that the loan was granted to the applicant on **13th April 2012**, and barely seven months after, had the Plaintiff defaulted in loan repayment. It is evident from annexure **KCB 8** on the **“money in”** column, the applicant made no payment as the column reflect nil entries. Due to the above stated failure to service the loan, the Defendant sent several letters and documents to the Plaintiff. Such documents are; Statutory Notice of Sale 45 days Redemption Notice, Notification of sale and an advert in the Newspapers which indicated that the auction would take place on **27th May 2014**.

It was the Defendant’s submissions that after the advert in the newspaper indicating the sale would take place on **27th May 2014**, the Plaintiff approached the Defendant and pleaded with it to stop the scheduled auction. It is also evident that the Plaintiff has only attached the Bank statement for the month of **May 2014** when she made some payments and also deposit slips for the months of October 2014 and he did not attach the Bank statements for the whole period.

It is not in doubt that the Defendant instructed auctioneers through another Notification of Sale dated **11th September 2014** and thereafter the Plaintiff made several payments as evidenced by annexures **10, 12, and 13** in Plaintiff’s bundle of documents. The Plaintiff thereafter moved to court and brought the instant application. The applicant has alleged that the intended sale is illegal as the Defendant has undervalued the property contrary to the obligation in **Section 97** of the **Land Act 2012** and that the validity of the Statutory Notice and Notification of Sale are contested. I will now endeavor to consider the whole pleadings and submissions to arrive at a finding as to whether the applicant is deserving of the Orders sought or not.

The applicant needed to demonstrate that he has a prima facie case with probability of success at the trial. Prima facie case is described in the case of **Mrao Ltd Vs First American Bank of Kenya and 2 others (2003) KLR 123**, the court described prima facie case as:

“A Prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later”.

A prima facie case therefore means more than arguable case; that the evidence must show an infringement of a right and the probability of success of the applicant’s case at the trial.

The applicant has argued in his application that the Defendants had advertised his property for sale

by public auction despite the fact that since **May 2014** , he has paid more than **2,850,000/=** which the Defendant has not taken into account .It is evident that the Plaintiff took a loan facility of **Kshs.6,230,000/=** on **13th April, 2012** and the latter of offer showed that the Plaintiff would repay the loan at **Kshs.181,756/=** per month over a period of **5 years** at a variable interest of **24%** per annum.

However, it is evident that after taking the loan, the Plaintiff paid the monthly repayment for only seven months. It is evident from annexures **KCB 8**, the Plaintiff did not make any payments from **November, 2012** until **May 2014**. Several letters relating to the said default had been sent to him.

The Defendant, Bank gave the Plaintiff mortgage facility and it was the duty of the Plaintiff to pay his monthly commitment. The Plaintiff defaulted the said payment and the Bank had the power to sale by public auction the mortgaged property as provided by **clause 15** of the letter of offer.

The plaintiff submitted that the Defendant did offend the provisions of **Section 97** of the **Land Act** by under-valuing the suit property and that the Statutory Notice and Notification for Sale were in contravention of the provisions of the **Land Act**. However, the Applicant has not attached a contrary valuation report from the valuers. It is evident that the applicant defaulted and the Defendant issued a Statutory Notice and Notification for Sale by public auction. There is evidence that the issuance of the Statutory Notice of sale and Notification of Sale and advert in Newspaper that the auction would take place on **27th May 2014**, prompted the Plaintiff to approach the Defendant on how to resolve the matter. It is also evident that the Notification of sale herein is dated **11th September 2014**. The public auction was scheduled for **13th November, 2014** but the Plaintiff waited until **7th November, 2014** to bring the instant application. He only attached the statement where he had made payments for the month of **May 2014** and deposit slips for the month of **October** and **November 2014**. He did not attach the whole Bank Statement showing the **Status Quo** of his Mortgage Account as at **7th November, 2014**. The Plaintiff has therefore failed to establish that he has a prima facie case with probability of success.

On the second principle that the Plaintiff will suffer irreparable injury which cannot be compensated by an award of damages, it is evident that the plaintiff offered his suit property as security for a mortgage facility of **Kshs. 6,230,000/=** . As per **clause 15**, of the letter of offer, the Defendant was empowered to sell the property in case of default. The Plaintiff did default and therefore his property became a commodity for sale. The said suit property can be assessed and quantified and in the case Plaintiff succeeds in his case on a future date, he can be compensated by an award of damages. In this regard , the Court will be persuaded by the case of **Bii Vs Kenya Commercial Bank Ltd (2001) KLR 458** (as quoted by the Defendant). The Court in the above case held that:-

“Is the applicant’s probable injury capable of being adequately compensated in damages. I have no doubt that it is. The applicant has known all along that the securities he offered for his charge debt would be realized if default was made in the repayment. As I have said severally, once a property is offered as security, it by the very fact becomes a commodity for sale and there is no commodity for sale whose loss cannot be compensated adequately damages”.

On the balance of convenience, the Court finds that if an injunction is issued and the Plaintiff continues to default, then the interest would continue to accumulate and the value for the property may prove to be insufficient to satisfy the debt at the conclusion of the suit. This was the position held in the case of **Maithya Vs Housing Co. of Kenya and Another (2003) IEA 133**(as quoted by the Defendant in their submissions).The Court held as follows:-

“Should the injunction be refused, the Respondents security would continue to be eaten away by the mounting redemption money and the security might prove insufficient to satisfy the ultimate balance due whereas on the other end of the scale, the Respondents will be able to satisfy whatever decree is passed against it. I therefore hold that in the circumstances the balance of convenience does tilt very heavily in favour of the Respondent”.

In the present case, the Court finds that the balance of convenience tilts in favour of the Defendant

as the plaintiff has shown tendencies of failing to honour his monthly obligations, If injunction is granted, then the value of the property might turn out to be insufficient to satisfy the debt due to the inclusion of the interest accrued and penalties.

It is also evident that the Orders sought by the applicant are equitable remedies. The party seeking it must come to Court with clean hands. The applicant defaulted in his loan repayment and filed this application on the eve of the sale by public auction. The applicant has not come to court with clean hands or good faith.

For the above reasons, the Court finds that the applicant has failed to demonstrate that he is deserving of the Orders sought. The upshot of the foregoing is that the applicants' Notice of Motion dated **7th November, 2014** is not merited. The same is dismissed entirely with costs to the Defendant. The interim Orders earlier issued if still in force are hereby discharged forthwith.

It is so ordered.

Dated, Signed and delivered this **17th day of April 2015**

L. GACHERU

JUDGE

17/4/2015

Before L Gacheru J

Court Clerk Hilda

Mr Kirwa for the Plaintiff/Applicant

Mr Mwangi for Defendant/Respondent

L GACHERU

JUDGE

17/4/2015

Court:

Ruling Read in open Court in the presence of the above counsels.

L GACHERU

JUDGE

17/4/2015

Mr Kirwa : I apply for the certified copy of the Ruling.

Court:

The Certified copies of the Ruling to be supplied to the advocates herein upon payment of the requisite fees.

L GACHERU

JUDGE

17/4/2015