



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO 425 OF 2014

NOORBEGUM FAZAL (Suing as a

holder of Power of Attorney in favour

of NADRA HUSSEIN FAZAL..... PLAINTIFF

VERSUS

DIAMOND TRUST BANKDEFENDANT

RULING

INTRODUCTION

1. The Plaintiff's Notice of Motion application dated and filed on 24th September 2014 was brought pursuant to the provisions of Section 3A of the Civil Procedure Act, Order 40 Rules 1, 2, 3 and 10 of the Civil Procedure Rules and all enabling provisions of the law. Prayers Nos (1) and (2) of the said application were spent. It sought the following remaining orders:-

1. Spent.

2. Spent.

3. THAT the Defendant whether by itself or its servants or agents or auctioneers or otherwise be restrained by a temporary order of injunction of injunction from doing the following acts or any of them, that is to say from further advertising or offering for sale, selling by public auction or private treaty or completing by conveyance or transfer of any sale or otherwise transferring, disposing of or in any other way alienating or encumbering or interfering with the ownership, title and/or interests in L.R. No NAIROBI/BLOCK 32/791 ("the suit property") pending the hearing and determination of this suit.

4. THAT the Plaintiff be at liberty to apply for such further or other orders and/or directions as this Honourable Court may deem fit and just to grant.

5. THAT the Plaintiff's costs be provided for.

THE PLAINTIFF'S CASE

2. The application was supported by the Plaintiff's Affidavit that was sworn on 24th September 2014. Her Written Submissions and List of Authorities were dated and filed on 7th November 2014. Her Reply to the Defendant's Written Submissions and a Supplementary List of Authorities were dated 3rd December 2014 and filed on 4th February 2015.

3. The Plaintiff stated that she was the holder of the Power of Attorney of Nadra Hussein Fazal (hereinafter referred to as "the Chargor") who was at all material times the registered owner of L.R. No Nairobi/Block 32/791 (hereinafter referred to as "the subject property"). On or about 2009, Farzana Ali H Jhanda (hereinafter referred to as "the Borrower") applied for loan under the name of Kher Hardware and General Stores from the Defendant which was secured by a Charge dated 18th January 2009 over the said subject property. The Borrower subsequently entered into several renewals, variations and extensions of the initial contract.

4. Notably, the Chargor denied ever having appeared before a Jack Omondi Bunde, Advocate or being explained to, the effect of executing a charge over the said subject property. She also contended that the Defendant breached the loan and overdraft contracts by charging excessive and extortionate interest, charging illegal and invalid bank charges on both loans, consolidating the various facilities and loading double interest, failing to notify her and failing to comply with the requirements of the Banking Act and the Central Bank of Kenya Act.

5. It was her contention that despite the Borrower paying the loan to a tune of about Kshs 6,000,000/= against an initial advance of Kshs 10,000,000/= between 2010 and 2014, the Defendant nonetheless charged penalty interest and advertised the subject property for sale by public auction.

6. She also denied ever having been served with a valid Statutory Notice for Sale but admitted having received a Notification of Sale dated 3rd April 2014 that was issued by M/S Garam Investments, auctioneers, in which they had indicated that the said subject property would be sold by way of public auction on 3rd June 2014.

7. It was her further averment that she stood to suffer irreparable loss and damage that could not be compensated by way of damages if the sale of the subject property was to proceed either by way of public auction or private treaty. She indicated that she was ready to provide a written undertaking as to damages and therefore urged the court to grant her the prayers she had sought as the balance of convenience tilted in her favour and further that it was in the interests of justice that the said application be allowed.

THE DEFENDANT'S CASE

8. In opposition to the said application, on 21st October 2014, Stephen Kodumbe, the Defendant's Company Secretary swore a Replying Affidavit that was filed on the same date. The Defendant's Written Submissions were dated 5th December 2015 and filed on 8th December 2014.

9. The Defendant confirmed the circumstances under which the Borrower sought and obtained financial accommodation from it and added that the same was secured by a First Legal Charge, Further Legal Charge and Second Further Legal Charge that were dated 18th January 2010, 26th November 2011 and 7th March 2012 respectively.

10. It added that the Plaintiff duly executed Deeds of Guarantee on the same dates on behalf of the Chargor herein, agreeing to personally guaranteeing the aforesaid financial facilities and indemnifying the bank against all outstanding amounts owed to it by the Borrower.

11. It stated that as at 12th January 2013, the facilities were in arrears to the tune of Kshs 1,672,454,04. Following repeated demands to the Borrower to repay the same which she failed to do, on 30th January

2013, it averred that it issued her and the Plaintiff a demand letter and upon failure to repay the said outstanding monies, it again issued her and the Plaintiff the requisite Statutory Notice dated 28th February 2013 in accordance with the Land Act.

12. It was its further averment that upon the expiry of the stipulated period, it instructed M/S Dalali Traders Auctioneers to sell the subject property by way of public auction whereupon the said auctioneers issued the forty five (45) days' Notification of Sale dated 14th June 2013 advertising the sale of the subject property on 5th September 2013.

13. It stated that the Borrower approached it with a proposal to have the loan taken over by another bank as a result of which it cancelled the said scheduled sale. However, the said loan had not been taken over but instead the Plaintiff's son made proposals on 10th March 2014 to partly pay the outstanding monies which were not acceptable to it.

14. It was then that it instructed M/S Garam Investments to re-issue another forty five (45) days' Notification of Sale which the Chargor duly acknowledged receipt. However, the sale of the subject property that was scheduled for 3rd June 2014 did not take place as the Plaintiff made another offer to have the facilities taken over.

15. It averred that that all the intermittent payments that the Borrower had made were duly credited to her account and having failed to regularise her account, its Statutory Power of Sale had accrued. It was its contention that the Statutory Notices issued were valid and that the present application was filed with the sole purpose of scuttling the realisation of the subject property.

16. It therefore urged the court to dismiss the Plaintiff's application with costs to it as no good case for being granted a temporary injunction had been shown for the reason that her conduct, that of the Chargor and that of the Borrower were unconscionable and undeserving of the equitable relief that had been sought herein.

LEGAL ANALYSIS

17. The court used the words "Plaintiff" and "Chargor" interchangeably to refer to the same person as the Plaintiff held a Power of Attorney on behalf of the Chargor herein.

18. It was not in contention that the Borrower was advanced financial accommodation which was secured by a First Legal Charge, Further Legal Charge and Second Further Legal Charge over the subject property as aforesaid and that there were certain monies that were outstanding.

19. Although the Plaintiff listed several issues for determination, it did appear to the court that was really in dispute was whether or not the Borrower was in arrears as had been contended by the Defendant, whether or not there was a valid charge and whether or not the Defendant had fully complied with the provisions of the law before it purported to exercise its statutory power of sale.

20. The Plaintiff was categorical that the Chargor never appeared before the aforesaid advocate and was not informed of the Defendant's Statutory Power of Sale in the event of default of payment of the loan. She argued that this was contrary to the provisions of Section 3 of the Law of Contract Cap 23 (Laws of Kenya) and Section 69(4) of the Indian Transfer of Property Act 1882 (now repealed) as her signature was not attested by a witness who was required to be present at the time the Charges were executed by the Chargor.

21. In this regard, the Plaintiff placed reliance on the case of **Mohammed Gulam Hussein Farzal Karmali & 2 Others vs CFC Bank Limited & Another [2006] eKLR** where Ochieng J held that a mortgage instrument is only valid:-

"if the mortgagor's signature to the mortgage instrument has been witnessed by an advocate and if

the said instrument bears a certificate signed by that advocate to the effect that he has explained to the mortgagor the effect of subsection (1) of this section and he was satisfied that the mortgagor understood the same.”

22. She also referred the court to the cases of **Kipkemei Arap Songok vs Barclays Bank of Kenya Limited [2011] eKLR** and **Sharok Mohammed Ali & Another vs Southern Credit Banking Corporation Limited & Another [2008] eKLR** where the common thread was that no statutory power of sale could accrue if a charge was invalid.

23. On the other hand, the Defendant argued that the subject property had been advertised for sale several times in the past but that neither the Plaintiff nor the Borrower complained about the validity of the Charges herein and that the issue of the invalidity of the said Charges was a mere afterthought.

24. The court perused the email dated 10th March 2010 attached to the Replying Affidavit and marked as Exhibit marked “SK 15” by Yasin H Fazal, who the Plaintiff acknowledged as her son in Paragraph (7) of her Supporting Affidavit and who in Paragraph (8) of the said Affidavit is said to have made proposals to repay the outstanding monies which the Defendant rejected.

25. The court thus found itself in agreement with the Defendant that the new assertion of the invalidity of the Charges was merely an afterthought as the Plaintiff ought to have demonstrated that she had raised the issue previously or at all the material times she had sought to stop the sale of the subject property by way of public auction.

26. Alleging that the Chargor was not present at the time the Charges were executed was not enough particularly after the Borrower had enjoyed the benefit of the financial accommodation that was accorded to her by the Defendant. If indeed, the Charges were not validly executed, the Borrower ought not to have taken the loan which has been outstanding since 2009. Abetting an illegality would not confer any benefit or defence upon a person who would want to avoid the consequences of his default.

27. Indeed, the onus was on the Borrower to demonstrate that the Chargor could not have been present at the time the said Charges were being executed. Her acquiescence of the alleged illegality, if at all the same was true, amounted to a waiver to object and for which the court could not be persuaded to grant an injunction on this ground.

28. In this regard, the court fully associated itself with the holding in the case of **Coast Brick & Tile Works Limited & Others vs Premchand Raichand Limited & Another [1964] E.A. 187**, which the Defendant relied upon, wherein it was held as follows:-

“...I think that anyone who challenges the validity of a duly registered instrument (if he can do so at all) must discharge a substantial onus...the onus is a heavy one based upon the particular facts of this case...”

29. Turning to the issue of interest, a perusal of the Charges that were executed by the Plaintiff and/or Chargor and the Borrower and the Letters of Offer show that the Defendant could vary interest and that its decision to do so could not be questioned. The Plaintiff and/or Chargor and the Borrower had an option of not accepting the terms of the Charges or Letters of Offer by not executing the same.

30. They exercised their option when they signed the same and for all purposes and intent, valid and binding contracts between the Chargor and the Defendant herein were created. In this respect, the court wholly concurred with the Defendant that a court could not re-write terms of a contract that were contractually binding between parties as was held in case of **National Bank of Kenya Limited vs Pipeplastic Samkolit (K) Limited & Another [2001] KLR 112** that the Defendant placed reliance upon.

31. Save for alleging that the Defendant had breached the provisions of Section 44 of the Banking Act Cap 488 (Laws of Kenya) that stipulate that **“No institution shall increase its rate of banking or other**

charges except with the prior approval of the Minister”, the Plaintiff did not demonstrate how this was so. There was no computation of the interest that would have perhaps given the court an indication that the charging of the interest was unconscionable, exorbitant, immoral or contrary to the terms of the contracts and thus find an avenue to find that the Defendant had clearly acted outside the terms of the contract.

32. Indeed, an allegation of a fact with no supporting documentary evidence would be meaningless and have no probative value at all. In this respect, having noted the facts of the case against the holdings in the cases of Margaret Njeri Muiruri (being the Administrator of Joseph Muiruri Gachoka (deceased) vs Bank of Baroda (Kenya) Limited [2014] eKLR and John Gatu Nderitu vs Kenya Commercial Bank Limited [2011] eKLR amongst other cases that the Plaintiff relied upon, the court was also not inclined to grant the Plaintiff an injunction on this ground as the allegation of breach by the Defendant regarding the charging of interest and penalties was clearly not proven to the required standard.

33. The proposals by the Plaintiff to have the loan taken over by another financial institution, the failure by the Borrower or Chargor to pay the monies in the manner that was provided for in the Charges and the acknowledgment by the Plaintiff and his son that certain monies were due and owing to the Defendant were sufficient evidence and proof that there were outstanding monies that had remained unpaid to the detriment of the Defendant. As monies were clearly owing herein, the court was satisfied that the Defendant’s Statutory Power of Sale had arisen and that it was at liberty to exercise the same.

34. Having said so, it was necessary to establish whether or not the Defendant had issued valid Statutory Notices before it could exercise its Statutory Power of Sale.

35. Section 90 of the said 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;

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;

c. if the default consists of the failure to perform or observe any covenant, express or implied, in the charge, the thing the chargor must do or desist from doing so at to rectify the default and the time, not being less than two months, by the end of which the default must have been rectified;

d. the consequence 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.

36. Reading the contents of the Statutory Notice dated 28th February 2013 annexed to the Replying Affidavit and marked “SK 8” against the provisions of Section 90 of the Land Act, it was evident that the said notice did not include the notification that the Defendant would proceed to exercise any of the

remedies referred to in the said section in accordance with the procedures provided for in that sub-part and the statement of the right of the chargor in respect of certain remedies to apply to the court for relief against those remedies as was rightly pointed out by the Plaintiff.

37. The court therefore fully associated itself with the holding in the case of **David Gitome Kuhiguka vs Equity Bank Limited [2013] eKLR** where it was held that where a chargee failed to issue a notice that strictly complied with the provisions of Section 90(2)(b) of the Land Act, then such a notice could not be deemed to valid. This court has previously made similar findings in the cases of **Manasseh Denga vs Eco Bank Ltd & Another [2015] eKLR** and **Florence Njeri Karanja vs Molyn Credit Limited [2014] eKLR** amongst several other cases.

38. 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.”

39. 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 which was not the case herein.

40. 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, a position that was also held by Gikonyo J in the case of **Palmy Company Limited vs Consolidated Bank of Kenya Limited [2014] eKLR**.

41. Evidently, the Defendant did not issue the Plaintiff with a Notice under the provisions of Section 96 (2) of the Land Act which made the purported sale of the subject property null and void *ab initio*. In fact, the Defendant conceded that it had not issued a Statutory Notice under Section 96(2) of the Land Act in Paragraph 73 of its Written Submissions where it stated as follows:-

“The acts complained off (sic) by the Plaintiff... have been overtaken by events. They should no longer be in consideration by this Honourable Court. The Defendant’s Statutory Power of Sale has arisen however the Defendant has not decided to exercise this power recently. Therefore when the Defendant shall decide to sell the Property it will issue Notice to Sell pursuant to section 96(2) of the Land Act No. 6 of 2012 and therefore there is no reason to grant an injunction on fictitious claims.”

42. As the Defendant admitted that there was need for a Statutory Notice under the provisions of Section 96(2) of the Land Act, the court saw no need to say more on this issue as the same was no longer relevant in the circumstances of the case herein. It clearly knows what is expected of it before it exercises its statutory power of sale because failure to do so would definitely vitiate any sale of the subject property as it would clearly be a fetter or clog of the Plaintiff’s right of redemption.

43. Bearing in mind the holding in the case of **Civil Application No 108 of 2005 Francis J.K Ichatha v Housing Finance Company of Kenya Ltd** where 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, the court was not persuaded to grant a temporary injunction herein as there was clearly outstanding monies due and owing to the Defendant and that as it was seen hereinabove, the Plaintiff did not demonstrate that the interest and penalties charged to date were contrary to the terms of the contract and against the provisions of the Banking Act and the Central Bank of Kenya

Act as she had contended.

44. Accordingly, having considered the pleadings, the affidavit evidence, oral and written submissions and the case law in support of the parties' case, the court nonetheless came to the firm conclusion that the Plaintiff did not meet the threshold to be granted an interlocutory injunction as was envisaged in the celebrated 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.”

45. Having admitted that the Borrower was indebted to the Defendant herein, the Plaintiff had clearly not made out a *prima facie* case with a probability of success at trial. The question of her suffering loss that could not be compensated by way of damages if the interlocutory judgment was not granted could not arise. The balance of convenience did not tilt in her favour as the issuance of the invalid Statutory Notices could be regularised by the Defendant issuing valid Statutory Notices.

46. On the other hand, the balance of convenience tilted in favour of the Defendant which was at liberty to exercise its statutory power of sale provided that it fully complies with the strict provisions of the law.

DISPOSITION

47. Accordingly, the upshot of this court's ruling was that the Plaintiff's Notice of Motion application dated and filed on 24th September 2014 was not merited and the same is hereby dismissed. As the Defendant had not complied with the provisions of the Land Act before it advertised the subject property for sale by public auction, each party shall bear its own costs of this present application.

48. For the avoidance of doubt, the status quo order issued on 22nd October 2014 and extended several times thereafter is hereby vacated, lifted and/or set aside.

49. It is so ordered.

DATED and **SIGNED** at **NAIROBI** this 18th day of September 2015

J. KAMAU

JUDGE

READ, DELIVERED and **SIGNED** at **NAIROBI** this 22nd day of September 2015

F. AMIN

JUDGE