



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL CASE NUMBER 22 OF 2015

DAVIS NYANJUI NJEHIA t/a

DAVIS ACADEMY1ST APPLICANT

TULIPS COLLECTIONS LTD.....2ND APPLICANT

VERSUS

NATIONAL BANK OF KENYA LIMITEDRESPONDENT

RULING

1. By a Notice of Motion dated the 26th March 2015 and brought pursuant to provisions of **Order 40 Rule 1(a) and Rule 4, Order 51 Rule 4 of the Civil Procedure Rules**, the Applicants, being the Registered owners of properties known as **LR NO. Bahati/Bahati Block 1/871, Bahati/Bahati Block 1/872, Dundori/Muroreni Block 2/1592, Dundori/Muroreni Block 2/3641 and Dundori/Muroreni Block 2/1589** sought orders of temporary injunction to restrain the Respondent through its agents Saddabri Auctioneers from selling or disposing of the said properties in a public Auction or private treaty or in other manner pending inter partes hearing and determination of the application and the suit filed herewith.

2. On the 26th March 2015, the court granted the applicants a temporary injunction in accordance with prayer 2 of the application under consideration.

3. The grounds advanced in support of the application by the 1st Applicant are straight forward, that, the Respondent unreasonably delayed disbursing the loan amount that it had taken over from their former bankers causing them to suffer financial prejudice, that one of the properties set for sale is a matrimonial property and no spousal consent was obtained prior to registration of the charges in favour of the respondent, National Bank of Kenya Limited, that the charges upon which the borrowing were based are invalid, that there was no valuation of the charged properties prior to the advertisement for sale by public auction and that the 45 days redemption notice was not issued by the auctioneers. It was further stated and urged that the applicants would suffer irreparable damage should the properties be sold.

4. The application was vehemently opposed by a Replying Affidavit sworn by the Respondent Remedial analyst one Morris Tiema – on the 14th April 2015.

5. **The applicant's case and submissions.**

It was submitted by Mr. Ochang' Advocate for the applicants that there was no current valuation report, the latest having been done on the 13th May 2014 and the intended sale of the properties scheduled for the 2nd April 2015, eleven months since the valuation, and therefore not within acceptable limits. It was urged that the whole problem was caused by the Respondent by failing to take over the full bank loan and interest from the previous banks that caused the applicants to service two loans, one on the interest and the other as taken over by the respondent, and that they unreasonably delayed in disbursement of the funds to the banks it had taken over thus caused them to suffer financial loss and prejudice.

6. Further arguments were that on the properties there stood a college, a school and the applicants matrimonial home and that there was no spousal consent to charge the said properties and that sale of the properties would cause suffering to the students against the rights of the children as envisaged in the Children Act and urged the court to consider the fate of the children while making its findings.

7. On the grant of the equitable remedy of injunction, it was urged that the application was filed without delay and that the applicant had demonstrated a probability of success of the case and that the balance of convenience tilts in favour of the applicants as the bank held the securities hence would lose nothing whereas the applicants and in particular the students would lose immensely. The applicants did not file written submissions though leave was granted.

8. **The Respondent's case and submissions**

It was submitted for the Respondent that the application lacked in merit, was baseless and an abuse of the court. To demonstrate the above, Mr. Kiburi Advocate relied on the Replying Affidavit and his written submissions and urged that there was no dispute that the applicants owed the bank more than Kshs.100,000,000/= flowing from undisputed financial accommodation that the applicants defaulted in repayment almost immediately after disbursement. He submitted that the charges, further charges and debentures and the personal guarantees registered were valid, that the statutory notices of intention to realize the securities were duly served, that the statutory 45 days redemption notice were issued by the auctioneers but the applicants did nothing, that no attempt has been made to repay the loans.

9. On valuation, he urged that the properties were valued eleven months before the notification of sale was given and that the valuation was current for purposes of the intended sale and therefore valid for the intended purpose.

10. It was submitted that a party seeking an equitable order of injunction must approach the court with clean hands, that the applicants made no attempts to pay the loans since disbursement hence cannot urge the court to stop the bank from realising the security as it is its right too. Statements from the Bank produced demonstrated none payment of the loan.

It was stated that the applicant's spouse indeed gave her spousal consent before the charges were registered contrary to the applicants submissions. It was further stated that the spouse also gave her personal guarantee on the loans and can therefore not be said to have been ignorant of the loans and financial implications by the applicant.

The respondent continued to submit that once a matrimonial property is given out as security, it is thus put forth as a commercial commodity capable of being sold if there is a default. To that end, he relied on several authorities among them **John Ndauti T/a Johester Merchants Court of Appeal Civil Application No. 306 of 2005, Archibald Wamburu Kahora -vs- National Bank and Another HCCC ELC No. 541 of 2013 and Sammy Japheth Karuku -vs- Equity Bank Ltd, Mombasa HCCC No 84 of 2013**, where the courts have pronounced and held as above and further that sentimental value to a property cannot be used to obtain an injunction against sell in default of repayment of the loan. The respondent submitted further that the Applicants did not meet the threshold of granting an order of injunction as stated in the **Giella -vs- Cassman Brown Case (1973) EA 358** and urged the court to disallow the application with costs.

11. **Findings and determination**

From the affidavit evidence, submissions and documents as filed, the issues that arise for determination in my view are:

1. Validity of the charges as registered
2. Matrimonial property
3. Statutory notices under the Land Act, 2012 and the Auctioneers Rules 1997
4. Whether relief sought ought to be granted.

12. **Validity of the charges**

The court has considered the two charges executed by the applicants. In October 2013, the applicants were granted a loan in the Sum of KShs.81,000,000/= and a further restructuring loan of KShs.72,235,000/= on the 30th May 2014. As at 18th August 2014 a sum of KShs.109,474,731/= was then outstanding. I have looked at the charges. For all purposes and intent they are valid. Correspondence exchanged between the parties and attached to the respondents affidavit attest the terms that were accepted by the chargor leading to the execution of the 1st and the further charges. Before execution the chargor was explained and confirmed understanding of the effects of **Section 90 of Land Act 2012** and the banks rights under **Section 82 and 83 of the Land Act**. He signed in presence of his Advocates. I have also seen a spousal consent and an affidavit of the applicants spouse, one **Mary Nyambura Nyanjui Njehia**, who described herself as the wife of he chargor. She stated in the consent that she understood the purport of the chargees rights, and further that she unconditionally and irrevocably granted her authority to have all the properties charged to the respondent. Together with the two charges, the chargor and spouse also executed personal guarantees and indemnity. All these documents were registered, together with a debenture executed by the 2nd applicant.

The court finds no fault whatsoever with the charges as registered, and indeed, the applicant did not submit on their invalidity save to mention in passing that he doubted the validity thereof. Having alleged, he ought to have proved the invalidity, if any.

13. **Matrimonial property**

In her spousal consent dated the 14th October 2013 and the affidavit in support, **the spouse, Mary Nyambura Nyanjui Njehia** unconditionally and voluntarily granted an irrevocable authority for the charging of all the properties. She indicated that title **Bahati/Bahati Block 1/872** forms part of her matrimonial property while **Bahati/Bahati Block 1/871** did not form the matrimonial home.

It is my finding that from the onset, the applicant and his spouse gave out the properties as security knowing well that if there was default, they would be sold. Once a matrimonial property is offered as security, it automatically becomes a commodity ready for sale and more so if spousal consent is granted under the **Land Act 2012**.

See **Kerugoya ELC No. 451 of 2013 (Supra) and HCCC NO. 135 of 2013, David Ngugi Ngari -vs- KCB (2015) KLR**.

I fully agree with Mr. Kiburi Advocate's submission that sedimental attachment and value of a property cannot be a serious consideration to deny the chargee exercise of its statutory power of sale whether it be a family home, college, school or even a spiritual house as held in **Nduati Kariuki t/a Johester Merchants -vs- National Bank of Kenya (supra)**.

It is the court's finding that arguments that the properties being matrimonial home, and educational institute are improperly and totally misplaced and cannot be used as a ground to deny a chargees from exercising its chargee power of sale.

14. Statutory Notices

It is not in dispute that on the 27th August 2014 the chargor was served with the **statutory Notice under Section 90(1) of the Land Act** giving him 3 months notice to pay or risk the properties being put up for sale. Prior to that several demand notices were issued on the 11th December 2014, 11th July 2014 and 18th August 2014. No payment was made. The following other notices were issued and served:

- a) The statutory notice dated 27th August 2014 was served upon the applicant personally and again by prepaid post and a certificate of posting attached. This notice did not elicit payments, and Saddabri auctioneers were then instructed to commence the process of selling the properties by public auction.
- b) On the 28th February 2015, a 45 days Redemption notice under the **Auctioneers Rules 1997** served upon the applicant personally who appended his signature on the copy on the same day.
- c) On the same day, 28th February 2015, the Auctioneers also served upon the Applicant, Davis Njehia, a notification of Sale pursuant to Rule 15 of the Auctioneers Rules 1997 and stated thereon that the charged properties would be sold in a public Auction on the 2nd April 2015, and the amount then outstanding as KShs.93,045,363/95. The notification of sale notice was also sent by Registered Post and a certificate of posting confirms the same.
- d) Under **Section 96(2) Land Act 2012**, a further not less than 40 days notice is envisaged, that ought to be served upon the chargor before the chargee can proceed to sell the property. It reads

Section 96(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 sale of the charged land until at least forty days have lapsed form the date of the service of the notice to sell.”

15. I have perused all the notices issued and served. This notice under **Section 96(2)** was not served. Notices specified under the Land Act are mandatory and are made to protect the equity of redemption in the **New Land Law, 2012** and accord the chargor an opportunity to redeem the services.

On the 18th march 2015, the auctioneers advertised the properties for sale in a public auction on the 2nd April 2014, exactly 14 days after the advertisement in the Daily nation Newspaper.

16. Timeliness in the **Land Act 2012** are mandatory.

The 45 days Redemption notice served on the 28th February 2015 would have lapsed on the 13th April 2015. Before the said expiry, and on the same day the redemption notice was issued a **Notification of Sale Notice** under the **Auctioneers Rules 1997** was also issued. It gave the date of sale as 2nd April 2015, before the expiry of the redemption period. From my understanding of the notices and the Land Laws, no valid actions can take place before expiry of the timelines given under the rules.

The properties and as stated in the Notification of sale would have been sold on the 2nd April 2015 before the Redemption period of 45 days had expired. My calculations show me that the redemption period would have lapsed on the 13th April 2015 after the sale of the properties further and as I stated earlier, a further notice of 40 days ought to have been served upon the chargor after the Redemption notice under **Section 96(2) of the Land Act** – as it envisages a situation where the chargee is barred from entering into a contract of Sale of the properties until at least 40 days have lapsed after service. Even if this notice under **Section 96(2)** was served and which was not, the sale of the properties on the 2nd April 2015 would have been a nullity as the Redemption period ought to have expired before the sale could take place. It is

a mandatory provision completely separate from the notice under Section 96(2).

See **HCCC No 135 of 2013 – David Ngugi Ngaari -vs- KCB 92015) KLR.**

17. Having carefully considered the chronology of all the statutory notices served upon the Applicants under the **Land Act 2012** and the **Auctioneers Rules 1997**, it is my finding that the Notification of Sale notice under the Auctioneers rules served on the 28th February 2015 together with the Advertisement for sale were both premature as the 45 days Redemption notice had not lapsed, rendering the said notices invalid. It is my further finding that the notice of not less than 40 days, that in my view ought to have been served under **Section 96(2) of the Land Act, 2012** upon the chargor after the notification of sale was not served. On the above basis, it is my finding that the chargees statutory power of sale cannot be exercised, and that the Advertisement in the dailies for the sale of the said properties before the Redemption period lapsed was likewise invalid and of no consequence.

18. **Remedy of Injunction**

The application hereof is for injunction. Principles upon which an order of injunction may be granted are spelt out in the Case **Giella -vs- Cassman Brown Ltd (1973) EA 358** that;

1. That the applicant must satisfy the court that he has a *prima facie* case with a probability of success.
2. That the applicant will otherwise suffer irreparable injury which cannot be compensated in damages.
3. If in doubt, the court will determine the application on a balance of convenience.

In the case **Albert Marco Cordetro -vs- Cyperr Enterprises Ltd HCCC No. 2340 of 1996**, the court held that an injunction may not issue if it is proved to the satisfaction of the court that the applicant is undeserving of such equitable relief.

19. In the case **Mrao -vs First American Bank Ltd and Others (2003) KLR 125** a *prima facie* case is described as a case in which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposing party as to call for an explanation or rebuttal from the latter.

The facts and explanations of this case by the applicants do not in my view establish a *prima facie* case.

The loan is not disputed, the charges have been held to have been validly executed and spousal consent was expressly granted. The applicants have not demonstrated that they are willing to pay. No proposals of payment were given since the disbursement of the loan proceeds.

Of the two parties, it is my view that the respondent whose debt of over Kshs.100,0000,000/= stands unpaid by the respondent would suffer irreparable loss should realization of the securities be delayed as the securities may at the end not be able to fetch the loan amount as the same continues to increase due to interest.

20. The applicants on the other hand would not suffer irreparable loss as the respondent is a reasonably stable bank that would ordinarily have no difficulty in repaying whatever damages that the applicants may suffer by denial of the injunctive orders sought.

Taking all the circumstances of this case the court further finds that the balance of convenience tilts in favour of the Respondent save for the issues raised as to the validity of the statutory notices, that the court has held to have been prematurely served rendering the exercise of the chargees statutory power of sale unexercisable.

The court has stated above that it is not disputed that the Applicants have not paid the loan in the tune of more than KShs.100,000,000/=. In the circumstances and taking into account all the rival interests of the parties, I proceed to issue the following **ORDERS**:

- I. The Respondent shall through its agents proceed to serve upon the Applicants afresh:
 - (a) A 45 days Redemption notice under the Auctioneers Rules 1997 and further notice to sale the charged properties under **Section 96(2)** of the **Land Act, 2012**.
 - (b) The Notification of Sale of the charged properties under the Auctioneers Rules 1997, and thereafter, the sale shall abide by the relevant provisions of the Auctioneers Act and rules.
 - (c) In the meantime, a conditional temporary injunction restraining the Respondent from selling the charged properties by public auction or in any other manner is hereby granted pending fulfilment by the Respondent of the conditions set out in (a) and (b) above.
 - (d) Upon fulfilment of the conditions above stated, the Respondent shall be at liberty to exercise its statutory power of sale against the applicants.
2. The application dated 26th March 2015 having succeeded in part, each party shall bear its own costs.

Orders accordingly.

Dated, signed and delivered in open court this 17th day of September 2015

JANET MULWA

JUDGE

In the presence of:

No appearance - for Applicants

Kaburi Kamonjo Advocates - for Respondents

Court clerk – Lina.