



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
(MILIMANI LAW COURTS)
COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 170 OF 2015

JONATHAN KITHEKA MUVINGA.....1ST PLAINTIFF
SOLOMON MUVUNGA.....2ND PLAINTIFF

VERSUS

YAWZEKANA SACCO LIMITED.....1ST DEFENDANT
INGRID MUNRO.....2ND DEFENDANT
JAMII BORA BANK LIMITED.....3RD DEFENDANT
KIBE KARIITHI t/a ICON AUCTIONEERS.....4TH DEFENDANT

RULING

1. Before this Court for consideration is the Notice of Motion brought by the Plaintiff dated 16th December, 2014. The same is brought under **Order 40 Rule 1 (a) and 2 (1) of the Civil Procedure Rules 2010**.
2. The Application seeks an order for temporary injunction pending the hearing and determination of this suit barring the Defendants, its agents, employees, proxies, servants or any one acting on their behalf from selling, disposing, advertising for sale, offering for sale, transferring or in any other way interfering with the 1st Plaintiff's land parcels number Mwingi/Mwingi/144 and Mwingi/Mwingi/66 until the hearing and determination of this suit. The same was based on the grounds that the 3rd and 4th Defendants had advertised for sale the plaintiff's properties. The sale was set for 11th April, 2004 by public auction. It was the contention of the Plaintiff that the sale was illegal and in breach of Section 90 and 96 of the land Act.
3. The application was supported by the affidavit of Jonathan K. Muvunga sworn on 27th March, 2015. The deponent stated that he was the owner of Mwingi/Mwingi/144 and Mwingi/Mwingi/66 (hereinafter the properties). That sometime in 2007, he charged Mwingi/Mwingi/144 to City Finance Bank for a sum of Kshs. 2,500,000/=. That further he charged the property known as Mwingi/Mwingi/66 in favour of the 3rd Defendant as security for monies advanced to the 2nd Plaintiff. It was contended that the Plaintiffs regularly serviced their loan with the respective financial institutions. Sometime in March 2010, the Plaintiffs were approached by the 2nd

Defendant who was the managing director of the 3rd Defendant. She claimed to be the owner and Chief Executive Officer of the 1st Defendant.

4. According to the Plaintiffs, the 2nd Defendant intimated that the 3rd Defendant was taking over the assets and liabilities of City Finance Bank Limited. She also informed them that all loans that were granted by City Finance Bank, would now be repaid to the 3rd defendant. The defendants heeded these instructions and hence started paying their outstanding debts to the 3rd Defendant. However, in July 2012, it was the assertion of the Plaintiff's that the loans were taken over by the 1st Defendant, on the advice of the 2nd Defendant. According to the deponent, they had no reason to doubt the loan take over as the 2nd Defendant had in her possession the title deeds to the subject properties. The Plaintiffs stated that they executed loan takeover forms at the 3rd Defendant's offices situated in Mwingi/Mwingi/144. Consequently, the loan repayments were made to the 1st Defendant as per the new arrangement. By a letter dated 22nd July, 2013, the 1st Defendant informed the Plaintiffs that it had taken over their loans and the same had been consolidated.
5. The plaintiff also pointed out that the 3rd Defendant's offices were situated in Mwingi/Mwingi/144 and as part of the financial arrangement, the 3rd Defendant would offset the rental amount against the Plaintiffs' loan.
6. However, it was averred that after the loan take over, the 3rd Defendant started paying rent directly to the 1st Plaintiff. That on 12th August, 2014, the 1st Plaintiff received notifications of sale of the subject properties from the 4th Defendant as instructed by the 3rd Defendant. That the same was due to a loan default of Kshs. 8921332/=. However, the intended sale did not take place as the said notices were allegedly recalled. However on 21st March, 2015, the Plaintiff contended that the 4th defendant proceeded to advertise for sale the subject properties to recover the loan arrears as instructed by the 1st, 2nd and 3rd Defendants. It was therefore the assertion of the defendant that the intended sale was illegal and against the provisions of the Land Act. That further the plots in question are family land which loss cannot be compensated by way of damages.
7. The Defendants filed grounds of opposition dated 22nd July in response to the application. The defendants contended that the application was premature and in bad faith as the parties were still negotiating with a view of settling the matter. That the prayers sought had been overtaken by events as the Defendants stopped the sale of the property vide public auction. It was also the contention of the Defendants that the application herein lacked merit as the Plaintiff's had failed to meet the threshold for the grant of an injunction and the same should therefore be dismissed.
8. The application was dispensed by way of written submissions. The Plaintiffs filed their submissions on 1st October, 2015. It was submitted that in advertising the properties in questions for sale, the 3rd Defendant did not issue proper notification sale to the Plaintiffs and in the foregoing, the intended sale was illegal.
9. The Plaintiffs were also of the opinion that the notice of sale issued by the 4th Defendant was equally as defective and illegal, since it gave a period of 45 days which was against section 90(2) (b) of the Land Act. It was also the plaintiffs' argument that there were no legal charges created in favour of any of the Defendants. That the 1st Plaintiff only created charges over his properties in favour of City Finance Bank Limited and as such the 3rd Defendant's cannot purport to exercise their statutory power of sale. In the same vein, the Plaintiffs contended that the 3rd Defendant were claiming an exaggerated amount in arrears.
10. It was pointed out that the Kshs. 17,000,000/= claimed by the Defendant as arrears for the principle amount borrowed of Kshs. 3,500,000/= was in contravention to section 44 of the Banking Act as the maximum amount that could be demanded was Kshs. 7,000,000/=. The Plaintiff's further averred that the property known as Mwingi/Mwingi/66 was a matrimonial home and as such warrants special protection. In conclusion, the Plaintiffs averred that they had fulfilled the all the requirements for the grant of an injunction and urged the court to grant the orders sought.
11. In a rebuttal to the above, the defendants filed their submissions on 29th September, 2015. The long and short of these arguments was that the Plaintiffs' application lacked merit and was an

- abuse of the court process. The Defendant further submitted that the Plaintiffs had failed to make a case for the granting of an injunction. According to the Defendants the Plaintiffs admitted being indebted to the 1st Defendant as they did not present any proof that they were not in arrears. As such, it was the Defendants' conclusion that the Plaintiffs have come to the court with unclean hands and were therefore not entitled to an equitable remedy.
12. I have carefully considered the Affidavits on record, the rival submissions by the parties and the various cited authorities. Having done so, I take the following view on this matter.
 13. Looking at the pleadings on record and the submissions of parties, I think, the overall determination the court must make is; whether the proposed sale of the suit premises should or should not be stopped by way of an injunction. In doing so, the court will be guided by the test for granting a temporary injunction as laid down in the case of **GIELLA Vs. CASSMAN BROWN & Co Ltd [1973] EA 358**, and as it has developed over time. But for the court to reach there, I see several issues: One; whether the 3rd Defendant as the Chargee has initiated the process of exercising its power of sale of the charged properties in accordance to the law as laid out in the Land Act, of 2012.
 14. In order to determine, this the court has to look at prima facie whether there was a loan take over from the 3rd Defendant to the 1st Defendant. Secondly, the court will have to assess whether the amount demanded by the 3rd Defendant is exaggerated and against section 44 of the Banking Act. Thirdly, the court will assess whether or not there was a notice of sale served upon the Plaintiffs for sale of the charged properties. The court will also have to render itself on whether an injunction should issue because the charged properties are family and matrimonial properties.
 15. I also realize that there were issues that were raised regarding fraud and collusion by the defendants. I am however of the view that the same should not be handled at this stage, as the said dispositions can only be tested through cross examination and not through affidavit evidence.
 16. With regard to the first issue, I note the Plaintiffs claim that there was a process of loan take over from the 3rd Defendant to the 1st Defendant. According to the 1st Plaintiff, he had no reason to doubt the loan take over as the 2nd Defendant had in her procession the title deeds to the subject properties. The Plaintiffs stated that they executed loan takeover forms at the 3rd Defendant's offices situated in Mwingi/Mwingi/144. Consequently, the loan repayments were made to the 1st Defendant as per the new arrangement.
 17. I have looked at the documents adduced at this stage. Of note is that, no charge documents were filed in this court to determine the terms and conditions that the Plaintiffs borrowed monies from City Finance Bank which was thereafter the 3rd Defendant (Jamii Bora was the successor in title to City Finance Bank). As such, the court cannot draw any conclusions with regard to the amounts borrowed and secured, and what interest rates applied.
 18. The Certificates of search duly attached as JM2 on page 12 and 13 of the applicants' annexures are also not up to date. The same are dated 13th November, 2012 and are in respect of Mwingi/Mwingi/144 and show that a charge had been created over the said piece of land to secure a loan of Kshs. 2,500,000/= to City Finance Bank. The same are therefore of no use in helping the court determine the Plaintiff's assertion that there was a loan take over by the 1st Defendant. Though at this interlocutory stage the court is not enjoined to make any firm findings, I must state in passing that a loan take over process is not as simplistic as the Plaintiffs have made it out to be. The process would involve a consent from the chargee even possibly a letter of undertaking from the 1st Defendant undertaking to pay the amounts owing and accruing to the 3rd Defendant. A discharge of charge would also have to be necessary. No such documents have been produced at this stage to buttress the Claimants' position.
 19. The Letter of intent by the 1st Defendant dated 22nd July, 2013 indicating a loan take over cannot in itself serve to support the Plaintiffs' position. Therefore based on the material before the court, the Plaintiffs has not made out a case for an injunction by virtue of the fact that there was a loan take over by the 1st Defendant and that in the foregoing, the 3rd Defendant cannot exercise its statutory power of sale.
 20. On the issue of disputes on the sum owing and interest charged, I agree with the Defendants that it is trite law that a dispute as to the amount cannot be a basis upon which an injunction is granted. I adopt the finding of **Rudd, J** in **BHARMAL KANJI SHAH AND ANOTHER v SHAH DEPAR DEVJI [1965] EA 91** where he stated that:

“...the court should not grant an injunction restraining a mortgagee from exercising his statutory power of sale solely on the ground that there is a dispute as to the amount due under a mortgage...”

21. Further let me state that, although the Applicants alluded to section 44A of the Banking Act in that there was nothing much that was canvassed or material placed before the court on the section, and I think that issue does not warrant any decision by the court at this stage. Further, no Charge documents were adduced to help the court deduce as to what exactly the agreement was between the parties. That is the principle amount borrowed and the interest rates to be applied. Though the 1st Plaintiff stated in his submissions that copies of the Charge documents had not been supplied to him by City Finance Bank, there exists mechanisms in law to aid the Plaintiffs in obtaining such documents from the defendants or otherwise. In sum, unless there are other cogent grounds, disputes on the amounts owing or interest charged will not be the sole basis for grant of an injunction against a bank which is exercising the statutory power of sale of the charged property. The Plaintiff cannot therefore rely on this ground to obtain an injunction from this court.
22. I now turn to the issue of whether the properties in question are family land or constitute matrimonial property. I am guided by the case of **HCCC Number 82 of 2006 Maltex Commercial Supplies Limited & Another –vs- Euro Bank Limited (In Liquidation)** where the court held thus ;

“... Any property whether it is a matrimonial or spiritual house, which is offered as security for loan/overdraft is made on the understanding that the same stands the risk of being sold by the lender if default is made on the payment of the debt secured”.

23. Also in the case of **Maithya V. Housing Finance co. of Kenya & Another [2003] 1 EA 133 at 139** where **Nyamu, J.** stated as follows:

“Charged properties are intended to acquire or are supposed to have a commercial value otherwise lenders would not accept them as securities. The sentiment of ownership which has been greatly treasured in this country over the years has in many situations given way to commercial considerations. Before lending, many lenders banks and mortgage houses are increasingly insisting on valuations being done so as to establish forced sale values and market values of the properties to constitute the securities for the borrowings or credit facilities... loss of the properties by sale is clearly contemplated by the parties even before the security is formalized”.

24. Likewise in the case of **Jimmy Wafula Simiyu vs. Fidelity Bank Ltd [2014] eKLR** the court held as follows:

“On matrimonial home;

It is quite arrogant for the Applicant to think that conversion of a Mortgaged property into a matrimonial home will provide some form of indomitable shield from realization of a security given in a Mortgage under the law. The law on creating Mortgage on and sale of matrimonial home only aims at ensuring the consent of the spouse or spouses is sought before such property is Mortgaged, and relevant notices are served on the spouse who had given consent to the Mortgage before the exercise of Mortgagee’s statutory power of sale. The protection of a matrimonial home within the set-up of the law on mortgages and the Land Act is not, therefore, to be used as the spear by a defaulter on or as absolution of contractual obligations under a Mortgage. On this, see PART VII and specifically sections 79 and 96 of the Land Act. The argument by the Applicant that the suit property is a matrimonial home, has been used improperly and totally misplaced in this application and the less I say about it the better.”

25. The common thread running in the above cases is that the fact that the Mortgaged properties as either matrimonial or family property will only become relevant if the Applicant is alleging lack of consent of the spouse or family members in the creation of the Mortgage herein or notice on the spouse or spouses has not been accordingly issued as by law required. But where the right of

- Mortgagee's statutory power of sale has lawfully accrued, it will not be stopped or postponed because the Mortgaged property is a matrimonial or family property. In view of the foregoing, the fact that the charged properties are family land or matrimonial land cannot persuade this court to grant an interlocutory injunction.
26. I now turn to the issue of the notification of sale. From the record, the Applicant denied being duly served with a Statutory Notice of sale in accordance to Section 90 of the Land Act, 2012. I note that the 3rd Defendant did not contest this issue. I have also not seen any notice to sell the charged land which was issued to the Applicant under section 90 of the Land Act. What I see in the documents annexed to the application is a Notification of Sale by the auctioneers dated 21st June, 2014. In the absence of a notice clearly indicated to be a notice under section 90 of the Land Act, I am not able to legally pronounce that such notice was issued. It is trite law that where a notification of sale is not served on the borrower or is defective, the courts have held that sale of such charged land should stop.
27. However, I note that in its grounds of opposition, the Defendants averred the Plaintiff's application has been overtaken by events as the Defendants have stopped the sale of the property by public auction with a view of setting aside the matter. From the said sentiments, it is clear that the Defendants do not deny the Plaintiffs' position that they were not served with the statutory notice of sale or a demand letter with regard to any arrears due and accruing to the 3rd Defendant. In the absence of a proper notice under section 90 and 96(2) of the Land Act, the instructions to the auctioneer herein were not proper and all the subsequent processes issued upon those instructions are accordingly vitiated in law, and in particular, the Notification of Sale and the ensuing advertisements of the suit premises. See the case of **Palmy Company Limited v Consolidated Bank of Kenya Limited [2014] eKLR.**
28. Given the circumstances of this case, I therefore hold that the Plaintiffs have made a prima facie case with respect to the failure by the 3rd Defendant and the auctioneer to comply with the requirements of section 90 and 96(2) of the Land Act, and the Auctioneers Act, respectively.
29. Accordingly, the court hereby issues an injunction restraining the defendants either through themselves or by agents, servant, proxies, employees or any one acting on their behalf from selling, disposing, advertising for sale, transferring or in any other way interfering with the 1st Plaintiff's properties known as Mwingi/Mwingi/144 and Mwingi/Mwingi/66 until a proper and valid statutory notice is issued or until the hearing and determination of this suit whichever is earlier. The costs of the application in the suit.

Dated, signed and delivered in court at Nairobi this 30th day of October, 2015.

C.KARIUKI

JUDGE