



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CIVIL CASE NUMBER 94 OF 2015

JOSEPH MURUKAPLAINTIFF/APPLICANT

VERSUS

NATIONAL BANK OF KENYA LIMITEDDEFENDANT/RESPONDENT

RULING

1. The Applicant herein and plaintiff in the suit approached this court by his Notice of Motion brought under **Order 40 Rule 1 and Order 50** of the **Civil Procedure Rules** together with **Sections 103, 104 105 and 106** of the **Land Act 2012** – and dated 11th December 2014. He seeks a temporary order of injunction to restrain the bank by itself or through its agents or servants from selling his property, **LR NO.Nakuru Municipality Block 4/283** by public auction or private treaty or in any other manner pending the hearing and determination of the suit.
2. The grounds upon which the application was brought are that the Respondent bank had advertised the property for sale by public auction in contravention of the provisions of the **Land Act, 2012**, that the Notification of Sale issued by the auctioneers was bad in law, that the applicant had not been given an opportunity to exercise his rights to redeem the charged property, that he states was to be sold far below the market value.
3. The applicant in his sworn affidavit in support of the application admitted that the bank had advanced him a loan in the sum of Kshs.8,200,000/= in with an interest of 15% per month among other terms as contained in the charge document, but he defaulted in repayment due to what he calls hard economic times.
4. As at October 2014, he was in arrears in sum of Kshs.7,391,835/=. He admits that he was served with the statutory notices under **Section 90(1)** to pay the debt within 3 months, the 45 days Redemption notice under the **Auctioneers Rules 1997**, 40 days notice under **Section 96(2)** of the **Land Act 2012** and the Notification of sale under Rule 15 of the Auctioneers Rules. He further states that he could not pay the arrears and his proposals for instalment payment was rejected by the Bank leading to the advertisement for sale by public Auction of the property on the 16th December 2014.
5. The only issue raised in support of the application and that the court ought to address is that the bank intended to sell the property at a far less value of Shs.12 Million than the market value that he estimated at Kshs.40Million. He sought indulgence of the court that he ought to be given an opportunity to liquidate the loan within 6 months and urged the court to invoke provisions of **Section 103, 104, 105 and 106 of the Lands Act 2012** and allow the application, and extend time to allow him pay the arrears. Since filing of the application, ten months have lapsed. He has not filed the court how much he has since paid.

6. The application is opposed. The Respondents Remedial officer one Morris Tiema swore a detailed affidavit in response on the 15th January 2015. He confirmed that the applicant was granted a loan facility in the sum of Kshs.8,200,000/= which was secured by a charge over the applicants property mentioned above. He deposes that default in payment occurred barely five months after disbursement of the funds and that despite demand to pay the arrears, he did not. His proposals to pay by instalments was rejected as they did not meet approval of the bank. Thereafter, all necessary notices envisaged in the **Land Act 2012** and **Auctioneers Rules 1997** were duly served as admitted. He further states that when sale of the property became evident, the bank carried out a valuation on the property in compliance with **Land Act 2012** which was valued at Kshs.20,000,000/= open market value, and Kshs.15,000,000/= forced sale value. A valuation report dated 10th July 2014 is annexed to the affidavit. He urged that the application is therefore without merit and urges the court to dismiss it with costs.

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

Mr. Kimatta Advocate for the applicant in his oral submissions told the court that the applicant sought indulgence when he fell into arrear but his proposals of payment were rejected. On behalf of the applicant, he admitted that the applicant was in arrears and only sought time – an extension of six months to organise monthly payments.

8. It was his submission that under the **New Land Act 2012**, the court under its discretion can intervene and stop the chargee from exercising its statutory power of sale and allow other relief under **Section 103** – that reads:

(3)- An application for relief may be made at any time after service of a notice under **Section 90(1), 91(2), 94,(1) (5(1))** or during the exercise of the remedies contemplated in those sections.

Under **Section 104 of the Act**, the court has power to grant the reliefs applied for after considering, and being satisfied that the remedy applied is reasonable and necessary to prevent reduction in value of the charged land.

If it consists of agricultural land or commercial premises, and the remedy proposed is to appoint a receiver, or to take possession of, or lease the land or part thereof.

In this matter, the charged property is a commercial property. It was submitted that the bank ought to consider appointment of a receiver to manage the business as one of the remedies under the Land Act, in lieu of exercising its statutory power of sale. Replying on the case **Hc Misc Appl. No 19 of 2014 Nakuru steros services Co ltd -vs- National Bank of Kenya**, he submitted that alternative relief may be granted as was done in the case above.

Mr. Kimatta did not however urge the court on the sufficiency of the alternative reliefs under the **Land Act 2012** He stressed that all what the applicant sought was extension of time to enable the applicant organise and start payment, and proposed six months as aforementioned.

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

Mr. Malonza Advocate for the Respondent, referring to the very detailed replying affidavit by the Bank's Remedial officer submitted that it had accorded the applicant enough time to repay the loan but he has continued in default and demonstrated this by referring to the statutory notices served upon the applicant on 26th February 2013 and 12th August 2013 when the debt was then Ksh.7,825,950/=. He submitted that there was no effort to rectify the default. He urged that the applicant has not demonstrated the will to pay even if extension of time is granted.

10. On the valuation of the property by the Bank, it was submitted that valuation was done on the 10th

July 2014 which report gave a market value of Kshs.20 million and forced sale value of Kshs.15 million. He submitted that under the New Land Act, Section 97, the applicant ought to present a valuation report. None was presented hence statement that the property had a value of Kshs.40 Million was misleading and unsupported.

He further submitted that the respondent having complied with all necessary steps and issued all necessary notices that are not disputed, it should be allowed to exercise its statutory power of sale to avoid the security from devaluating and escalation of the debt due to interest which would cause the respondent prejudice as further stay would cause it irreparable loss, as the security may not realise the debt sum if more time is allowed.

11. The respondent further submitted that granting the order sought would be to re-open the charge and impose terms not contemplated in the contract. It was his submission that the Land Act allows reopening of a charge only if the property is matrimonial property, which it was not, and stated that the charged property was not special and sedimental attachment ought not be considered in line with the holding in the case **John Nduati Karuki T/A Johester Merchants -vs- National Bank Of Kenya (2006) KLR**. On balance of convenience, it was the Respondents statement that the applicant having been in default since 2012, and having defaulted since then (2012) and the loan continuing to increase by way of accrued interest, the balance of convenience tilts in its favour. On extension of time to repay as requested by applicant, it was the respondents response that such request ought to be denied as no willingness was demonstrate to pay since 2012. He urged the court to decline to grant the orders sought.

12. It was further submitted that on the 21st May 2015, the court granted the applicant an interim injunction and restrained the Respondent from selling his property and made an order that pending ruling on the application on the 29th October, 2015, the applicant shall be required to continue paying the outstanding loan-arrears, and compliance and schedule of payments would be shown to the court which would inform the court on the way forward. This was not done. He urged the court that the applicant has snot met the principles on the grant of an injunction as spelt in the case **Giella -vs- Cassman Brown (1973) EA 358**. He further presented a long list of other authorities for the courts consideration.

13. Findings and determination

The court finds that the circumstances of the matter as presented clear and straight forward. All what the applicant is seeking is to be allowed time extension of at least six months to organise payment of the arrears of the loan standing at Kshs.7,391,835/= as at October 2014.

The **Land Act 2012** vests in the court power to appoint a receiver over the business but the reliefs under **Sections 103-106 Land Act** were at no one time explored by the applicant before coming to court for it to consider. No documents at all were availed to the court to demonstrate that he had approached the bank for that accommodation. In his very scanty affidavit in support of the application, Paragraph 5, he stated that he was upto date with the loan repayments and no arrears were outstanding which contradicts his advocates submission that he was indeed in arrears and only pleads for time to be able to pay. I have looked at the Applicants Mortgage account with the Respondent being account **No.01135019670400**. As at 29th July 2015 there was a debt of Kshs.5,683,892/70 plus recovery costs of Kshs.704,490/40 making a total of Kshs.6,499,529/20. It further confirms that there has been no loan payments from 21st May 2015 to 28th July 2015.

14. By an order of this court on the 21st May 2015, the applicant was directed to continue paying the loan arrears and prepare a schedule of payments and file with the court.

I have not seen any schedule prepared by the applicant as directed and as such the court has not been informed as to whether there has been repayments or not. The Respondent however filed the statements of loan account and also a current account of the applicant with the bank showing status of both accounts as at 28th July 2015. I have stated that, based on the bank statements, no loan repayments were made. However it is shown that the applicant made some payments that went to reduce his liability on the

current account which had been over dawn prior to 21st May 2015.

As the court order was not complied with, and the plaintiff continues to be in breach of his obligation on the loan repayment, an order of injunction, being an equitable remedy ought not be available to him.

15. **Remedy of injunction**

The applicant has sought for a temporary order of injunction. The principles upon which such order may be granted are spelt out in the case **Giella -vs- Cassman Brown Ltd (1973) 358**, among others that:

1. The applicant must satisfy the court that he has *prima facie* case with a probability of success.
2. That the applicant will otherwise suffer irreparable injury and loss 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 Corderto -vs- Cypperr Enterprises Ltd HCCC No 2314 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 underserving of such equitable relief.

The **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 or 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.

16. In my considered view, the applicant has not established any *prima facie* case capable of succeeding. To the contrary, it is the Respondent whose rights of recovery of the loan amount have been infringed by the none payment of the loan amount advanced to the applicant. It is my finding also that the applicant would not suffer irreparable loss should the charged property be sold as such loss would be compensated in damages. The respondent is a reasonably stable bank that would have no difficulty in paying damages should that be occasioned by a denial of an order of temporary injunction.

17. On the matter of valuation of the charged property, I am satisfied that the valuation undertaken by the Respondent on the 10th July 2014 with a value of Kshs.20 Million and a forced sale value of Kshs.15 Million was reasonable. The applicant ought to have brought a valuation report to demonstrate that the property had a valuation of Kshs.40 Million as he stated. An allegation of fact ought to be proved. In any event, a valuation report is only a guideline. The chargee in exercise of its power of sale under the **Land Act, 2012**, is under an obligation to obtain the best price reasonably obtainable at the time of sale, but subject to a reserve price and that which must be above 25% of the market value.

Having stated as above, then it is my finding that the balance of convenience tilts in favour of the respondent. To that end, the applicant has not demonstrated that he is entitled to the remedy of temporary injunction as prayed.

18. The court has considered the authorities submitted by both parties.

In the case **Industrial Hardware Ltd -vs- Standard Chartered Bank (1999) KLR 25**, the court refused to restrain the chargee after the chargor admitted being in debt due to hard economic time, and that it is not the duty of a court to renegotiate terms of a contract in a manner different from that contracted under the charge.

19. In **John Nduati Kariuki t/a Johester Merchants -vs- National Bank of Kenya Ltd (2006) KLR**, conditions upon which a court may restrain a mortgagee from exercising its statutory power of sale are if the mortgagor pays the amount claimed in court, that is the amount the mortgagee claim to be due, unless

on the terms of the mortgage the claim is excessive.

The court has noted that, and which was emphasized by the applicant through his able advocate Mr. Kimatta, that he pleads for an extension of time to organise payments of the loan arrears. The applicant rejected the plea saying that since 2012, the applicant has defaulted and the loan amount continues to increase. The court was urged to extend a hand of Mercy while in exercise of its discretion to do justice to both parties and in particular consider provisions of **Section 106(3) Land Act, 2013** that read:

In considering whether to exercise the powers conferred on it by this section the court shall have regard to:

(g) any other factors that the court considers relevant. **Section 106 of the Act** as stated earlier deals with the exercise of power to re-open certain charges.

Section 106(2) states in re-opening the charge, the court may

(2) (a) direct that the charge shall have that effect subject to modifications that the court shall order.”

20. The court has considered the above provisions and the plea to extend a hand of mercy and allow the application. I have also noted that since the court granted the applicant an interim injunction and directed him to continue making payments pending this ruling, that no payments were made in the loan account save a sum of Kshs.268,060/- paid into the overdrawn current account with the Respondent. I have doubts in my mind as to whether a grant of a further six months as pleaded will cause the applicant to make substantial payments in to the loan account to the satisfaction of the chargee and the court.

That notwithstanding, and taking into account my above findings that the orders of injunction sought cannot be granted, I shall in exercise of my discretion and power conferred upon the court under the **Land Act 2012** and other enabling provisions of law, the court grants the following **ORDERS**.

1. That the applicant is hereby granted an extension of three(3) months time from the date of this ruling to make substantial deposits into his loan account with the Respondent towards payment of the loan arrears and in any event not less than 50% of the amount now outstanding as at the date of this Ruling.
2. That in the meantime the Respondent is restrained by an order of injunction from continuing with the process towards the exercise of its statutory power of sale over the charged property.
3. That there shall be a mention at the expiry of the three months and parties are directed to prepare a loan repayment schedule to be presented to the court for further orders.
4. Mention on the 8th February 2016.

Orders accordingly.

Dated, signed and delivered in open court this 29th day of October 2015

JANET MULWA

JUDGE