



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
AT MILIMANI
ELC NO. 886 OF 2012

PETER NJUGUNA NJENGA.....1ST PLAINTIFF
NJENGA KABUNYI2ND PLAINTIFF
MASHARIKI MULTI WORKS LTD.....3RD PLAINTIFF
=VERSUS=
EQUITY BANK LIMITED.....DEFENDANT

RULING.

The matter coming up for determination before me is a Notice of Motion dated 23rd November, 2012 brought by the Plaintiffs/Applicants under **Order L Rule 1, Order XL, Rule 1 & 2 and Sections 3 and 3A of the Civil Procedure Act** and all other enabling provisions of law seeking for these orders.

- a. *Spent*
- b. *Pending the hearing and determination of this application, an injunction do issue restraining the Defendant whether by itself, its servants or agents or advocates or auctioneers or any of them or otherwise be restrained by a temporary Order of injunction from doing the following acts or any of them, that is to say from interfering with the Plaintiffs' rights of possession, disposing of, advertising for sale selling by public auction or otherwise howsoever at any time or completing by conveyance or transfer of any sale concluded by auction or private treaty, leasing, letting or otherwise howsoever interfering with the Plaintiffs' ownership of title to and/or interest in all those parcels of Land known as LR. Nos. Limuru/ Kamirithu/2240 and LR Nos. Limuru/Kamirithu/703 respectively.*
- c. *That cost of this application be borne by the Defendant.*

The application was premised upon the following grounds;

- i. *That the Defendant has never issued a statutory Notice on the Plaintiffs or at all to realize the security over LR.Nos. Limuru/ Kamirithu/2240 and LR Nos. Limuru/Kamirithu/703*

respectively (the suit property).

- ii. That vide letters dated 22nd October, 2012, the Defendant purported to issue notification of sale through **Antique Auctioneers** to the 1st and 2nd Plaintiffs of its intention to sell the suit property herein and the said notices were to expire on 5th December, 2012.
- iii. That the 1st and 2nd Plaintiffs was apprehensive that the Defendant may sell the suit property as already threatened.
- iv. That the 2nd and 3rd Plaintiffs have neither executed nor authorized the execution of any valid and/or legally enforceable mortgages in favour of the Defendant nor did the board of the 3rd plaintiff have any power to mortgage the 2nd Plaintiff's property to guarantee third party debt.
- v. That the mortgages were not executed in accordance with the 3rd plaintiff's memorandum and articles of association. The monies for which the property was mortgaged was not for the purpose of the plaintiffs business. The mortgages are null and void as they have not been executed by the 2nd plaintiff and witnesses by two witnesses.
- vi. That the 1st and 2nd Plaintiffs assets are in real and imminent danger of being dissipated and wasted away completely due to the unlawful actions of the Defendant.
- vii. That the 1st and 2nd Plaintiffs therefore stand to suffer irreparable loss and injury unless the orders prayed for herein are granted.
- viii. That the plaintiffs have a prima facie case with a very high probability of success against the Defendant herein as detailed in the *Plaint*.

The application was further supported by the annexed affidavits of **Peter Njuguna Njenga** and **Njenga Kabunyi** and the annexures therein.

Peter Njuguna Njenga the 1st Plaintiff herein, swore his Replying Affidavit and averred that on or around June, 2011, the 3rd Plaintiff the (borrower) negotiated for a loan facility from the Defendant (the bank) and the same was accorded. He further averred that it was a term of loan facility that the 1st Plaintiff would cause to be created a charge over his personal property as security for repayment and that the property was **Limuru/Kimirithu/2240**(the 1stproperty).

Further that the Defendant subsequently purported to create a charge over his property aforesaid. The deponent denied appearing before any advocate or any competent witness for purposes of executing the charge. The 1st Applicant further stated that the Board of borrower never approved the borrowing of the said loan and neither did the borrower approve any liability on behalf of third party in respect of the same loan. He further averred that such borrowing was against clause 18 of the Articles of Association of the borrower company as evidenced by **PNN1**.

He also stated that his wife, *Esther Wanjiru Karanja*, did not give her consent prior to creation of the alleged charge. That he has diligently sought from the Defendant (bank), copies of documents for his advocate's perusal and advice but to no avail. He further alleged that he was surprised on 22nd October, 2012 when the Defendant through an auctioneer known as **Antique Auctions** served him with notification of sale of his property which notice was to expire on 5th December 2012, as per annexure **PNN2**.

Therefore, the 1st applicant denied ever being served with the mandatory three months statutory notice. He also averred that his account was loaded with unlawful interest and penalties and that the Defendant bank is clogging his right to redeem his property by failing to comply with the law. Though the Defendant intends to proceed with the unlawful sale of the suit property, the charge is void and the

requisite mandatory notice was not issued. He further averred that the subject property is his matrimonial home and he is bound to be rendered homeless together with his family if the orders sought are not granted

On his part, **Njenga Kabunyi**, the 2nd Plaintiff averred that he is the registered proprietor of **Limuru/Kamirithu/703** (the second property). He denied that he was privy to any undertakings/arrangements between the 1st, 3rd Plaintiffs and the Defendant herein with regard to any monies advanced by the Defendant as a lender. He further stated that on or around 27th October, 2012, he received a letter from **Antique Auctions Agencies**, dated 22/10/2012 which was a notice of intention to sell his property known as **Limuru/Kamirithu/703** as evidenced by **NK1**. That in the said notice, the Defendant (bank) purported to realize its purported security for monies that he never applied for at all. He denied ever offering any property as security to the Defendant and neither has he ever formally received any notice from the bank whatsoever seeking repayment of any monies or at all other than the auctioneer's aforesaid letter. The 2nd Plaintiff further alleged that his attempt to obtain the relevant documents leading to the grant of the alleged loan facility, from the Defendant have been futile. He further refuted that he is a Director of the 3rd Plaintiff nor got any relationship with the said company.

The Defendant/Respondent opposed the instant application. One **Purity Kinyanjui**, the head of Debt Recovering unit of the Defendant, swore a Replying Affidavit and averred that the applicants' application is misconceived, bad in law and should be dismissed with costs to the Respondent. She contended that the applicants are indebted to the Respondent in the sum of **Kshs.12,836,219/=** which sum the applicants have made no attempts to liquidate as evidenced by annexure **PK1**.

Further, that the allegations that the Defendant wishes to realize the security over **LR No. Limuru/ Kamirithu/ 2240** and **Limuru/Kamirithu/703**, without having issued the mandatory notices is meant to misrepresent the actual position and to frustrate the Defendant's right to realize the said security and as such subvert the course of justice. She further averred that this application is bad in law, frivolous and devoid of merit. She further contended that the 1st and 2nd Plaintiffs are both the registered owners of **LRNo. Limuru/Kamirithu/2240** and **Limuru/Kamirithu/703**, respectively as per annexure **PK2**.

The deponent further averred that on 12th February, 2010, the 3rd Plaintiff through its Directors, **Peter N Njenga**, the 1st Plaintiff and **Esther W Karanja**, applied to the Defendant for a business loan facility in the sum of **Kshs. 7,000,000/=** pursuant to a resolution of the Board of the 3rd Plaintiff as evidenced by annexure **PK4**. Further, that by a **Letter of Offer**, dated 16th April, 2010, the Defendant approved the said application for the loan to the tune of **Kshs. 6,970.000.00/=** together with the terms and conditions of the said loan as per annexure **PK5**.

She further deposed that it was the terms of the **Letter of Offer** that the loan facility was to be secured by the first legal charge over all that parcel of Land known as **Limuru/Kamirithu/2240**, registered in the name of the 1st Plaintiff who is the Director of the 3rd Plaintiff and that the original Title Deed over that property was to be held by the Defendant until full payment of the loan facility extended to the 3rd plaintiff. The same was signed by the Directors of the 3rd Plaintiff thus constituting a legally binding contract as per annexure **PK 6**. She also deposed that the 3rd Plaintiff later applied for another loan facility from the Defendant to the tune of **Kshs. 10,000.00/=** and the Defendant granted the said loan through a **Letter of Offer**, dated 6th July 2010 as per annexure **PK 7**.

The conditions therein were that the said facility was to be secured by way of personal guarantee by the 1st Plaintiff supported by a legal charge over **LR No. Limuru/Kamirith/2240** for a sum of **Kshs.8,251.000/=** and a further personal guarantee by **Njenga Kabunyi**, the 2nd Plaintiff supported by a 1st legal charge over **LR No. Limuru/Kamirithu /703 for Ksh.3, 850,000/=** in favour of the Defendant. The Defendant deposed that a further legal charge was created over property **LR No. Limuru/Kamirithu /2240** as per annexure **PK 8**. Further, a first legal charge was created over the 2nd Plaintiff's parcel of land known as **LR No. Limuru/Kamirithu /703** and the same was executed by the 2nd Plaintiff as per

annexture **PK9**.

She further deposed that subsequently, the plaintiffs defaulted in the repayment of the said loan and therefore breached the said contracts.

The Defendant sent letters to the 1st and 3rd plaintiff with the notification of the said default to the 2nd Plaintiff as per annexture **PK 10**. She further averred that no action was taken by the Plaintiffs and the Defendant issued a **formal Demand**, to the Directors of 3rd Plaintiff for immediate repayment of the outstanding loan of **Kshs.12,407,809** as per annexture **PK 11**. However, the plaintiffs did not pay the said sum due and the Defendant invoked its right of **Statutory Power of Sale** of the charged properties and as such issued the statutory notices dated 10th July, 2012 to the plaintiffs as evidenced by annexture **PK 12**.

Further, the Defendant carried valuation on the two parcels of land and instructed **Antique Auctions Agencies** to go ahead and carry out a Public Auction of the said properties on behalf of the Defendant to wit they advised the 1st and 2nd Plaintiffs vide notifications dated 22nd October, 2012 as per annexture **PK 14**.

She contended that for the 1st Plaintiff to say that the said parcel of land should not be auctioned on the ground that it is his matrimonial home is without merit as an advocate explained to him the effect of securing advances to the 3rd Plaintiff and the right of the Defendant in the event of a default which the 1st plaintiff understood and agreed to and voluntarily executed the charge instrument. That the Plaintiffs application is not justified and is aimed at frustrating the Defendant's right of realizing the monies owed to it by the 3rd Plaintiff. It was contended that the instant application is an abuse of the court process and the same should not be allowed.

The parties herein consented to canvass this Notice of Motion by way of written submissions. I have carefully considered the said written submissions, the pleadings generally and the relevant law and I make the following findings. The present application is premised under **Order 40 Rule 1 & 2** which deals with temporary injunction.

[40 (1)Where in any suit it is proved by affidavit or otherwise—

- a. *that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.*

The Plaintiffs have alleged that the Defendant herein intends to sale by way of public auction **LR.No Limuru/Kamithiru/2240** and **703** respectively which parcels of Land belong to the 1st and 2nd Plaintiffs respectively. The Plaintiffs have alleged that the said sale is illegal as the alleged mortgages over the two parcels of land are null and void in law as they failed to comply with **Land Registration Act No. 2012**.

The Plaintiffs herein are basically seeking for injunctive relief. The plaintiffs therefore have a duty to satisfy the court that there exist conditions that would warrant this court to grant the said orders. These conditions are the threshold principles set out in the case of **Giella Vs Cass Brown & Co.Ltd (1973) EA 358**, and which were later re-emphasized in the case of **Kibutiri Vs Kenya Shell, Nairobi High Court, civil case No. 3398 of (1980) KLR 390**, where it was held that.

“The conditions for granting a temporary injunction in East Africa are well known and these are; first the 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”.(See also **EA**

Industries Vs Trufods (1972) EA 420.

Have the applicants herein fulfilled the above three conditions?.

In the grounds stated in support of the Notice of Motion, the applicants alleged that they did not execute nor authorize the execution of any valid and or legally enforceable mortgages in favour of the Defendant nor did the Board of the 3rd plaintiff have any power to mortgage the 2nd plaintiff's property to guarantee third party debt. However, I have considered the Replying Affidavit by one **Purity Kinyanjui**, the Head of debt Recovery Unit in the Defendant bank and the annexures **PK 6**, **PK 8** and **PK 9** which show that the 1st and 2nd Plaintiffs charged their respective parcels of land to the Defendant as security for loan facility. The 1st and 2nd plaintiffs deposited their Title Deeds with the Defendant bank as security for the money advanced to 3rd Plaintiff.

The applicants also averred that the mortgages were not executed in accordance with the 3rd Plaintiff's Memorandum and article of Association. That the Mortgages are null and void as they were not executed by the 2nd plaintiff. The clause referred to in the Memo and Article of Association is clause No. 18 which states :-

“ The Managing Director may with the approval of the Board to mortgage or charge its undertaking,property and uncalled capital.....”.

I have however, scrutinized annexure **PK 4** by the Respondent. The same is a Resolution of the Directors of the 3rd Plaintiff resolving that the company can borrow **7000,000/=** for business purpose. The said letter is dated 12/2/2010 and was signed by the two Directors of the 3rd plaintiff, 1st Plaintiff included; Plaintiffs cannot turn around and allege that the said borrowing was not authorized by the Board of the 3rd Plaintiff.

Though the 2nd Plaintiff alleged that he did not execute the said mortgages and that the same is null and void as they were not executed by two witnesses, I have considered annexure **PK 9**, and it is very clear that 2nd Plaintiff executed the said charge on 28/7/2011 in the presence of an advocate. The 2nd plaintiff cannot claim that there is no valid legal charge created over his **property Limuru/Kamirithu/703**. From the three annexures mentioned above, it is evident that the 1st and 2nd Plaintiffs entered into Legal Charge with the Defendant herein. The said charges were executed in the year 2010 and 2011. The Defendant therefore could exercise their statutory power of sale as provided by **Section 74 of the Registered land Act Cap 300 (Now repealed)**.

The said Section provides as follows:-

“ If default is made in payment of the principal sum or of any interest or on any other periodical payment or of any part thereof, or in the performance or observance of any agreement expressed or implied in any charge and continues for one month, the chargee may serve on the chargor notice in writing to pay the money owing or to perform and observe the agreement as the case may be”.

The Respondent alleged that the plaintiffs defaulted in paying back the loan facility advanced to them. The Respondent attached the Bank Statements annexures **PK 1** to show that the 3rd plaintiff defaulted in payment. The 1st and 2nd Plaintiffs were therefore liable as they secured the loan advanced to 3rd Plaintiff by executing legal charges in favour of the Defendant. The 1st and 2nd Plaintiffs deposited their Title Deeds as security. Since the Plaintiffs defaulted in payment of the Principal sum and interest accrued, the Defendant had recourse in **Section 74** of the **Registered Land Act** (now repealed) under which the charge was administered. **Section 74(2)** of the above Act provides as follows:-

“ If the chargor does not comply within three months of the date of service, then the Notice served on him under subsection 1 , the chargee may:-

a. **Appoint a receiver of the income of the charged property.”**

b. **Sell the charged property**

The Plaintiffs in their application alleged that the Defendant never issued them with a **Statutory Notice** or at all to realize the security over **LR No.Limuru/Kamirithu/2240 and 703**. The Defendant averred that it indeed sent notices to the plaintiffs. The above position was buttressed by annexure **PK 10, PK 11, PK 12** and **PK 13**. I have considered annexures **PK 12** and **PK 13**. The two are letters addressed to the 1st and 2nd plaintiffs. The said annexures are **notices to exercise Statutory Power of Sale of LR No.Limuru/ Kamirithu/ 2240 and 703** which are registered in the names of the 1st and 2nd plaintiffs respectively. The plaintiffs therefore cannot be heard to claim that the Defendant did not issue them with the statutory three months notices as envisaged by **Section 74 of Cap 300** (now appealed).

Having considered the pleadings and the annexures therein, the court finds that the Defendant has complied with the provisions of the law.

The 1st Plaintiff also alleged that the subject ‘**Mortgages**’ are illegal as his spousal consent was not obtained as provided by Land Act. However, the suit property was charged under the **Registered Land Act Cap 300** (now repealed) whereby spousal consent was not one of the requirements. In any event, the 1st Plaintiff wife, one **Esther W Njenga** who is a Director of 3rd Plaintiff was aware of the existence of the loan facility. She had even signed the **letter of offer**.

It is evident that the Plaintiffs herein obtained loan facility from the Defendant and used the suit properties as securities to secure the loan. The Plaintiffs have defaulted and now the Defendant has resorted to exercise its right under **Section 74 of Cap 300**. The Defendant has sought redress by exercising its **Statutory Power of Sale**.

The plaintiffs have come to court seeking an injunction to restrain the Defendant from exercising that right.

The Plaintiffs have alleged that the Defendant has loaded their account with illegal charges and has denied them access to bank Statements. However, it is evident that the Plaintiffs have defaulted in loan repayment. The courts have variously held that :-

“An injunction restraining a mortgagee from exercising his power of sale can be granted very rarely if the dispute is only as to the amount of interest”(See **Shah Vs Shah (1965) EA 91**.

The plaintiffs/Applicants herein are in default and they have not demonstrated that they are willing to repay the loan. The applicants have denied ever entering into any legal charge but the documentary evidence shows contrary. The applicants therefore do not have a **prima facie case** with high probability of success. I will rely on the case of **Sports Cars Ltd Vs Trust Bank Ltd, Case No 754 of 1999**, where the court held:-

“The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute or because the mortgagor has begun redemption action, or because the mortgagor objects to the manner in which the sale is being arranged. He will be restrained, however, if the Mortgagor pays the amount claimed into court, that is the amount which the mortgagee claims to be due, unless on terms of the mortgage, the claim is excessive”.

The applicants herein have not shown that they have paid the amount claimed into court or that on the terms of the legal charge executed by the parties, the claim is excessive.

Again in the case of **Fina Bank Ltd Vs Spares and Industries Ltd, Civil Appeal No. 51 of 2000, 1EA 52**, the court held that:-

“ where a party has a statutory right of action, the court will not usually prevent that right being exercised except that the court may interfere if there was no basis on which the right could be exercised or it was being exercised oppressively”. (See Godfrey Nyaga Vs. Housing Finance Company of Kenya, Civil Appeal No. 134 of 1987).

The Defendant herein has a right to **statutory power of sale** stipulated under *Section 74 of the Registered Land Act* (now repealed). The Defendant issued the plaintiffs with three months statutory **notices**, on 10/7/ 2012 but the Plaintiffs did not pay the amount. The applicants were also served with **Notices** to redeem their properties. Instead of paying up the amount owing or trying to redeem their properties, they filed the instant suit. The applicants have failed to demonstrate that they have a prima – facie case with chances of success.

The plaintiffs have to establish that they will suffer irreparable loss which cannot be compensated by an award of damages. The 1st plaintiff had averred that the subject suit land is his matrimonial property and he stands to suffer if the same is to be sold as advertised by the Defendant. However, it is very clear the 1st Plaintiff executed the legal charge and understood that in the event of default, the Defendant had a right to sell the property. As was held by **Waweru J**, in the case ***of Nahashon K. Mbatia Vs Housing Finance Company ltd, (2006) eKLR.***

“ In any event, having charged the property , the plaintiff converted it to commercial commodity with monetary value that can be easily ascertained. Its loss can always be made good by an appropriate award of monetary compensation”.

In the instant case, there is no indication that the Defendant cannot be able to compensate the plaintiffs. The plaintiffs will therefore not suffer irreparable loss which cannot be compensated by an award of damages.

Since plaintiffs are indebted to the Defendant, and they have not shown or made any effort to repay the loan advanced and thus redeem their properties, thus court finds that the balance of convenience tilts in favour of the Defendant.

Having carefully considered the Notice of Motion dated 23rd November, 2012, the Court finds the same is not merited. In the light of the above, I dismiss the said Notice of Motion application with costs to the Defendant.

It is so ordered.

Dated, signed and delivered this 24th of March, 2014

L. GACHERU

JUDGE

In the Presence of

.....for the 1st Plaintiff

.....for the 2nd Plaintiff

.....or the 3rd Plaintiff

.....for the Defendant

LukasCourt Clerk

L.GACHERU

JUDGE