



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL SUIT NO. 76 OF 2013**

**ACT FAST SECURITY LIMITED .....PLAINTIFF**

**-V E R S U S-**

**EQUITY BANK LIMITED .....DEFENDANT**

**RULING**

1.Plaintiff obtained a loan from the Defendant for the sum of Kshs. 9 million. The security Plaintiff offered for that loan was a legal charge over property, **KWALE/DIANI BEACH BLOCK/1000**. It is not denied that the Plaintiff defaulted in the repayment of that loan. Defendant after giving the Plaintiff notice of its intention to sell the charged property instructed an auctioneer to sell the property. Those instructions provoked both this suit and an interlocutory application for injunction.

2.By its plaint Plaintiff seeks an order of injunction to restrain Defendant from selling the charged property on the basis that such sale is illegal, null and void because Defendant had failed to issue Plaintiff with requisite statutory notices. Plaintiff also pleaded that the intended sale was intended to defeat Plaintiff's right of redemption of the property.

**Notice of Motion**

3. Plaintiff by Notice of Motion dated 19<sup>th</sup> June 2013 seeks interlocutory injunction pending the hearing and determination of the suit to restrain Defendant from selling the charged property.

4. Plaintiff in its supporting affidavit sworn on 19<sup>th</sup> June 2013 by its Director Mary Syevutha Peter, reiterated the content of the plaint. Deponent stated in her affidavit that she approached the Defendant's Managers in Mombasa and Nairobi and agreed that since the property had a higher value than the outstanding loan that both the Plaintiff and Defendant do look for buyers of the same to enable Plaintiff redeem the loan. That that process was delayed by the General Elections but after those Elections deponent contacted Defendant's Managers based in Mombasa and informed them she was still looking for buyers.

5. That in May 2013 Deponent found a Notice by Trevo Auctioneers, at her business premises in Malindi which notice indicated the property would be sold on 20<sup>th</sup> June 2013. Deponent stated that she contacted Defendant's Manager in Mombasa who told her to ignore that Notice and the Manager even supplied her with the copy of their valuation of the charged property. She was later to learn from her friends that the

charged property had been advertised in the newspaper for sale on 20<sup>th</sup> June 2013. Deponent was of the view that such sale is illegal because Plaintiff had not been served with Statutory Notices.

6. Defendant by replying affidavit dated 15<sup>th</sup> July 2013 of the Defendant's Manager in Mombasa, James Mbuthia, responded to the Plaintiff depositions thus-

**6. THAT the Plaintiff has defaulted in repayment of the said loan and the outstanding balance now stands at Kshs. 10,738,275/- as evidenced by a copy of the loan statement in respect of mortgage account No. 0250599685559 annexed hereto and marked 'JM-1.'**

**7. THAT I am aware that the Plaintiff was served with a demand letter dated 7<sup>th</sup> November, 2012 for a sum of Kshs. 9,618,098.70 as at 7<sup>th</sup> November, 2012. The said demand letter was posted to the Plaintiff on 13<sup>th</sup> November, 2012 by way of registered mail as Parcel No. 88. Copies of the demand letter and the relevant list of registered parcels are annexed hereto and marked 'JM-2' and 'JM-3' respectively.**

**8. THAT further the Plaintiff was served with a notice dated 26<sup>th</sup> November, 2012 concerning the Defendant's intention to exercise its statutory power of sale, unless of course the Plaintiff settled the sum of Kshs. 9,737,786.10. A copy of the Statutory Notice dated 26.11.2012 is annexed hereto and marked 'JM-4'.**

**9. THAT I am aware that the said Statutory Notice dated 26<sup>th</sup> November, 2012 was posted to the Plaintiff on 30<sup>th</sup> November, 2012 by way of registered post through the postal address contained in the Letter of Offer as evidenced by Parcel No. 180 and 181 on the annexed copy of list of registered parcels marked 'JM-5'**

**10. THAT the Plaintiff was thus properly served with the requisite statutory notice and hence she is guilty of deliberate concealment and non disclosure of material facts.**

**11. THAT I am further aware that under the instructions of the Defendant, M/s Trevor Auctioneers proceeded to issue the requisite Auctioneers Notice dated 13<sup>th</sup> March, 2013 to the Defendant as evidenced by a copy of the notice annexed hereto and marked 'JM-6'**

**12. THAT in reply to paragraph 6, 7 and 8, it is true that upon receiving the demand letter and statutory notice, Mary Syevutha Peter did approach the bank in the month of December, 2012 and intimated that she intended to look for a buyer and sell the suit property in order to offset the outstanding loan balance.**

**13. THAT however, at no point did the Defendant suspend the repayment of the loan nor make any representations to the Plaintiff that it would look for a buyer on her behalf or at all.**

7. Plaintiff in a further affidavit dated 26<sup>th</sup> July 2013, and again sworn by its Director denied receiving bank statements from the Defendant and again denied receipt of Defendant's Statutory Notices of sale. Curiously Plaintiff denied receiving a copy of the valuation report from the Defendant. However, Plaintiff by its supporting affidavit to the Notice of Motion deponed that such a valuation was given to its Director by Defendant's Manager and even annexed that Valuation as an exhibit. Plaintiff on that score is not correct.

### **Plaintiff's Submissions**

8. It was submitted that the Plaintiff has satisfied the principles of granting an injunction as set out in **GIELLA –VS- CASSMAN BROWN & CO. LTD [1973]E.A. 358.** That the Plaintiff had established a

prima facie case with probability of success because the Defendant had failed to serve it with two months Statutory Notice of sale as required under Section 90 of The Land Act 2012 (**LAND ACT**); because Defendant had failed to give further 40 days Statutory Notice as provided under Section 96 of the Land Act; and because Defendant had violated Section 96(3)(b) of the Land Act in that it had failed to serve Statutory Notice on the Lessor, the Government of Kenya which had leased the charged property to Plaintiff for 99 years.

9. That in respect of the second principle of granting an injunction that the Plaintiff will suffer irreparable loss which loss cannot be compensated by an award of damages if an injunction is not granted because the charged property had been valued at Kshs. 22 million and Defendant was selling it at below that market value.

10. On third principle of granting an injunction Plaintiff submitted that the charged property would continue to appreciate in value and Defendant would be able to recover its loan.

### **Defendant's Submissions**

11. Defendant submitted Plaintiff had failed to establish a prima facie case with probability of success because Defendant had demonstrated that it had served Statutory Notice of sale, to both the Plaintiff and its Directors. Defendant cited the case **STEPHEN ODABIAH KARIUKI NJOROGE –Vs- EURO BANK LTD & 3 OTHERS HCCC NO. 5 OF 2001** as follows-

**“evidence ... shows that the notice required to be served upon the plaintiff was posted to him at the address given in the charge document. In my view that constitutes satisfactory evidence of good service in terms of Section 3(5) of the Interpretation and General Provisions Act and consequently the complaint by the plaintiff that the notice required to be served under S.74 of the Registered Land Act was not so served lacks substance.”**

12. Further since Plaintiff had admitted the debt Defendant submitted that an injunction cannot be issued as sought and relied on the case **MECHANICAL ENGINEERING PLANT LTD & OTHERS –Vs- STANDARD CHARTERED BANK LTD HCCC NO. 92 OF 2007** as follows-

**“... that when part of the amount claimed is admitted or proved to be due, a chargor cannot be restrained by an injunction.”**

Defendant further cited case **DANIEL KAMAU –Vs- HOUSING FINANCE COMPANY OF KENYA LTD (2006)eKLR**, in which the learned Judge quoted the finding of the Court of Appeal in **FRANCIS J. K. ICHATHA –Vs- HOUSING FINANCE COMPANY OF KENYA, CIVIL APPLICATION NO. 108 OF 2005-**

**“A Plaintiff should not be granted an injunction if he does not have clean hands, and no court of equity will aid a man to derive advantage from his own wrong doing, for the Plaintiff seeks this court to protect him from the consequences of his own default. He who seeks equity must do equity. The plaintiff should not be protected or given advantage by virtue of his own refusal to make repayment to the defendant/respondent a debt of which he expressly undertook to pay.”**

13. On irreparable harm Defendant submitted that Defendant being a bank was in a position to pay Plaintiff damages that may be assessed by the Court.

14. On balance of convenience Defendant relied on the case **MAITHYA – Vs- HOUSING FINANCE CO. OF KENYA AND ANOTHER (2003)IEA 133** where it was held-

**“The balance of convenience tilts in favour of the lender since it is in a position to repay should the borrower succeed at trial whereas the borrowers security continues to be**

**eaten away by the mounting redemption money and may prove insufficient.”**

### **Analysis**

15. Plaintiff’s application is grounded on two broad grounds. Firstly that Defendant failed to serve it with the requisite Statutory Notices of Sale and secondly that Defendant intends to sell the charged property at an under value. On Statutory Notices the relevant law is the Land Act which Act commenced on 2<sup>nd</sup> May 2012. It is therefore necessary to interrogate that Act.

16. Section 90(1) provides that a chargee may (underlining provided) serve a Notice in writing to pay a debt if the repayment is in default for one month. That Section is not in mandatory terms. It should be noted that the Notice under that Section is one that requires repayment of the debt and not one which gives Notice of Sale of the charged property. That Notice must 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 as to rectify the default and the time, being not less than two months, by the end of which the default must have been rectified;**
- d. **the consequence that 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.**

Although the provisions above of Section 90(1) and (2) may seem not to be obligatory, as stated before a chargee cannot exercise the power of sale of charged property as will be seen below, unless that Notice is issued. Section 96(1) provides as follows-

#### **“Chargee’s power of sale-**

**1. Where a charger 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.”**

Before exercising that power of sale however, as above, the chargee must give a further Notice as required under Section 96(2) as follows-

**“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.”**

Notice as required under the above Subsection (2) of Section 96 must also be served upon the following-

**“(3) A copy of the notice to sell served in accordance with Subsection (2) shall be served on-**

- (a) the Commission, if the charged land is public land;
- (b) the holder of the land out which the lease has been granted, if the charged land is a lease;
- (c) a spouse of the chargor who had given the consent;
- (d) any lessee and sublessee of the charged land or of any buildings on the charged land;
- (e) any person who is a co-owner with the charger;
- (f) any other chargee of money secured by a charge on the charged land of whom the chargee proposing to exercise the power of sale has actual notice;
- (g) any guarantor of the money advanced under the charge;
- (h) any other person known to have a right to enter on and use the land or the natural resources in, on, or under the charged land by affixing a notice at the property; and
- (i) any other persons as may be prescribed by regulations, and shall be posted in a prominent place at or as near as may be to the charged land.”

It follows that under the Land Act a chargee before it can exercise the power of sale must give not less than two months Notice requiring the charger to pay the money owing (Section 90(1) and (2)). If the charger remains in default following that Notice the chargee may sell the charged property after giving the charger 40 days Notice (Section 96(1) and (2)). There must also be compliance with Section 96(3) by serving the Notices to persons to set out there (Section 96(3)).

Did the Defendant breach the law in regard to the required Notices?

Defendant served upon the Plaintiff and its Directors a Notice dated 7<sup>th</sup> November 2012 requiring the Plaintiff to pay the debt due, Kshs. 9,618,098.70 within 14 days from the date of the Notice.

19. Defendant gave a further Notice dated 26<sup>th</sup> November 2012 giving 3 months Notice that the charged property would be sold unless Plaintiff settled the amount due of Kshs. 9,737,786.10.

20. From the above it is clear chargee did not serve Notices as required under Section 91 and 96 of the Land Act. However on the Plaintiff’s submission that the Kenya Government as the lessor of the charged property should have been served with the Notices of Sale as per Section 96(3)(d) is without legal basis. This is because the Land Act, under the definition Section defines lessor as-

**“a person by whom a lease is granted and includes a person who has accepted the transfer or assignment of the reversion of a lease.”** (underlining mine)

From that quotation the question that arises is the Kenya Government a “person”? Black’s Law Dictionary, 8<sup>th</sup> Edition defines a person as-

**“A human being”**

The Kenya Government is not a human being. Accordingly the Plaintiff’s submission that the Kenya Government is a lessor requiring to be served with Statutory Notice under Section 96(3)(d) is rejected.

21. On the submissions that Defendant was selling the charged property at under value; it bears to remind the Defendant that Section 97 of the Lands Act requires a chargee in exercising power of sale to exercise duty of care. Under that Section it is clear that the Defendant owes the Plaintiff duty of care not to sell the property below twenty five percent below the market value of the charged property. There is

no evidence produced before Court that the Defendant has failed to exercise that care. That submission of the Plaintiff is therefore rejected.

22. Before concluding this Ruling I need to state that I have noticed that the Bank statements attached to Defendant's replying affidavit reflected Plaintiff's address as P.O. Box 16760-80100, Mombasa Coast. The Defendant however sent the Notice to the Plaintiff through P.O. Box 40900-80100, Mombasa. The Defendant's letter of offer for the loan facility reflected Plaintiff's address as P.O. Box 40900-80100, Mombasa. The discrepancy shown above could explain the Plaintiff's contention that it did not receive the bank's statements attached to replying affidavit.

23. On who bears the burden of proof when Notices sent to a charger are provided in evidence by the chargee, I believe Section 107 of the Evidence Act adequately answers that. It provides-

**1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.**

**2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.**

The burden, once those Notices are shown to have been posted, as can be seen from the above Section shifts to the chargor to prove that it did not receive those Notices. This is in particular where the Notices are sent by Registered Post, and the Post Master General retains evidence of their delivery and the Plaintiff can provide evidence of such delivery.

24. Having found that the Defendant failed to give Statutory Notices as required under the Land Act I am of the view that an injunction to be issued can only be a limited injunction restraining the Defendant from selling the charged property on the strength of the Notices thus far issued. In this regard I am well guided by the case; NATIONAL BANK OF KENYA LTD -Vs- SHIMMERS PLAZA LTD [2009]eKLR where the Court of Appeal stated-

**“The duration of an order of injunction is at the sole discretion of the trial Judge and depends on the circumstances of each case. In this case, the duration of the injunction until the determination of the suit frustrated the statutory right of the bank to realize the security upon giving a notice which complies with the law, we venture to say that where the Court is inclined to grant an interlocutory order restraining a mortgagee from exercising its statutory power of sale SOLELY on the ground that the mortgagee has not issued a valid notice then the order of injunction should be limited in duration until such time as the mortgagee shall give a fresh statutory notice in compliance with the law.”**

25. The above case resonates with the facts in this case. The Defendant failed to give statutory notices of sale as required under the Land Act. It is for that reason I make the following orders-

**(a) An injunction is hereby issued restraining the Defendant from selling or in any way disposing property KWALE/DIANI BEACH BLOCK/1000 if such a sale is based on the Statutory Notices thus far issued to the Plaintiff. Such an injunction does not bar the Defendant from issuing the Plaintiff with fresh Statutory Notices in compliance with the provisions of the law and does not bar the Defendant from relying on such fresh Statutory Notices on any subsequent sale of KWALE/DIANI BEACH BLOCK/1000.**

**(b) The Plaintiff is awarded costs of the Notice of Motion dated 19<sup>th</sup> June, 2013.**

**DATED and DELIVERED at MOMBASA this 19<sup>TH</sup> day of JUNE, 2014.**

**MARY KASANGO**

**JUDGE**