



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ELC CIVIL CASE NUMBER E88 OF 2016

JOSEPH MBURU KIMANI.....PLAINTIFF/APPLICANT

VERSUS

FAMILY BANK LIMITED.....DEFENDANT/RESPONDENT

RULING

INTRODUCTION

1. This ruling is in respect of the Plaintiff/Applicant's Notice of Motion application dated 15th December 2021. The said application expresses to be brought under Order 51 Rule 1 and Order 40 Rule 2 of the Civil Procedure Rules, Section 84(1), 90(1) & 96(2) of the Land Act, 2012, Section 3A and 63(e) of the Civil Procedure Act and Article 159 of the Constitution of Kenya 2010.

2. The application seeks the following Orders:

1. ...Spent

2. ...Spent

3. That an order of injunction do issue restraining the Defendant/Respondent by itself, servants, and/or agents or otherwise howsoever from selling, dealing, interfering, alienating or disposing of all that parcel of land known as NAKURU MUNICIPALITY BLOCK 12/252 with all its structures thereon pending the hearing and determination of this suit.

4. That costs of this application be in the cause.

3. The application is based on the grounds on its face and supported by the affidavit sworn by Joseph Mburu Kimani sworn on 15th December 2021.

FACTUAL BACKGROUND

4. This suit was commenced by a Plaint dated 15th December, 2021 and filed in court on 16th December 2021. The Plaintiff seeks the following orders:

1. An order of permanent injunction do issue restraining the Defendants itself, servants, and/or agents or otherwise howsoever from selling, dealing, interfering, alienating or disposing of all that parcel of land known as NAKURU MUNICIPALITY BLOCK 12/252 with all its structures thereon.

2. An order directing the Chargor to sale (sic) his property and thereafter clear the outstanding sum of money.

3. Costs of this suit.

4. Any other relief this Honourable court deems fit to grant.

5. The background is set out to understand the nature of proceedings and appreciate the orders sought.

THE PLAINTIFF/APPLICANT'S CONTENTION.

6. The Plaintiff/Applicant contends that he is the registered owner of land parcel No. **NAKURU MUNICIPALITY BLOCK 12/252** and that he executed a charge over it on 4th September 2017.
7. The Plaintiff/Applicant further contends that the suit property is matrimonial property where he resides with his family and the respondent has instructed Jogedah Auctioneering Services to sell it to recover the sum of Kshs. 28,158,067.62/=.
8. He also contends that the sale was coming up on 17th December 2021 with the sale value set at Kshs. 37,500,000/= which is inordinately low and should the sale proceed, he will suffer irreparably.
9. It is his contention that the current value of the suit property is kshs. 63,000,000/= and that no statutory notice was issued to him as required by the law and neither did the auctioneer issue him with the notification of sale as required by the Auctioneers Act.
10. The Plaintiff/Applicant contends that the statutory power of sale in favour of the Defendant/Respondent has not arisen and that he has made some payments to the charge to settle the loan advanced but he is yet to be issued with a reconciled statement of the outstanding amount.
11. He further contends that it is only fair and just that the present application be heard on priority basis to stall the sale of his suit property and that unless the injunction is granted the respondent will proceed with the sale and he stands to suffer irreparable and substantial loss.
12. He ends his deposition by stating that it is in the interest of justice that his application is allowed.
13. Upon service of the Replying Affidavit on the Plaintiff/Applicant, he filed a Further Affidavit sworn on 20th January, 2022 and filed on 24th January, 2022.
14. He contends that in response to paragraph 10 of the Replying Affidavit, with regards to the issuance and service of the statutory notices, he has never received the said notices and only came to learn of them upon being served with the Defendant/Respondent's Replying Affidavit.
15. He contends further and in response to paragraph 10(c) of the Replying Affidavit, that the alleged Notification of Sale and the 45 days Redemption Notice indicates a different person as the registered owner of the charged property and therefore the details are incorrect.
16. He also contends that the Defendant/Respondent has not attached any proof to show that the annexed notices were served by way of registered post either in the form of certificate of service or email correspondence.
17. He contends that Defendant/Respondent's right to exercise its statutory power of sale does not accrue as it failed to issue the requisite notices as required by law.
18. It is his contention that the charged property is where he resides with his family and therefore if it is sold, he will be rendered homeless.
19. He contends further and in response to paragraph 14-19 of the Replying Affidavit that he has come to court with clean hands and that contrary to the allegations by the Respondent, the property has been undervalued.
20. It is his contention that he has tendered a counter-valuation report and that the difference of the value is too big and that the Defendant/Respondent has not produced the annual practicing certificates of the valuers to prove that they are qualified.
21. He also contends that it is only fair if an independent valuers is appointed to conduct the valuation of the suit property and if the property is sold as per the valuation done by the Defendant/Respondent, it will not be within the reasonable market value and so he stands to suffer loss.
22. He concluded his deposition by stating that he is informed by his advocates on record which information he believes to be true that the Defendant/Respondent's attempt to exercise its statutory power of sale is unlawful as it did not follow the prescribed procedure and it is only fair and in the interest of justice that his application be allowed.

DEFENDANT/ RESPONDENT'S RESPONSE.

23. The Defendant/Respondent filed a replying affidavit sworn by its legal officer Sylvia Waban who contends that she is conversant with the facts giving rise to the application and suit herein as she has the authority and access to all the information, documents and records relating to the matter in question.
24. She contends further that she has read the Notice of Motion and supporting affidavit and that the Defendant/Respondent denies each and every allegation made in the supporting affidavit save for what is expressly admitted.
25. It is the Defendant/Respondent's contention that the Plaintiff/Applicant's application lacks merit, is vexatious, is brought in bad faith and ought to be dismissed.
26. She also contends that the application is a misplaced attempt by the Plaintiff to stop the Defendant from moving to recover what it is owed to it.

27. She contends further that the statutory notices that are to be issued under Section 90 and Section 96 of the Land Act together with the Redemption Notice and Notification of sale, were all served upon the Plaintiff/Applicant.
28. The Defendant/Respondent also contends that the Plaintiff/Applicant has raised the issue that the suit property is matrimonial property but has failed to demonstrate the damage to be suffered in the event that the property is sold to recover the sum due.
29. She contends further that it is not enough to plead that the property is matrimonial as it is not a ground for grant of an injunction and that the security could not have been created without the consent of the spouse.
30. The Defendant/Respondent contends that the spouse is not a party to the proceedings and has not challenged the sale and that spousal consent was acquired and notices served upon that spouse.
31. She contends also that matrimonial property offered as security in a commercial transaction is made with the understanding that the same stands a risk of being sold in the event of default.
32. She contends further that the valuation used by the Defendant/Respondent is not inordinately low as alleged by the Plaintiff/Applicant as a valuation of the charged property was conducted in accordance with Section 97 of the Land Act prior to exercising its statutory power of sale.
33. She contends that it is not enough for the Plaintiff/Applicant to claim that the intended price is not the best price obtainable by producing a counter-valuation report and that the Plaintiff/Applicant has failed to demonstrate that the Defendant/Respondent's valuers is unqualified, incompetent and that he carried out the valuation in consideration of irrelevant factors or that it was done before the time of the intended sale.
34. The Defendant/Respondent also contends that the Plaintiff/Applicant has presented nothing to discredit the valuation report by Acumen Valuers Limited for their valuation report dated 16th July 2021 which is to last for a period of twelve months.
35. She further contends that the actions of the Plaintiff/Applicant are prejudicial to the Defendant/Respondent's interests and the interests of its customers as he was initially offered a facility of Kshs. 29,400,000/= which was communicated via the letter dated 20th March 2017, and that the security was a charge over the suit property with equal monthly instalments of Kshs. 551,156/= which facility was repaid without the agreed consistency.
36. She contends that the Plaintiff/Applicant applied for a second facility for Kshs. 7,500,000/= which offer was communicated through the letter dated 24th May 2018 and was for a period of 24 months. That the Plaintiff/Applicant struggled to settle that facility and noting those challenges, the Defendant/Respondent opted to amalgamate the two facilities through a special restructure.
37. She also contends that even after disbursement, the Plaintiff/Applicant failed to service the facility as agreed and the default led it to exercise its remedies under the charge which is the statutory power of sale.
38. She contends further that it does not have money of its own as the monies offered as a loan belong to other customers and that the facility is currently accruing interest at default rates to the prejudice of the bank and its customers.
39. It is her contention that the Plaintiff/Applicant has not come to court with clean hands and does not therefore deserve the reliefs sought as he has failed to disclose crucial information to enable the court reach a fair and reasonable determination which includes his default in making the agreed monthly instalments and receiving the served statutory notices.
40. The Defendant/Respondent through its legal officer contends that the Plaintiff/Applicant has not established a prima facie case with a probability of success and that the court must uphold the sanctity of lawful and proper commercial transactions.
41. She contends further that as at 31st December 2021, the loan outstanding was Kshs. 28,291,752.75 with arrears of Kshs. 5,926,748.97 with the facility at 270 days in arrears.
42. She finished her deposition by stating that an injunction is an equitable remedy which should not be issued to a notorious defaulter at the expense of the Defendant and its customers and prayed that the Plaintiff/Applicant's application be dismissed with costs.

ISSUES FOR DETERMINATION

43. The Plaintiff/Applicant filed his submissions on 27th January ,2022 while the Defendant/Respondent had filed its submissions earlier on 24th January, 2022.
44. The Plaintiff/Applicant in his submissions identified the following issues for determination:
- i. Whether the statutory notices were served upon the Plaintiff/Applicant.*
 - ii. Whether the Applicant meets the legal standards for granting interlocutory injunction.*
45. The Defendant/Respondent in its submissions identified the following issues for determination:

i. Whether the Plaintiff has a prima facie case with a probability of success.

ii. Irreparable harm that cannot be compensated by an award of costs.

iii. Balance of Convenience

ANALYSIS AND DETERMINATION.

46. The preceding paragraphs give a factual background and set the tone of this claim which is crucial for my determination.

47. An examination of the plaint and affidavits filed in support and opposition of this application herein reveal that the suit seeks a determination on the following questions:

a. Whether or not the statutory notice for sale was served on the Plaintiff.

b. Whether the valuation report by the Defendant is accurate and/or representative of the market value of the suit property.

48. In the decision in *Co-operative Bank of Kenya Ltd and Patrick Kaneohe Njuguna and five Others (2017) eKLR*, the Court of Appeal found that the jurisdiction of the Environment and Land Court to determine with disputes connected to 'use' of land within the meaning of Article 162(2) (b) of the Constitution of Kenya, 2010 does not include mortgages, charges, collection of dues and rents and that these are within the civil jurisdiction of the High Court.

DISPOSITION.

49. In view of the foregoing, I find that this is substantially a commercial dispute and this court lacks jurisdiction to determine it.

50. I order that this suit be transferred to the High Court of Kenya at Nakuru.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 10TH DAY OF MARCH 2022.

L. A. OMOLLO

JUDGE

In the presence of: -

Miss Wamaita for the Plaintiff/Applicant.

Miss Gitau for Ms Onsare for the Defendant/Respondent.

Court Assistant; Jeniffer