



FRIDAH MUTHONI GACHOYA.....PLAINTIFF

VERSUS

FAMILY BANK LIMITED.....1ST DEFENDANT
LAWRENCE G. NJENGA.....2ND DEFENDANT
BETHANY WANJIRU THEURI.....3RD DEFENDANT
MARGARET NYAMBURA NDERITU.....4TH DEFENDANT

RULING

In a Notice of Motion dated 4th April 2011 (the Application) Fridah Muthoni Gachoya (the Applicant), sought inter alia -

“an order of temporary injunction restraining Family Bank Limited (the Bank – or 1st Defendant), Lawrence G. Njenga, Beatrice Wanjiru and Jane Nyambura (other Respondents), from selling by public auction or private treaty, trespassing, encroaching, demolishing, evicting tenants or otherwise in any other way or manner dealing with the parcel of land known as NAKURU MUNICIPALITY BLOCK 29/637 (Rhonda), (the suit property) pending the hearing and determination of this suit.”

A temporary order of injunction was granted ex parte on 6th April 2011. This Ruling therefore relates technically to the second leg of the Application for grant of a temporary injunction pending the hearing and determination of the suit herein.

The Application herein was based upon the grounds on the face of it, and the Supporting Affidavit of the Applicant sworn on 4th April 2011. In addition to the grounds and supporting affidavit, the Applicant's counsel also filed written submissions with authorities supporting the Applicant's case.

The Applicant's case in essence is that the 1st Defendant, the Bank, never served the Applicant with any notice or demand for payment of the loan which the Applicant admits to have taken or borrowed from the Applicant. The Applicant consequently contends that the 1st Respondent – the Bank is in breach of its contractual obligations to the Applicant, and that the purported sale of the suit property is therefore illegal and consequently null and void. The court should therefore grant the applicant the prayer sought.

The application was however opposed, firstly by the Replying Affidavit sworn on 20th April 2011 by one Margaret Nyambura Nderitu (aka Jane Nyambura?) (who describes herself as the 4th Defendant and swore the Affidavit on her own behalf and on behalf of the 3rd Defendant), and secondly, by the Replying Affidavit of Harun Njuguna (who describes himself as the Debt Recovery Manager of the Bank) sworn on 26th April 2011 and filed on 27th April 2011.

In their Affidavit the 3rd and 4th Respondents deny that they are agents of the 1st Respondent or the Bank and aver that they were purchasers at a public auction conducted on 24th January 2011 at which they bought the suit property and that thereafter the 1st Respondent released to them -

- (a) Original Title Deed for the suit property,
- (b) Duly executed Transfer,

Duly executed Land Control Board Application.

and that upon purchase of the suit land they took possession immediately.

This deponent also averred that the Applicant found him at the suit property after taking possession, and after intervention by the Office of the Provincial Commissioner, the Applicant offered to purchase the suit property from them at Shs 1,500,000/=, to which they agreed. However on the payment date, 29th March 2011, they waited for the Applicant in vain, she did not turn up. These Respondents therefore concluded that the suit property is now truly theirs, and that the Applicant should resolve any issues with the 1st Respondent – the Bank. Upon failure by the Applicant to honour their agreement to pay them the said sum of Ksh 1.5 million, they moved back to the suit land and started working thereon.

These Respondents also charge the Applicant of indolence as the property was sold on 24th January 2011 and did not come to court until 4th April 2011, some nearly three months later. They contend that the Applicant had not established a prima facie, in this suit and that application for injunction should be refused and dismissed with costs.

The 1st Respondent weighed in like manner in the said Affidavit of Harun Njuguna. Specifically Harun Njuguna avers that the Applicant was not a guarantor but a borrower, and was duly served with a demand letter dated 20th April 2010, giving the Applicant and Lawrence Gichuru Njenga (the 2nd Defendant), thirty (30) days Notice that their loan was in arrears in the sum of Ksh 194,761.05 as at 31st March 2011. When the Applicant and her co-borrower, ignored that demand notice, the 1st Respondent gave the Applicant the requisite 90 days Statutory Notice per its letter dated 29th May 2010 by Registered Post to the Applicant's last known address.

The deponent further avers that when the Statutory Notice did not elicit any response from the Applicant, the 1st Respondent by its letter of 20th November 2010 instructed John Gitau Kimani trading as Jogi Auctioneers of Nakuru to sell the suit property through public auction. The auctioneers gave and served upon the Applicant Forty Five (45) days Notification of Sale on 9th November, 2010. The Applicant was personally served, and acknowledged the service of the notification by signing it in the presence of one Ezekiel Ng'ang'a.

According to the Certificate of Sale, the suit property was sold to Margaret Nyambura Nderitu, Peter Macharia Ndirangu and Bethany Wanjiru Theuri on 24th January 2011, that is to say, some 76 days (seventy-six days) after the Notification of Sale on 9th November, 2010.

It is significant that the Applicant has not challenged the averments of either Margaret Nyambura Nderitu or Harun Njuguna, by Further or Supplementary Affidavit. In other words the contention by both of Respondents representatives by these deponents are factually correct and true.

This being so, the arguments by learned counsel for the Applicant that the Applicant has established any prima facie, or that damages would not adequately compensate the Applicant for loss suffered as a result of the sale of the suit property lose any persuasive value.

In law a prima facie case is a case which has at face value or at first blush a probability of success. Such success in the law of borrower and lender is hinged upon failure or breach by the lender to comply with or adhere to the legal safeguards established by law to protect the borrower. These safeguards are found in the various sections of the Registered Land Act (Cap. 300, Laws of Kenya). Counsel for the Applicant referred to these sections in my decision in the case of JOSEPH KAMAU MWANGI VS. KENYA COMMERCIAL LIMITED [2004] eKLR where I held that failure to comply with the conditions precedent established under S. 65(2) of the Registered Land Act is fatal to the lender's exercise of its power to issue a statutory notice under 74(1).

In this case, the Bank complied with the default notice of 30 days under Section 65(2) of the Registered Land Act which was later followed by a Statutory Notice under Section 74(1) of the said Act.

Similarly the Auctioneer's Act was followed to the letter by the Auctioneers Notices referred to above. It is thus clear that the Applicant has no basis for claiming the establishment of a prima facie case with any

chance of success.

Although in a court of equity money is not everything at all times and in all circumstances, and no person should violate another citizen's rights only at the pain of damages, in this case, I cannot perceive at this stage any violation of the Applicant's rights, but if I am wrong, and the Applicant were to establish such violation, this would be a proper case where damages would be an appropriate remedy.

Having transferred the property to the 3rd and 4th Respondents, who have also taken possession after giving the applicant an opportunity to take back her property at shs. 1.5 million, the balance of convenience would certainly lie with the 1st, 3rd and 4th Respondents. In other words the applicant has failed to bring her case within the principles established under the *GIELLA VS. CASSMAN BROWN & CO. LTD* [1973] E.A. 358.

For those reasons, I find no merit in the Applicant's Notice of Motion dated 4th April 2011 and filed on 5th April 2011 and dismiss the same with costs to the 1st, 3rd and 4th Respondents. The 2nd Respondent was the Applicant's co-borrower, and it is unclear why he was sued, and in any event he filed no papers, and is not deserving of any costs.

There shall therefore be orders accordingly.

Dated, signed and delivered at Nakuru this 20th day of July, 2012

J. ANYARA EMUKULE
JUDGE