REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL SUIT NO. 172 OF 2010

MARY ATIENO NYAMOGO ……………........................……………………….PALITNIFF

VERSUS

BARCLAYS BANK OF KENYA LIMITED ….........................…………………DEFENDANT

RULING

There is in place an application by way of a Chamber Summons dated 10th November 2010 and filed the same date . It is brought under the old Order 39 Rules 1 & 2 of the Civil Procedure Rules and Sections 65, 66, 71, 74, 75, 83 and 84 of the Registered Land Act ad all other enabling provision of the law four reliefs are sought namely

(1) Spent

(2) 2 and 3 that pending hearing inter partes of the application in the first instance and the suit in the second instance the defendant / respondent be restrained either by herself or by her servants, agents or parties acting on her behalf from selling, alienating or in any other way disposing of the property registered as KISUMU /NYALENDA 'B'/ 1069

(3) That costs be provided for.

The grounds in support are set out in the body of the application, grounds in the supporting affidavit and the salient features of the plaint. For purposes of the record these are:-

- **The plaintiff/applicant is the registered owner of the suit property.**

- **Concedes having been granted a loan facility from the defendant in the year 2005 to the tune of Kshs. 2.5 Million which was to be secured by a legal charge over the suit property.**

- **It is the applicant's contention that they never appeared before any advocate to execute a legal charge over the suit property in favour of the defendant.**

- **That the absence of execution of a legal charge in favour of the defendant not withstanding , she liquidated the said indebtedness and as at the time of advertisement of the said property for sale she only had a balance of Kshs. 276,754.40 owing and outstanding in favour of the defendants.**

- **That the current value of the said property is Kshs. 7.8 Million and for this reason it will**

be unfair for the same to be disposed off on account of money allegedly accruing to the defendant.

In consequence thereof she seeks:-

(a) A declaration that the intended sale is illegal and void.

(b) A Permanent injunction restraining the defendant from selling, alienating dealing and/or in any other way interfering with the property known as KISUMU / NYALENDA 'B'/1069.

(c) Costs of the suit and interest thereon.

There is reliance on annextures namely the search certificate evidencing existence of a charge over the said property, a bank statement showing the balance as at8th March 2010 of Kshs. 276,754.45 advertisement for sale of property notice and demand notice from Barclays Bank dated 21st March 2006 demanding Kshs. 2,367,147.70

Further that the courts intervention is sought because the property forms her family home, her sentimental value attached to it, that no amount of money can compensate her for the value. Also contends that the prerequisite under the Registered Land Act prerequisite to the realization of the security have not been complied with.

Interim orders were granted on the 12th day of November 2010. The defendant was served and they entered appearance and filed a defence dated 7th day of December 2010 and filed the same date. On the defence anchored a replying affidavit deponed by one Allan Onyango and filed on the 12th day of January 2011. In a summary form the following have been highlighted as grounds in opposition to the application for the injunctive relief:-

- **Confirms that indeed the suit property was offered as security for the loan advanced.**

- **Contends the charge is regular as it was properly executed by the applicant.**

- **That the applicant has been a defaulter and has been indulged severally with a view to making her pay for the same.**

- **That the deponements of the applicant have not been made in good faith.**

- **That the statement exhibited does not have the correct position on interest.**

- **Contends they have complied with all the prerequisite under the R. L. A. before moving into realize the security.**

- **That amount is higher than the amount indicated**

- **That the value of the property is not 7.8 Million but 3. 6 Million.**

There is reliance on annextures being a charge being the charge, document duly signed, letter of offer and bank statement showing an outstanding amount of Kshs. 4,301,062.30 and a statutory notice issued on the 23rd February 2009 requesting action within three (3) months, advertisement for sale of property dated 3rd August 2009. Another notification of sale dated October 1, 2010 and a valuation report dated 12th day of August 2010.

In a further statement by the applicant deponed on 3rd day of November 2010 there, is assertion that it is not known how the defendant could show that she had paid a loan of Kshs. 3,593,294/= up from Kshs. 2.5 Million and then be said to have been owing an outstanding figure of Kshs. 4,304,509.30/=. That the value shown to be 3.6 Million was the value in 2005 and not the current value.

Parties filed written skeleton arguments. Those of the plaintiff are dated 10th March 2011 and a perusal reveals that they reiterate the content of the plaint, deponements in both affidavits and then the following have been stressed:-

1. The applicant has a prima facie case with a probability of success because

(a) Once she raised the issue of not having executed the charge document before an advocate, this assertion could only have been ousted it the concerned lawyer had deponed an affidavit that indeed the applicant appeared before him/her and executed the said charge.

- **The charge documents' validity is questionable as the certificate signifying the date when the alleged applicant appeared before the lawyer and executed the same is not indicated**

- **There is an issue for interrogation as to whether the plaintiff received the statutory notice.**

2. Concedes that the value of the subject matter is quantifiable and can be paid for in monetary terms but it is her contention that the sentimental value attached to the house being a family house cannot be compensated for in form of money considering that all that she owes to the bank is Kshs. 276,754/45

- **Turning to the bank statements the defendant owes the plaintiff an explanation as to how a loan of shown to be Kshs. 1,403,425.10 as at 15th September 2010 ,could have shot up by an extra 1.2 Million.**

(a) Also how a loan of 2.5 Million whose repayment was over 3 Million could have a balance of over 4 Million as the outstanding figure.

- **Considering that the defendant concedes to have issued the statement showing the balance asserted by the plaintiff of Kshs. 276,754.45 but says it did not include interest then the court is invited to find that the said interest is exaggerated. Contends that by reason of what has been stated above, the issue raised by the applicant can only be resolved at the hearing.**

- **Concedes an injunctive relief is a discretionary remedy but in the circumstances of this case the same is merited.**

The defendants submissions are dated 21st March 2011 and filed on the 22nd March 2011 and in it the following have been stressed:-

There is no prima facie case demonstrated to exist because:-

(i) The applicant signed the acknowledgement in the charge and the assumption is that she could not commit her property as security without reading the content of the charge to understand what she was committing herself to.

(ii) The applicant was duly served with a statutory notice on the 24th day of February 2009 using the same address that she has used in her affidavits herein which content was never returned to the defendant meaning that the same reached her.

(iii) They have demonstrated in their replying affidavit existence of a debt because the statement she is relying upon does not show the interest chargeable

(iv) They served a second statutory notice in October 2009, and when it expired the bank had no alternative but to issue instructions to have the security realized.

(v) That since default has not been denied that is sufficient justification for the realization of the

security. The court should not concern itself with issues of interest as that should be left for the trial

On irreparable injury, they contend that no irreparable injury will be suffered by the applicant as the bank is in a position to pay damages. That the balance of convenience also tilts in favour of the Respondent on account of default by the applicant.

On case law the court was referred to the case of **Ochieng and Another =vs= Ochieng and other [1995 – 1998] 2 EA 268** where the Court of Appeal held inter alia "**that a sale which is void does not entitle the purchaser of such sale to obtain proprietorship or title to the land sold.**

The case of **Zeyu Yang =vs= Nova Industrial Products Ltd [2003]IEA 362** where Nyamu J as he then was held inter alia "**that the existence of a valid sale agreement extinguished the equity of redemption and the applicant had no remedies touching on the property both as against the former mortgagee and against the power exercising the power**

(2) The title issued to the purchaser cannot be impeached except on grounds of fraud.
The case of **Moses Ngenye Kahundo =vs= Agricultural Finance Corporation Nairobi HCCC Milimani Commercial Court No. 1044 of 2001**
decided by A. G. Ringera as he then was on the 12th day of October 2001. At page 2 of the Ruling, the learned judge as he then was set out

the ingredients required to be established before one can earn an injunctive relief namely:-

(i) Establishment of existence of a prima facie case with a high probability of success.

(ii) The applicant has to show that he would otherwise suffer irreparable injury which cannot be adequately compensated for by way of damages.

(iii) Thirdly, if the court is in doubt then the matter will be decided on a balance of convenience of both parties.

At page 3 of the Ruling the learned Judge made observation that:-

(a) The applicant did execute the charge in favour of the Respondent

(b) The charge was duly registered

(c) The applicant expressly acknowledges that he understood the effect of Section 74 of the R. L. A.

(d) He had not tendered any evidence of coercion in the execution of the charge

(e) He has not made any complaint to any lawful authority with regard to any illegal or fraudulent charge of his land.

(f) It was evident from the annextures that the applicant was warned of repayment and had on several occasions explained his difficulties in repaying the loan.

At page 4 of the Ruling the learned judge ruled thus:- **" A person who charges his property to secure a loan and does so knowing only too well that upon default, the property could be sold to recover the loan. It does not therefore lie in the mouth of such a person to state that he would suffer an injury which cannot adequately be compensated in damages if the lender realizes the security in question"….. The applicants loss if any can adequately be compensated in damages and that the respondent being a lender of repute would be in a position to meet any such award of damages"**

The case of **Nathalal Monji Rai & 5 (five) others =vs= Standard Chartered Bank Kenya Ltd**

Nairobi CA No. 194 of 1998 decided by the Court of Appeal on the 26th day of March 1999 where the court declined issuances of an injunctive relief for the reason that:- " **the other reason why the applicants application was bound to fail is because all they were trying to do was to restrain a mortgagee from exercising its statutory power of sale in a case where default and indebtedness were not denied and the necessary notices had been served, there was clearly no legal basis for any injunction (see Halsbury's Laws of England Volume 32 (4th Edition) paragraph 725 for the circumstances in which a mortgagee may be restrained from exercising its statutory power of sale".**

In Halsbury's Laws of England Volume 32, 4th Edition paragraph 725 **" A mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute.**

(b) Or because the mortgagee has begun a redemption action

(c) Or because the mortgagor objects to the manner in which the sale is being arranged.

But he may be restrained however if the mortgagor pays the amount claimed into court, that is the amount which the mortgagor claims to be due to him unless on the terms of the mortgage the claim is excessive."

The case of **Millicent Wanjiku Gatheru =vs= Housing Finance (k) Ltd Nairobi Milimani Commercial Court HCCC No. 138 of 2007** decided by Okwengu J on the 12th day of July 2007. At page 12 of the Ruling, the learned Judge construed the provisions of Section 74 of the R. L. A and made findings that **" Thus a mortgagee's Statutory Power of Sale can only properly arise where the Mortgagor has defaulted in the payment of the principal sum or any interest or periodic payment and an appropriate 3 months notice has been served on the mortgagor".**

At page 14 quoted with approval the case of **Sarabjit Singh Sehmi & Another =vs=Housing Finance Company of Kenya Ltd Nairobi Milimani HCCC Number 612 of 2005** thus:- "**That the proviso to Clause 1 of the, charge document appear to give the Respondent the sole discretion to charge the rate of interest as at the material time, there was no feter to this discretion, there being no minimum or maximum interest rates determined by the central Bank. The applicant therefore voluntarily put herself completely at the mercy of the Respondent. It is further apparent from the statement of accounts which were exhibited by the applicant that the Respondent only started charging interest on arrears and levying penalty charges when the applicant started defaulting in making the monthly repayments. I find no prima facie evidence that the charges levied by the Respondent were anything other than what was impliedly agreed by the parties".**

Then at page 17 the learned judge continued:- "**The applicant has not offered any evidence to show that she will suffer irreparable loss which cannot be adequately compensated by an award of damages if the interlocutory injunction is not granted. The loss will be the value of the suit premises which can be easily ascertained. Moreover it being apparent that the sale of the suit premises is precipitated by the Applicant's own default. She cannot be heard to complain of the consequent loss as she has only herself to blame………..**"

The case of **Maithya –VS- Housing Insurance Co. of Kenya & Another [2003 IEA, 133** whereby Nyamu J as he then was now JA, ruled that: - "**the plaintiff/applicant had not established a prima facie case with a probability of success. The penalty interest and default charges were covered by the charge or in the alternative these charges could be implied by custom and trade usage.**

The securities are valued before lending and loss of the properties by sale is clearly contemplated by the parties even before the security is formalized. Damages would therefore be an adequate remedy. The balance of convenience tilts in favour of the lender since it is in a position to repay should the borrower succeed at the trial where as the borrower's security continues to be eaten away by the mounting redemption money and those who came to Equity. Failure to service

the loan or to pay the lender or pay into court what had been admitted took the Applicant outside the realm of courts jurisdiction"

This court has given due consideration to the aforesaid rival pleadings and principles of case law and in its opinion the following are own framed question for determination in the disposal of this interlocutory application.

(1) What are the agreed facts herein?.

(2) What are the agreed principles of law applicable?

(3) What relief is the applicant seeking from the court?

(4) What ingredients is she required to establish before earning the said relief?

(5) Has the applicant brought herself within the ambit of the ingredients?

(6) What final orders are to be granted herein in the disposal of this matter?

In response to own framed questions:

(1) **The agreed facts are as follows:-**

(a) Indeed applicant took a loan from the defendant / respondent and used the suit property as security.

(b) There is a charge executed which though signed, the date when it was executed is not indicated and for this reason the applicant alleges that it is void.

(c) There is no dispute that the property was charged and the charge registered evidenced by the content of the search certificate

(d) No dispute that funds were advanced and the applicant utilized the same.

(e) The amount was 2.5 Million. No dispute that as per the documentation exhibited by the defendant / respondent the applicant has paid off the principal sum in full and also an amount over and above the original sum which according to her stands for interest.

(f) There is no dispute that the statement of account given to the applicant as at the time the defendant /respondent moved to realize the security is shown to be less than Kshs. 300,000.00 whereas the documentation shown by the defendant shows an excess amount of Kshs. Over 4 Million

(g) The defendant has not denied that both documents were issued by themselves, that he alleges that one does not bear interest charged upon default.

In response to own framed questions principles of law applicable are that:-

(i) A mortgagor's right of sale arises upon default of payment.

(ii) It has to be based on the existence of a validly executed charge

(iii) There is no restraint order which can be issued on account of dispute arising from amount due or interest payable but there is a right of restraint where the amount outstanding is tendered into court or that the amount demanded is excessive .

With regard to own framed questions 3, 4, and 5 the relief the applicant seeks is an injunctive relief. The ingredients required to be established are demonstration of existence of a prima facie case, that damages will not be adequate compensation, and that the balance of convenience tilts in favour of the applicant.

These have been considered against the facts and the applicable principles, of law in totality and the court is satisfied that a prima facie case has been established because of the following reasons:-

(1) **(a)The applicant has an arguable case as regards the validity of the charge document on account of the date on which the charge is said to have been executed before the bank authority being undated.**

(b) Whether indeed she appeared before the named advocate to execute the charge or she just signed the charge and the advocate just endorsed it in her absence considering that the advocate has not deponed to the effect that she indeed appeared before him and executed the charge in his presence.

(c)The dispute on interest is not a normal dispute on interest, but arise from the fact that the bank itself acknowledges issuing two documents one with a lesser figure and another with a figure in excess of the amount already paid.

(d)It has been shown that the applicant has paid off the principal sum and some interest hence the assertion that the amount claimed is excessive and requires interrogations at the trial.

(2) Indeed the property can be valued and paid for in terms of damages but this has been outweighed by the need to establish the validity of the charge documents before the right to realize the security can be sanctioned

(3) The balance of convenience also tilts in favour of the applicant on account of excessive demand of the amount due and also on account of a defective charge being the basis for the realization of the security which needs to be interrogated first

For the reason given in number 1 – 3 above, prayer 3 of the applicant's application dated 10th November 2010 is allowed on the following conditions:-

(1) That the amount forming the figure on the document served on the applicant shortly before the intended sale of Kshs. 300,000/= is deposited into court within sixty (60) days from the date of the reading of this Ruling

(2) That the applicant pays costs to the defendant .

(3) In default of number 1 the injunctive relief granted to stand lapsed.

(4) There will be liberty to apply.

Dated, signed and delivered at Kisumu this 23rd of September 2011.

R. N. NAMBUYE
JUDGE

RNN/aao