



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

ELCC No. E10 OF 2020

JANE NJERI JAMES PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LIMITED 1ST DEFENDANT

GREAT RIFT INVESTMENTS LIMITED 2ND DEFENDANT

RULING

1. This ruling is in respect of the plaintiff's Notice of Motion dated 30th October 2020 which seeks the following orders:

a) *[Spent]*

b) *THAT this honourable court be pleased to issue an order of inhibition, inhibiting the registration of any disposition, in the register of land parcel Nakuru Municipality/ Block 20/111 pending the hearing and determination of this suit.*

c) *[Spent]*

d) *THAT this honourable court be pleased to issue a temporary permanent injunction restraining the 1st Defendant either by itself, its agents, servants, employees or otherwise howsoever from receiving payment of purchase price from the 2nd Defendant, transferring, registering any dealings in all that parcel of land known as Nakuru Municipality Block 20/111 pending the hearing and determination of this suit.*

e) *[Spent]*

f) *THAT this honourable court be pleased to issue a temporary permanent injunction restraining the Defendant either by itself, its agents, servants, employees, or otherwise howsoever from advertising for sale, offering for sale, by public auction or dealing with in way prejudicial to the interests of the Plaintiff or otherwise howsoever all that parcel of land known as Nakuru Municipality Block 20/111 pending the hearing and determination of this suit.*

g) *THAT the costs of the application be provided for.*

2. The application is supported by an affidavit sworn by the plaintiff. She deposed that she applied for a mortgage facility from the 1st Defendant in 2014 to enable her to purchase the parcel of land known as Nakuru Municipality Block 20/111. The facility was approved in the sum of KShs 21,300,000 which was to be repaid over a period of 10 years with monthly instalments of KShs 367,730. On 2nd September 2014 the land was transferred to her name and on 5th September 2014 a charge was registered against the title in favour of the 1st Defendant.

3. She further deposed that on 10th June 2014, Lois Wairimu Magua filed Nakuru ELC No. 163 of 2014 against Henry Keter Chepsengeny, Rukima Estate Ltd, Nakuru District Land Registrar, Attorney General, Mamis Motor World Ltd and Equity Bank Ltd and that the plaint was later amended to include her, one Madrine Wawira Muthoni and the 1st Defendant. On 11th June 2015, the court issued an order of inhibition, inhibiting the registration of any disposition on the suit property. She added that the 1st Defendant has never served her with statutory notices and that on 15th November 2019, the 1st Defendant tried to sell the suit property through Kolato Auctioneers but a temporary injunction was issued on 3rd February 2020 restraining them from doing so. On 29th July 2020, judgement was delivered in Nakuru ELC No. 163 of 2014, where the suit was dismissed. That she then contacted the 1st Defendant on 3rd August 2020 requesting for the restructuring of the loan, but the 1st Defendant declined. She further deposed that she also requested the 1st defendant for a current statement

of account through several emails, but none was provided. That on 30th September 2020 through an email from the 1st Defendant, she received copies of auctioneer notices and other notices allegedly served on her on various dates between 2015 and 2019.

4. She deposed further that later in the month of October 2020, the 1st Defendant instructed Kolato Auctioneers to sell the suit property and on 12th October 2020 the said auctioneers advertised the property in the Daily Nation newspaper for sale on 26th October 2020 at 12:00pm in their office. She added that the conditions of sale were that the sale was subject to a reserve price and payment of 25% deposit among others. That the property was sold by public auction on 26th October 2020 to the 2nd Defendant who emerged as the highest bidder, but he was not able to pay the 25% deposit on the day of the auction and instead paid the amount a day later. She further deposed that the 1st Defendant did not conduct a current valuation and as a result the suit property was sold below its current market price which according to her is KShs 35,000,000.

5. The 1st Defendant responded to the application through a replying affidavit sworn by Kennedy Kasamba, a Recovery Manager under its employment. He confirmed that the Applicant was granted a facility by the 1st Defendant and that a charge was registered against the suit property on 5th September 2014. He further deposed that by the time the order in Nakuru ELC No. 163 of 2014 was given, the applicant had already defaulted in her obligations under the charge since 2015 and the 1st defendant had commenced the process of realizing the security by sending her a statutory notice under Section 90 of the Land Act on 3rd March 2005, a notice to sell under Section 96 of the Land Act on 4th August 2015, redemption notice on 22nd September 2015 and notification of sale on 18th September 2015. He added that the notices were sent by registered post in accordance with the charge and through emails exchanged between the applicant and the 1st defendant in which the applicant acknowledged receipt of the notices. That the 1st defendant appointed a valuer who carried out a forced sale valuation and prepared a report dated 26th October 2019. He further stated that the applicant has been in arrears for a period of over six years and therefore the 1st defendant sold the suit property through a public auction after issuing the requisite notices.

6. The application was canvassed through oral submissions. Counsel for the applicant argued that the condition requiring that deposit be paid at the fall of the hammer was not fulfilled hence there was no proper sale on 26th October 2020. He added that the applicant was not served with the 3 months and 40 days statutory notices and that the valuation report was dated 26th October 2019 hence violating the requirement that the valuation should be at least a year old since the auction herein was conducted on 26th October 2020. The valuation had expired. There are several valuation reports annexed, all of which show that the property was depreciating in value, contrary to normal practice where properties appreciate in value. Further, that the period between the first advertisement on 12th October 2020 and the time of sale on 26th October 2020 contravenes rule 15 (e) of Auctioneers rules. He relied on the case of **Maina Wanjigi & Another –vs- Bank of Africa Kenya Ltd & 2 others [2015] eKLR** and urged the court to allow the application.

7. In response, counsel for the 1st defendant argued that the applicant has not repaid or attempted to repay even a single cent since taking the loan of KShs 21,300,000 from the 1st defendant in the year 2014. She added that the auction process was conducted properly and that there is email confirmation by the applicant that she received the notices. Counsel relied on the case of **Cieni Plains Co. Ltd -vs- Ecobank [2017] eKLR** and argued that the circumstances of the transaction should be considered. That in this case, the bank has had to wait for 6 years. She further argued that the applicant is seeking equitable orders but has not come to court with clean hands. She urged that the application be dismissed with costs.

8. I have considered the application, the affidavits and the submissions. I do not need to reinvent the wheel in so far as the law relating to interlocutory injunctions is concerned. The applicant is required to establish a *prima facie* case with a probability of success. Even where a *prima facie* case is established, an injunction will not issue if damages are an adequate remedy in the circumstances of the case. If the court is in doubt as to whether damages will be an adequate compensation, then the court will determine the matter on a balance of convenience. All three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. If *prima facie* case is not established, then irreparable injury and balance of convenience need no consideration. See **Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR**.

9. Similarly, I need not commit more ink to any venture to develop a treatise on what constitutes *prima facie* case. The Court of Appeal defined the phrase in **Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] eKLR** as follows:

... a case in which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter... [it] is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case.

10. It is not in contention that the applicant obtained a mortgage facility in the sum of KShs 21,300,000 from the 1st defendant which was secured by a legal charge over the suit property. There is no dispute that the applicant is in arrears and has defaulted. She has not challenged the 1st defendant's contention that she has not repaid a single cent since taking the facility. Significantly, she has not mentioned any repayment in her affidavit.

11. The applicant alleges that she was not served with any statutory notices. The 1st defendant has demonstrated that the applicant was served with the 90 days statutory notice required under Section 90 of the Land Act on 3rd March 2005, that she was served with the notice to sell required under Section 96 (2) of the Land Act on 4th August 2015, a redemption notice on 22nd September 2015 and notification of sale on 18th September 2015. Again, one need not look any further than the applicant's own supporting affidavit and conspicuously present there is an email dated 30th September 2020 from her to the 1st defendant in which she categorically acknowledges receipt of the notices and she even states that she signed for the auctioneer's notices upon service. In those circumstances, her contentions that she was not served and that new notices ought to have been served does not avail her much.

12. The applicant has approached the court seeking equitable relief. She has to demonstrate equitable conduct. Unfortunately, her conduct does not measure up to the expectations of equity. She has relied a lot on the fact that there was litigation involving the suit property in Nakuru ELC No. 163 of 2014. That litigation did not bar her from honouring her contractual obligations under the charge by repaying the loan. Such conduct as the applicant's invited the following observation from Kwach JA in **Mrao Ltd v First American Bank of Kenya Ltd & 2 others** (supra):

I listened to the submissions of Mr Wasuna, for the appellant, and he seemed to place a great deal of emphasis on the allegation that the securities were invalid for one reason or another. And that because of that, his client is under no obligation to repay the debt. At no point in the course of argument did Mr Wasuna indicate to the Court when this alleged invalidity first came to the knowledge of the appellant. The appellant took a large amount of money on the strength of these securities. It has not paid back even a single cent. When First American asked for payment the appellant rushed to a court of equity and in effect told the judge, it is true I took the money, I have not paid it back but First American is precluded from realising its security because both the charge and debenture are invalid.

This kind of attitude, prima facie, shows that when the appellant took the money on the strength of those securities it had no intention of repaying it under the terms agreed with First American. This was a clear case of default, and as the appellant admitted this, there was no basis, on the authorities, upon which the appellant could obtain an order of injunction against First American. ...

13. In view of the foregoing discourse, I am not persuaded that the applicant has any *prima facie* case. That is enough to dispose of the application.

14. Even if I had reached a conclusion that the applicant has a *prima facie* case, the application would still have failed at the second limb of the test for granting an interlocutory injunction since damages are an adequate remedy in the circumstances of this case. The applicant has herself claimed, without availing any valuation report, that the current market value of the suit property is KShs 35,000,000. The 1st defendant has on its part availed a valuation report. The suit property was charged to secure a facility of KShs 21,300,000 and thereby became a commodity for sale whose value is easily ascertainable and whose loss can be compensated. The applicant concedes that the property was sold to the 2nd defendant. It follows therefore that any complaint regarding the manner of exercise of the power of sale have to be addressed in line with Section 99 (4) of the Land Act which provides as follows:

A person prejudiced by an unauthorised, improper or irregular exercise of the power of sale shall have a remedy in damages against the person exercising that power.

15. In view of the foregoing discourse, the applicant has failed to surmount the twin tests of establishing a *prima facie* case and demonstrating that damages are not an adequate remedy. I need not enquire into the last test. I find that Notice of Motion dated 30th October 2020 is without merit. I dismiss it with costs to the 1st Defendant.

Dated, signed and delivered at Nakuru this 28th day of January 2021.

D. O. OHUNGO

JUDGE

In the presence of:

Mr Konosi for the plaintiff/applicant

Mr Mburu for the 1st defendant/respondent

No appearance for the 2nd defendant/respondent

Court Assistants: B. Jelimo & J. Lotkomoi