



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT

AT MOMBASA

ELC NO. 133 OF 2020

NOORJAHAN EBRAHIM ADAM.....PLAINTIFF

VERSUS

SBM BANK (KENYA) LTD.....1<sup>ST</sup> DEFENDANT

KEYSAN AUCTIONEERS.....2<sup>ND</sup> DEFENDANT

RULING

1. By a notice of motion dated 21<sup>st</sup> September, 2020, and brought under Order 40 Rules 1, 2 & 4 and Order 51 of the Civil Procedure Rules, Sections 1A, 1B, 3A and 63 (e) of the Civil Procedure Act, the plaintiff/applicant is seeking the following orders:

1. Spent

2. Spent

3. Spent

4. That a temporary order of injunction be issued restraining the 1<sup>st</sup> and 2<sup>nd</sup> defendants whether by themselves their representatives, agents, employees, servants, proxies and/or assigns from advertising for sale, disposing of, selling, wasting, damaging, alienating, dealing in or otherwise interfering with the plaintiff's residential four-bedroom apartment number 22 "Typology 5" SUBDIVISION NUMBER 20247, SECTION 1 MAINLAND NORTH, MOMBASA (C.R. 67477) comprised on the second floor of Block B of Residential Apartments Development known as "The Right Address" pending the hearing and determination of this suit

5. Costs of this application be provided for.

2. The application is supported by the affidavit of Noorjahan Ebrahim Adam, the applicant sworn on 21<sup>st</sup> September, 2020 and a further affidavit sworn on 23<sup>rd</sup> November, 2020. The gist of the matter is that the applicant secured a loan of Kshs40,000,000/= from the 1<sup>st</sup> respondent's predecessor, Fidelity Commercial Bank Ltd and the suit property was charged to the 1<sup>st</sup> Respondent to secure the loan. It is not in dispute that the applicant was unable to adhere to the loan repayment terms and consequently the loan facility fell into arrears and the 1<sup>st</sup> respondent served the applicant with a notification of sale dated 28<sup>th</sup> July 2020 requiring the applicant to repay the sum of Kshs.35,477,473.81 which the 1<sup>st</sup> respondent claimed to be the outstanding balance and asked the applicant to repay the said sum and also any accrued interests thereon and other charges and expenses within a period of 40 days. The applicant made a proposal to the 1<sup>st</sup> respondent to repay Kshs.2,000,000/= and settle the balance owing in three months' time, but the 1<sup>st</sup> respondent rejected the said proposal, insisting that it shall proceed to sell the suit property as earlier communicated. The applicant faults the 1<sup>st</sup> respondent for giving three conflicting figures as the outstanding amounts being Kshs. 35,912,577.00, Kshs.35,477,473.81 and Kshs.36,027,955.10. The applicant states that the 1<sup>st</sup> respondent intend to sell the suit property which is the applicant's matrimonial home without the applicant exercising her equitable right of redemption. It is the applicant's contention that the 1<sup>st</sup> respondent did not issue the applicant with the requisite statutory notice of sale. The applicant denied being served or receiving notices, except the 40 day notification of sale dated 28<sup>th</sup> July 2020. The applicant also avers that no valuation of the property was conducted as required.

3. In opposing the application the 1<sup>st</sup> respondent filed a replying affidavit sworn by Dalmas Mwongela on 2<sup>nd</sup> November, 2020. The 1<sup>st</sup> respondent avers *inter alia* that the loan facility was repayable in equal monthly installments of Kshs.1,007,054 for a period of sixty (60) months. That upon the application of the applicant, the 1<sup>st</sup> respondent restructured the term loan vide a conditional letter of offer dated 12<sup>th</sup>

July, 2019 wherein the borrower acknowledged to owning Kshs.32,014,119.61 with the current facility now being repaid over a period of six months comprising of principal and interest. That in blatant disregard of the loan term facility even as revised, the applicant neglected, ignored and/or defaulted in repayment of the principal amount and the interest persistently failing to honour the terms of the charge and the Letter of Offer. The 1<sup>st</sup> respondent avers that it issued all the necessary statutory notices and that valuation was conducted on the property before proceeding with the intended advertisement and sale of the property by public auction contrary to the applicant's assertions. Copies of the notices and valuation report among other documents have been annexed. The 1<sup>st</sup> respondent contends that the applicant is a perennial defaulter who has never attempted to make reasonable payments to offset the loan arrears. The 1<sup>st</sup> respondent is apprehensive that the loan arrears will outstrip the security rendering the contract unenforceable. That it is in the interest of justice and fairness that the application be dismissed with costs.

4. The application was canvassed by way of written submissions which were duly filed by the advocates for both parties. The applicant submitted that no evidence of service of a 90 day statutory notice of sale. The applicant's counsel relied on the case of **Nyangilo Ochieng & Another –v- Kenya Commercial Bank (1996) eKLR** (cited in **Star Travel & Tours Ltd & 2 Others –v- Chase Bank (K) Ltd (2019)eKLR**; **Idris Abdi Abdullahi –v- Ahmed Bashane & 2 Others (2018)eKLR**; **Republic –v- Mark Lloyd Stevenson (2016)eKLR and Joseph Mwai Nduati –v- Republic (2017)eKLR**. The applicant cited Sections 90 and 96 of the Land Act, 2012 and submitted that the notice and notification of sale and the Auctioneer's Redemption Notice issued are illegal, unlawful and null and void. The applicant also relied on the case of **Kenwood Property Developers Ltd –v- Family Bank Ltd (2020) eKLR**. The applicant further submitted that no periodic statements were sent to her and that the amount owing is disputed and relied on the case of **Pius Kimaiyo Langat –v Co-operative Bank of Kenya Limited (2017)eKLR**. It is the applicant's submission that she has established a prima facie case for grant of the injunction and relied on the case of **Mrao –v- First American Bank of Kenya Ltd & 2 Others (2003)KLR 125 (cited in Solomon Mbili Ngomo –v- Kenya Deposit Insurance Corporation Dahali Traders (2019)eKLR**; **Nguruman Limited –v- Jan Bonde Nielsen & 2 Others (2014) eKLR**; **Nyangilo Ochieng & Another –v – Kenya Commercial Bank (1996)eKLR**; **Joseph Siro Oromo –v- Housing Finance Corporation of Kenya (2008)eKLR** and **Jimmy Wafula Simiyu –v- Fidelity Commercial Bank Kenya Limited (2016)eKLR** and **Karige Kihoro –v- Equity Bank Ltd & Another (2016)eKLR**. The applicant urged the court to allow the application and grant the orders sought herein.

5. On their part, the 1<sup>st</sup> respondent submitted that they complied with the relevant laws and regulations at all material times and particularly with the Land Act, 2012. The 1<sup>st</sup> respondent invited the court to take note of the certificate of postage annexed to the replying affidavit and relied on the case of **Karige Kihoro –v- Equity Bank Limited & Another (2016)**; **Nellie Enignus Wamalwa –v- Rafiki Deposit Taking Micro Finance (K) Limited (2016)eKLR**. It was submitted that at all material times, the applicant was provided with the true and accurate information regarding the loan account. The 1<sup>st</sup> respondent relied on the case of **Bharmal Kanji Shah and Another –v- Shah Depar Devji**. It was submitted that it is not disputed that the applicant is indebted to the 1<sup>st</sup> respondent and has not made any payment towards offsetting the loan amount, instead now ridiculously seeks protection of this court. That the applicant's conduct is meant to frustrate the rights of the 1<sup>st</sup> respondent bank to recover the outstanding loan amounts in glaring contravention of the equity principle that whoever comes to equity must come with clean hands. That the applicant has not taken any steps to redeem the property or clear the outstanding arrears and to further convince this court that interlocutory prayers sought would enable her remedy the situation. It was therefore submitted that the applicant has not disclosed any intention to make any payments despite enjoying an interim injunction granted by this court pending hearing of this application. That the applicant has not established any genuine case with a probability of success and the application should be dismissed with costs.

6. I have considered the application. The applicant's contention is that the suit property has been advertised for sale by public auction without complying with the law and specifically with the issuance of the relevant notices and without current valuation. The issues that the court shall determine are whether the conditions for issuance of an injunction have been made herein and whether the 1<sup>st</sup> respondent's right of statutory power of sale has accrued. The application herein is for injunctive orders which are equitable reliefs granted at the discretion of the court. Further, the court will warn itself that at this stage, it is not dealing with the disputed facts to finality but only determining whether the applicant is deserving of injunctive orders. The principles applicable were set out in the case of **Giella –v- Cassman Brown (1973)EA 358** to wit; whether the applicant has established a prima facie case with a probability of success; whether the applicant will suffer irreparable damage unless an injunction is issued; and if in doubt the court will decide the matter on where the balance of convenience lies.

7. In this case, it is not in contention that the applicant was advanced financial accommodation which was secured by the suit property. It is also not in dispute that the applicant defaulted in payment and the 1<sup>st</sup> respondent in exercise of its statutory power of sale, instructed the 2<sup>nd</sup> respondent to sell the property by public auction. The applicant contends that the 1<sup>st</sup> respondent did not issue her with the requisite statutory notice of sale, and that respondents have never conducted a valuation of the property before proceeding with the intended advertisement and sale of the property by public auction. Under the Land Act, a chargor should be served with the requisite statutory notice to remedy any default within 90 days, and he should be fully informed of the acts needed to remedy the default and his right to apply for relief. The notice must fully comply with Section 90(1) of the Land Act. Section 96(1) of the same Act provides for the chargee's power of sale "where a chargor is in default of the obligation 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)." Section 96(2) provides 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 and 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.”**

8. The requirements under Section 96(2) of the Land Act are mandatory, and is one of the provisions of the Act which reinforce the chargor's Equity of Redemption. I have perused the replying affidavit filed by the 1<sup>st</sup> respondent. Annexed thereto is a notice of exercise of statutory power of sale dated 29<sup>th</sup> October 2018 and 6<sup>th</sup> February, 2020, addressed to the applicant. There is also a valuation report that has been annexed. Further, there are letters by the applicant to the 1<sup>st</sup> respondent requesting for a reprieve on repayment. To me, it is clear that the requisite notices were issued and valuation was carried out and the statutory power of sale was therefore exercisable. Even the applicant's argument that the charged property is a matrimonial home is no sufficient ground to warrant the grant of the injunction orders sought as long as the chargee had fully adhered to the law.

9. Having admitted to being indebted to the 1<sup>st</sup> respondent, and the 1<sup>st</sup> respondent having fully complied with the law, the applicant has clearly not made out a prima facie case with a probability of success at trial. Further, I am not persuaded that the applicant stands to suffer irreparable loss if the suit property is sold as the same had by the charge registered over been reduced to a commercial commodity and whose value can be ascertained. Any loss arising from its sale can be quantified in damages.

10. The upshot is that this court finds that the notice of motion dated 21<sup>st</sup> September, 2020 lacks merit and the same is hereby dismissed with costs to the 1<sup>st</sup> respondent.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 23<sup>RD</sup> DAY OF MARCH, 2021**

**C.K. YANO**

**JUDGE**

**IN THE PRESENCE OF:**

Yumna Court Assistant

**C.K. YANO**

**JUDGE**