REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CASE NO. 559 OF 2017

GEOFFREY KINUTHIA MUNGAI.....1ST PLAINTIFF/APPLICANT

LENAH WANJIKU KINUTHIA.....2ND PLAINTIFF/APPLICANT

VERSUS

PROGRESSIVE CREDIT LIMITED.....DEFENDANT/RESPONDENT

JUDGMENT

1. Vide a plaint dated 25.5.2017, the plaintiffs who are husband and wife sued the defendant claiming the following:

(a) A permanent injunction restraining the defendants either by themselves, servants, agents and or attorneys from any way selling, letting, leasing, disposing, transferring, charging, pledging or dealing or in any other way interfering with the suit property being land title no. L.R No. Kabete/L. Kabete/3396 Lower Kabete, Kiambu County.

(b) A declaration that the 1st plaintiff is not in breach of any of the terms of the loan repayment of Kenya Shillings six hundred and sixty two thousand, two hundred and forty six shillings only (Kshs.662,246/=).

(c) A declaration that the charge instrument dated 9th February 2015 and created by the 1st plaintiff in favour of the defendant over title No. L.R No. Kabete/L. Kabete/3396 Lower Kabete, Kiambu County is unenforceable and void.

(d) Cancellation, annulment and invalidation, by the honourable court, of any legal or statutory notices issued by the defendants and or their agents.

(e) Costs of this suit and interest thereon at court rates.

(f) Such other or further relief as this honourable court may deem just to grant.

2. PW 1, the 1st plaintiff adopted his statement recorded on 25.5.2017 as his evidence. He also produced the documents in his list dated 25.5.2017 as plaintiffs' exhibits 1-7 respectively. He avers that sometime in January 2015, he entered into an agreement with the defendant whereby the latter offered him a loan facility of Kshs.662,246 which was secured by household goods and a title deed for a parcel of land known as Kabete/L. Kabete/3396 (the suit land). That he paid all the amounts but on 20.3.2017, defendant sent to him a statement of account claiming an outstanding amount of Kshs.1,142,392.05.

3. Aggrieved by the turn of events, plaintiff requested for a detailed statement of account reflecting the alleged debt. However, this was not forthcoming. Instead, defendant engaged the auctioneers who issued a notification of sale by public auction of the suit land. PW 1 terms the actions of the defendant as malicious and that they were made in bad faith.

4. PW 2, the second plaintiff also adopted her statement dated 25.5.2017 as her evidence. She contends that she never knew of the existence of the charge and that she never gave spousal consent thereof.

5. In their submissions, the plaintiffs contend that there was no spousal consent in respect of the charge as Pw2 did not sign the same. On this point, the plaintiffs made reference to Article 45 (3) of the constitution of Kenya, Section 2 and 79 (3) of the Land Act as well as Section 28 (a) and 93 (3) (a) of the Land Registration Act. They also relied on the following cases: **Fatma Hassan Hadi vs Diamond Trust Bank (K) Ltd (2019) eKLR, MWK vs SKK & 5 others (2018) eKLR and Geoffrey Kinuthia Mungai & another vs Progressive Credit Limited (2018) eKLR.**

6. The plaintiffs also claim that there was no valid legal charge capable of being enforced. They contend that there are discrepancies in regard to the amount stated in the letter of offer (shs.662,246), and the charge (Shs.600,000). The charge is not dated and signed under a seal nor witnessed. Further, plaintiffs state that the letter of offer did not state expressly that the borrower was to create a legal charge over the suit property in favour of the defendant. Finally on this point, the plaintiffs' contend that the 2nd plaintiff did not consent to creation of the charge of the suit property.

7. In support of the foregoing arguments, the plaintiffs have cited the provisions of Section 56 of the Land Registration Act and Section 79 (3) of the Land Act. They have also relied on the case of **Geoffrey Kinuthia Mungai (Supra).**

8. The plaintiffs have invoked the in-duplum rule while making reference to page 3 paragraph 2 in the charge, where it is expressly provided that the interest chargeable will not exceed any maximum permitted by the law. They aver that in clause 4 of the letter of offer, the interest is at the rate of 4% per month which translates to 48% per annum which is way above the normal CBK rates as at the time the offer letter was signed. The plaintiffs contend that the defendant was bound by the interest rates provided under the law.

9. On this point, the plaintiffs have relied on the provisions of Section 44 A of the Banking Act as well as the cases of **James Muniu Mucheru vs National Bank of Kenya Limited (2019) eKLR, Lee G Muthoga vs Habib Zurich Finance (K) Limited & another (2016) eKLR** and **Housing Finance Company of Kenya Limited vs Scholastica Nyaguthii Muturi & another (2020) eKLR.**

10. The plaintiffs also claim that they are not in any way indebted to the defendant. They contend that no detailed statement of account was ever issued to the plaintiffs establishing the amount owing including interests and penalties. They therefore urge the court to dismiss the counter claim.

11. The plaintiffs have also submitted that the relevant notices were not issued by the defendant. The plaintiffs urged the court to note that defendants admitted to having not sent the statutory notice as stipulated under Section 90 (2) of the Land Act. They contend that the statutory notice which was issued was for 45 days which is not in compliance with the aforementioned provisions of law.

12. They further state that no notice was issued in line with the provisions of Section 96 (2) of the Land Act which is a 40 days' notice issued by the chargee before the sale. They contend that this notice is different from the redemption notice issued under rule 15 of the Auctioneers Act.

13. On this point, the plaintiffs have relied on the provisions of Section 90 (1) and 96 (2) of the Land Act and Section 15 (d) of the Auctioneers Act. They have also relied on the following cases: **Zipporah Wanjiku Kariuki vs Progressive Credit Ltd & 2 others (2018) eKLR, Elizabeth Wambui Njuguna vs Housing Finance Co. Ltd (2006) eKLR, East Africa Ventor Co Ltd vs Agricultural Finance Corp. Ltd & another (2017) eKLR, Margaret Muthoni Njoroge vs Housing Finance Company Ltd & another (2020) eKLR and Geoffrey Kinuthia Mungai (supra).**

14. Finally, the plaintiffs have submitted that the suit property was not valued. It is contended that the defendant failed to conduct a property forced valuation thus failing to discharge its duties to the plaintiff as stipulated under Section 97 of the Land Act, and section II (b) (x) of the Auctioneers Rules. The plaintiff's also relied on the following case law: **East African Ventor Co. Ltd (Supra), Stephen Kibowen vs Agricultural Finance Corporation (2015) eKLR,** and **Beatrice Atieno Onyango vs Housing Finance Company Limited & 3 others (2020) eKLR.**

15. In the final analysis, the plaintiffs urge this court to allow their claim with costs and to dismiss the counter claim of the defendant.

16. The defendant filed an initial statement of defence on 24.9.2018 but this was amended vide a court order of 13.12.2019 where a counter claim was added. In paragraph 11 thereof, it is indicated that as at 16.7.2019, the 1st plaintiff owed the defendant a sum of Kshs.2,587,458.20 for the total sum of the loan borrowed and interest accrued thereon. It is further pleaded that spousal consent was duly given.

17. Defendant contends that the 1st plaintiff defaulted in repaying the monthly instalments despite several reminders. Defendant therefore engaged the auctioneers to sell the suit land in order to recover the outstanding amount of Kshs.2,587,450.20 and a statutory notice was duly issued.

18. The defendant therefore seeks the following orders in the counter claim:

(i) The plaintiff's suit be dismissed.

(ii) Judgment be entered in favour of the defendant against the plaintiffs for Kshs.2,587,458.20/= in arrears.

(iii) Interest at court's rate.

(iv) Cost of the suit and the counter-claim.

19. DW 1 adopted his statement recorded on 30.7.2019 as his evidence. He identifies himself as the legal officer of the defendant. He produced the documents in their list dated 18.9.2018 as D-exhibits 1-7 and the loan statement document in the list of 27.9.2020 as D-exhibit 8.

20. The testimony of DW 1 is that on or about 9th January, 2015, the defendant advanced a loan of Kshs.662,246/= to the 1st plaintiff on an

accruing interest basis and the 1st plaintiff was expected to repay the loan facility within eighteen (18) monthly instalments comprising of both principal amount and interest amounting to Kshs.50,000/= starting on 9th March, 2015 to 9th August 2015 and thereafter Kshs.70,000/= from 9th September 2015 to 9th August, 2016 as per the letter of offer dated 9th January 2015. The loan facility was secured by parcel of land title Number Kabete/L. Kabete/3396 belonging to Geoffrey Kinuthia Mungai, the 1st plaintiff herein. Defendant conducted due diligence, and the 2nd plaintiff voluntarily gave her consent.

21. Dw1 further stated that the 1st plaintiff subsequently defaulted in repaying the monthly installments despite several reminders from defendant. Thus defendant was forced to secure the services of Carnelian Enterprises Auctioneer to auction the suit land, of which the said auctioneers issued the statutory notice and notification of sale dated 27.3.2017. During cross examination, DW 1 stated that the 90 days' notice was not issued and the valuation was not conducted.

22. The issues framed by the defendant in its submissions are as follows:

(a) Whether the 1st plaintiff and the defendant entered into a valid legal charge over parcel of land title number Kabete/L. Kabete/3396.

(b) Whether the 1st plaintiff defaulted in loan repayment.

(c) Whether the defendant has a right to sell the security to recover the loan balance.

(d) *Whether the in-duplum rule is applicable.*

23. On the issue of validity of the charge, defendant submitted that the charge between plaintiff and defendant was duly executed and the charge was registered on 9.2.2015 as indicated by two stamps of the Land Registrar. It is averred that the parties were well aware of the amount secured by the charge. Thus the charge was executed in compliance with the provisions of sections 56 (1) and 2 of the Land Registration Act.

24. The defendant further submitted that the relevant notices were duly issued regarding recovery proceedings upon default, hence the plaintiffs were well aware of default in payment of the monthly installments and the amount of loan arrears accrued. To this end, defendant relied on the following authorities: **Equip Agencies Limited vs I & M Bank Limited (2017) eKLR, Al Jalal Enterprises Limited vs Gulf Bank Limited (2014) eKLR, Cieni Plains Company Limited & 2 others vs Ecobank Kenya Limited (2017) eKLR.**

25. It is further submitted that the second plaintiff has simply stated that the signature on the spousal consent form is not hers. That in line with the provisions of Section 107 of the Evidence Act, the burden was upon the plaintiffs to show that there was no spousal consent. It is contended that the plaintiffs did not call a handwriting expert to clarify the signature and that PW 2 did not adduce evidence to show that she is a spouse of PW 1. Further, no evidence was adduced to show that there was a matrimonial home occupied by the plaintiffs on the suit land. On this point, defendant cited the provisions of Section 79 (3) of the Land Act as well as the case of **Stella Mokeira Matara vs Thaddeus Mose Mangenya & another (2016) eKLR.**

26. On whether 1st plaintiff defaulted in loan payment, it was submitted that PW 1 had not presented any evidence to proof that he had fully repaid the loan advanced to him. It was submitted that as per D-exhibit 3 and 8, the outstanding balance as at 16.7.2019 stood at Shs.2,587,458.20 and that PW 1 admitted that much during cross examination.

27. The defendant further submitted that it has a right to sell the suit land in terms of clause 10 of the charge and that the plaintiffs' prayer for a permanent injunction is not warranted. Defendant relied on the case of **Nguruman Limited vs Jan Bonde Nielsen & 2 others (2014) eKLR.**

28. On the in-duplum rule, defendant submitted that they are not listed in the schedule of financial institutions under the Central Bank Act and are therefore not governed by the said act, thus Section 44A of the Banking Act does not apply in this case. On this point defendant relied on the case of **Desires Derive limited vs Britam life Assurance Co. (K) Ltd (2016) eKLR.**

29. Defendant therefore urges the court to dismiss plaintiffs' case with costs and allow its counter claim.

Determination

30. The uncontroverted fact is that in January 2015 or thereabout the 1st plaintiff and the defendant entered into an agreement whereby 1st plaintiff was advanced a loan of Kshs.662,246 by the defendant. The security thereof were household goods and a title to land parcel No. Kabete/Kabete/3396 (suit land).

31. The point of departure is whether there was justification in the process undertaken by the defendant to sell the suit property. The plaintiffs claim that the loan is fully paid, while defendant is counterclaiming an outstanding balance of Kshs.2,587,458.

32. I frame the issues for determination as follows:

(i) Whether there was a valid legal charge and whether the same is enforceable as between the parties.

(ii) Whether the 1st plaintiff is in default of loan repayment to the tune of Shs.2,587,458.20.

(iii) Whether proper procedures were followed before the purported sale of the suit land.

(iv) Whether the in-duplum rule is applicable.

(v) The relief.

Validity of the charge

33. One of the reasons why the plaintiffs are questioning the validity of the charge relates to lack of spousal consent. PW 2 denies having signed the document availed by defendant as a spousal consent form. As rightly submitted by the defence, he who alleges must prove – See Section 107 and 109 of the Evidence Act as well as the case of; **Jennifer Nyambura Kamau v Humphrey Mbaka Nandi [2013] eKLR**

34. **Section 79 (3) of the Land Act** provides that:

> ***"A charge of a matrimonial home, shall be valid only if any document or form used in applying for such a charge, or used to grant the charge, is executed by the chargor and any spouse of the chargor living in that matrimonial home, or there is evidence from the document that it has been assented to by all such persons".***

35. Matrimonial home under the Land Act means;

> ***"Any property that is owned or leased by one or both spouses and occupied by the spouses as their family home".***

36. It is not enough for the plaintiffs to say that they are spouses and that the suit land is their matrimonial home. They cannot leave it to the court to infer these facts. The plaintiffs ought to have adduced tangible evidence to show that not only are they spouses, but that the suit land fits the definition of a matrimonial home. The claim of lack of spousal consent by the plaintiffs is not merited.

37. I also find that there is a discrepancy in the letter of offer where the amount indicated is Kshs.662,246 and the charge which has a figure of Shs.600,000. The charge doesn't indicate that the amount borrowed was Shs.662,246. There is no evidence to state that these figures were ever reconciled.

38. It is also apparent that the charge document is undated.The letter of offer too was not signed or dated. Further, nowhere in the letter of offer is it stated that the borrower was to create a legal charge over the suit property. In light of the aforementioned discrepancies, I find that the charge is not enforceable.

Whether the 1st plaintiff is in default of loan payment.

39. Defendant has relied on their documents D-exhibit 3 and 8 to show that 1st plaintiff defaulted in payment. A keen look at these two documents which are statements of accounts as at 9.2.2017 and 7.9.2019 reveal tell tale signs of a rogue lender. It doesn't require rocket science to discern that the items loaded in the statement could not be comprehended by a mere look with the naked eye. Even this court cannot decipher the figures aligned to the various descriptions of the items in the two statements. It was incumbent upon the defendant to give a plausible account of the figures computed in those statements. However, nowhere in his evidence has DW 1 stated that they ever approached PW 1 to explain the aforementioned figures and items.

40. Further, I note that some of the items loaded in the statement include *penalties* and *interest due*. Going by both the letter of offer and the charge itself, the issue of penalty is not adequately captured. The letter of offer talks about interest on commission as well as additional interests. The charge document on page 3 also talks of interest. How then does the defendant explain the item termed as penalties on the statements.

41. Further on page 2 of the letter of offer on the heading "*additional interest*" it is provided as follows:

> ***"Such interest shall be payable at anytime on demand…..".***

42. It follows that the said interest was not to be levied before demand. Nowhere in his evidence has DW 1 given an account of when they were making demand for the items on interest in conformity with the terms of the letter of offer.

43. Another disturbing question is; *when did the default occur?* Clause 9 of the charge document contains 16 sub clauses of the *"events of default*. Thus the consequences of default as set out in clause 10 thereof were to take shape upon the occurrence of the events in clause 9. The only evidence of a demand notice is D-exhibit 4 dated 1.4.2015. There in, the defendants were bringing to the attention of 1st plaintiff that he was in arrears to the tune of Shs.69,904. The events of April 2015 could not be termed as the ones which led to the application of clause 10 (1) (e) on the charge to have the suit property sold.

44. It was incumbent upon the defendant to follow the laid terms and conditions of their agreement and indicate when default occurred as well as the nature and extent of such default.

45. The provisions of **Section 80 of Land Act** provide that the **Charge of land is to take effect as security only;**

> ***"(1) Upon the commencement of this Act, a charge shall have effect as a security only and shall not operate as a transfer of any interests or rights in the land from the chargor to the chargee but the chargee shall have, subject to the provisions of this Part, all the powers and remedies in case of default by the chargor and be subject to all the obligations that would be conferred or implied in a transfer of an interest in land subject to redemption. (2) …….***
>
> ***(3) Every charge instrument shall contain— (a) the terms and conditions of sale; (b) an explanation of the consequences of default; and (c) the reliefs that the chargor is entitled to including the right of sale".***

46. What resonates from the analysis of the evidence tendered herein is that the defendant did not lay a basis to support its claim of the sum of Shs.2,587,458.20 as he did not comply with the aforementioned provisions of the Land Act.

Whether proper procedures were followed before the purported sale.

47. It is indicated in the charge document that the charge was to be governed and interpreted in accordance with Kenyan law. Further in clause 10 of the charge document, it is specifically provided that all remedies were to be exercised in accordance with the provisions of Section 90, 96, 97 and section 101 of the Land Act.

48. The notices issued to the 1st plaintiff have been availed as D-exhibits 5 and 6. However, those notices do not emanate from the defendant. They are from the auctioneers. Section 90 of the Land Act provides that:

> ***"(1) If a chargor is in default of any obligation, fails to pay interest or any other periodic payment or any part thereof due under any charge or in the performance or observation of any covenant, express or implied, in any charge, and continues to be in default for one month, the chargee may serve on the chargor a notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be.***
>
> ***(2)……..***
>
> ***(3) If the charger does not comply within ninety days after the date of service after the notice under subsection (1), the charger may; (e) sell the charged land.***

49. In the case of **Zam Zam Investment Limited vs Altam Group International (K) Ltd & another Mombasa H.C.C No. 130 of 2012**, it was stated that:

> ***"For a three month's notice to be valid, it ought to follow to the letter the provisions of the above sections. ……***
>
> ***Most importantly, the statutory notice will require to inform the chargor the extent of default and the amount that needs to be paid to rectify the default (emphasize added). It will be no longer satisfactory to demand the whole outstanding amount in the chargor's account the moment the chargor defaults…..".***

50. In the present case, it was not even a case of non-compliance with the requirements stipulated under Section 90 (2) of the land Act, it was a no show case. DW 1 admitted that he was aware of the 90 days statutory notice but that the same was not issued.

51. As rightly submitted by the plaintiff, the provisions of Section 96 of the Land Act becomes applicable after the chargor fails to remedy the default. The said section provides as follows:

> ***"Where a chargor is in default of the obligations 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), a chargee may exercise the power to sell the charged land. (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 any 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".***

52. Again this notice was not issued by the defendant which notice must not be confused with the one under Rule 15 of the Auctioneers Act. The auctioneers ought to come into the picture after the compliance with the notices under Section 90 and 96 of the Land Act. See **Margaret Muthoni Njoroge vs Housing Finance Company Limited & another (2020) eKLR.** I therefore find that defendant did not comply with the laid down legal requirements when he set out to sell the suit land.

53. Further, it has emerged that no valuation was conducted before the purported sale process. DW 1 was not certain as to whether a forced sale valuation was done and that the auctioneers did not do a valuation before the sale.

54. **Section 97 (2) of the Land Act** provides that:

> ***"A chargee shall before exercising the right of sale ensure that a forced sale valuation is undertaken by a valuer".***

This again is another pointer to the fact that no proper procedures were followed by defendant when it embarked on selling the suit land.

55. In the case of **Palmy company Limited vs Consolidated Bank (2014) eKLR,** it was stated as follows:

> ***"The duty under section 97 (2) of the Land Act is therefore a serious legal requirement which will entitle the chargor to apply to court under section 97 (3) (b) of the Land Act to have any sale based on such breach to be declared void."***

See also **Beatrice Atieno Anyango vs Housing Finance Company Limited & 3 others (2020) eKLR.**

In Duplum Rule

56. Defendant contends that they are not governed by the Banking Act and Central Bank Act. DW 1 stated that he was also not aware of any interest capping. As rightly stated in the **Desire Derive case (supra),** the in-duplum rule acquired statutory clothing vide the Banking (Amendment Act No. 9 of 2006) Act. However, the rule has its root in Common law. Literally translated in-duplum means "*Double the amount*" and the rule provides that interest on a debt will cease to run where the total amount of arrears interest has accrued to an amount equal to the outstanding principal debt. The rule was developed in response to considerations of public interest.

57. In the case of **Mwabeja Ranching Company Limited and another vs Kenya National Capital Corporation (2019)** cited in the Court of Appeal case of **Housing Finance Company of Kenya Limited vs Scholastica Nyaguthii Muturi & another Nairobi COA civil appeal no. 153 of 2017**, the rationale of the rule was explained as follows:

> ***"The in duplum rule is concerned with public interest and its key aim was to protect borrowers from exploitation by lenders who permit interest to accumulate to astronomical figures. It was also meant to safeguard the equity of redemption and safeguard against banks making it impossible to redeem a charge property. In essence, a clear understanding and appreciation of the in duplum rule is meant to protect both sides….."***.

58. In the present case, defendant is claiming Ksh.2,587,458.20 yet what was advanced was Ksh.662,246. Further, and as rightly submitted by the plaintiffs, the charge document also has a provision (on the heading interest) that the rates were not to exceed any maximum permitted by the law.

59. Despite these astronomical figures, I do find that the in duplum rule as at now may not be applicable in this case primarily because the court has already established that the charge is invalid, that the interests and penalties loaded in the account of the 1st plaintiff have no basis, and so is the defendant's claim of Shs.2587458.

Relief

60. In the final analysis, I find that plaintiffs have proved their case on a balance of probabilities while defence counter claim fails. I therefore proceed to grant the following orders;

1. Plaintiffs' claim is allowed in the following terms:

(i) A permanent injunction is hereby issued restraining the defendants either by themselves, servants, agents and or attorneys from any way selling, letting, leasing, disposing, transferring, charging, pledging , dealing or in any other way interfering with the suit property being land title no. L.R No. Kabete/L. Kabete/3396 Lower Kabete, Kiambu County.

(ii) It is hereby declared that the 1st plaintiff is not in breach of any of the terms of the loan repayment of Kshs.662,246/=.

(iii) It is hereby declared that the charge instrument dated 9. 2. 2015 over title No. L.R No. Kabete/L. Kabete/3396 Lower Kabete, Kiambu County is unenforceable and void.

(iv) An order is hereby issued for the cancellation, annulment and invalidation of any legal or statutory notices issued by the defendants and or their agents.

2. Defendant's counter claim is hereby dismissed.

3. Defendant is hereby condemned to pay the costs of the suit.

DATED AND SIGNED AT MERU THIS 4TH DAY OF MARCH, 2021

HON. LUCY N. MBUGUA

ELC JUDGE - MERU

DELIVERED AT THIKA THIS 18TH DAY OF MARCH 2021

HON. LUCY GACHERU

ELC JUDGE - THIKA