



REPUBLIC OF KENYA



Kinyanjui v State Bank of Mauritius (SBM) & 2 others (Environment & Land Case E016 of 2021) [2022] KEELC 2418 (KLR) (5 May 2022) (Ruling)

Neutral citation: [2022] KEELC 2418 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU
ENVIRONMENT & LAND CASE E016 OF 2021
YM ANGIMA, J
MAY 5, 2022
FORMERLY NAIROBI ELC NO 287 OF 2021**

BETWEEN

SARAFINA WANJIKU KINYANJUI PLAINTIFF

AND

STATE BANK OF MAURITIUS (SBM) 1ST DEFENDANT

DALALI TRADERS 2ND DEFENDANT

MAINA IMANI 3RD DEFENDANT

RULING

1. By a notice of motion dated 2nd August, 2021 grounded upon Order 51 of the *Civil Procedure Rules*, 2010, Sections 3A of the *Civil Procedure Act* (Cap.21), the Land Registration Act 2012, the Auctioneers Act and all other enabling provisions of the law the Plaintiff sought the following orders:
 - (a) ...spent
 - (b) ...spent
 - (c) That there be a temporary injunction restraining the Defendants/Respondents, their agents, employees, servants or any other persons claiming, purchasing or acting through the Defendants/Respondents from auctioning, selling, offering for sale, advertising, transferring, interfering, alienating, evicting, entering and/or destroying in any way whatsoever and whatever transaction on that land known as land title number Nyandarua/Ol Aragwai/4725 registered in the name of the Applicant until full hearing and determination of this suit.
 - (d) That the costs of this application be borne by the Defendants.



2. The application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by the Plaintiff on 2nd August, 2021 and the exhibits thereto. The Plaintiff contended that sometime in 2015 the 1st Defendant advanced her a loan of kshs 800,000/= on the security of the suit property and that having repaid a substantial portion thereof she ought to be accorded an opportunity to redeem the suit property.
3. The Plaintiff further contended that despite her efforts to settle the 1st Defendant's loan, she was unable to do so due to declining business opportunities and the outbreak of Covid-19 pandemic in 2020. It was the Plaintiff's case that the suit property was the only source of her family livelihood and that the 1st Defendant's action of selling it to the 3rd Defendant was gravely prejudicial to her. She, therefore, prayed for an interim order in terms set out in paragraph one hereof.
4. The 1st Defendant filed a replying affidavit sworn by its Debt Recovery Officer, Julius Kimpei on 16th November, 2021 in opposition to the application. It was contended that the Plaintiff was granted a loan facility of kshs 800,000/= vide a letter of offer dated 30th July, 2015 and the facility was secured by a legal charge over the suit property. It was further contended that when the Plaintiff defaulted on the loan a 90-day statutory notice was issued to her under Section 96 (2) of the Land Act in 2019.
5. The 1st Defendant asserted that the instant application was a mischievous attempt by the Plaintiff to avoid her just legal obligations under the loan facility and the terms of the charge. The court was consequently asked to dismiss the application with costs. The record shows that the 2nd and 3rd Defendants did not file any response to the application.
6. Upon service of the 1st Defendant's replying affidavit, the Plaintiff filed a further affidavit in which she disputed the loan amount alleged to be outstanding at the time of the auction. The Plaintiff further disputed that she was served with a 90 days statutory notice to redeem the suit property and notification of intended sale. The Plaintiff contended that she was denied an opportunity to redeem the suit property before it was auctioned.
7. When the application was listed for inter partes hearing, it was directed that the same shall be canvassed through written submissions. The parties were granted timelines within which to file and serve their respective submissions. The record shows that the Plaintiff filed her submissions on 20th January, 2022 whereas the 1st Defendant filed its submissions on 14th February, 2022. The 2nd and 3rd Defendants did not file any submissions in the matter.
8. The court has considered that the Plaintiff's application for interim orders, the 1st Defendant's replying affidavit in opposition thereto, the plaintiff's further affidavit in as well as the submissions on record. The court is of the opinion that the main issue for determination herein is whether or not the Plaintiff has satisfied the requirements for the grant of an interim injunction.
9. The court is aware that at this interlocutory stage, it is not required to conclusively determine the issues in controversy in the suit because that is the function of the trial court. All that the Plaintiff is required to do as this stage is to satisfy the court that she has a prima facie case with a probability of success at the trial and that an award of damages shall not be an adequate remedy should the suit ultimately succeed. It is only where the court is in doubt on the issue of irreparable damage that the balance of convenience is considered. See *Giella v Cassman Brown & Co Ltd* [1973] EA 358.
10. There is no doubt from the material on record that the Plaintiff was advanced a loan facility of kshs 800,000/= in 2015 on the security of the suit property. There is no dispute that the loan was to be repaid within a period of 3 years. By the Plaintiff's own admission, there was default in repayment of the loan with the consequence that she was still making instalment payments as late as 4th May, 2021



about 6 years after the date of advancement. In her written submissions, the Plaintiff has made it clear that she is simply seeking indulgence to redeem the suit property. It is noteworthy that although the Plaintiff is disputing the outstanding balance of the loan, she has not offered to pay the 1st Defendant the undisputed amount. She has not even made any payment proposals to the bank so far.

11. The court has further noted that even though the Plaintiff claimed to have been called by the auctioneer in April 2021 alerting her that the suit property was at risk of being auctioned on account of default, the Plaintiff did not visit the 1st Defendant to seek indulgence until July 2021. The court is far from satisfied that the Plaintiff has been serious in seeking to redeem the suit property. There is no evidence on record to demonstrate that the Plaintiff has ever made any reasonable repayment proposals to the bank either before or after the date of the auction. It would, therefore, be unfair to restrain the 1st Defendant from exercising its contractual rights under the law. The court is not satisfied that the Plaintiff has made out a prima facie case with a probability of success at the trial on the basis of the material on record.
12. The court is further of the opinion that the issue of whether or not the 90-days statutory notice was served is a contested issue which can only be conclusively determined at the trial. However, the material on record indicates on a prima facie basis that the Plaintiff was duly notified via phone and WhatsApp messaging. She did not in her further affidavit dispute that the cell phone number indicated in the exhibits to the replying affidavit was hers or that the postal address employed was not genuine.
13. The upshot of the foregoing is that the court finds no merit in the Plaintiff's application for interim orders. Accordingly, the Plaintiff's notice of motion dated 2nd August 2021 is hereby dismissed with costs to the 1st Defendant only.

RULING DATED AND SIGNED AT NYAHURURU AND DELIVERED VIA MICROSOFT TEAMS PLATFORM THIS 5TH DAY OF MAY, 2022.

In the presence of:

No appearance for the Plaintiff

Mr. Obura for the 1st Defendant

No appearance for the 2nd and 3rd Defendant

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Y. M. ANGIMA

JUDGE

