



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT NYAHURURU**

**ELC CASE NO 8 OF 2019**

**JOSEPH KINGORI GIKONYO.....PLAINTIFF/APPLICANT**

**VERSUS**

**SUMAC MICROFINANCE BANK.....DEFENDANT/RESPONDENT**

**RULING**

1. Coming up for determination is the Notice of Motion dated 27<sup>th</sup> February 2019 brought under Order 50 Rule 6, Order 51 Rule 1 of *the Civil Procedure Rules* and Section 3A of the Civil Procedure Act and all enabling provisions of the law where the Applicant seeks to secure the following orders:-

i. **Spent.**

ii. That this Honorable Court be pleased to stay sale by JOSRICK Merchants Auctioneers of land parcel Nyandarua/Aragwai/8079 pending the hearing and determination of this Application inter-parties.

iii. That this Honorable Court be pleased to stay sale by JOSRICK Merchants Auctioneers of land parcel Nyandarua/Aragwai/8079 pending the hearing and determination of this suit.

iv. That the Defendant be allowed to continue paying the Defendant by installments as per future agreement henceforth.

v. That the cost of this Application be borne by the Applicant.

2. The Application is supported by the grounds on the face of it and the affidavit sworn by Mr. Joseph Kingori Gikonyo the Applicant herein.

3. The application was disposed of by way of written submissions wherein the Applicant submitted that the Respondent was bent on selling his family land due to a loan he took from them and which loan he has been servicing. That if the application was not allowed, the Respondent would sale the said parcel of land which would leave him and his family destitute and they would be rendered squatters.

4. That he had defaulted in servicing the loan because of some financial constraints and not that he had refused to pay the same. That further, he came to know of the sale through a friend, the Respondent having neither served him with a Statutory Notice nor a Redemption Notice as required by the law, which was clearly a breach of the law. That he was willing to clear the balance as soon as the accounts was taken to ascertain how much was owing. He relied on the decided case of **Albert Mario Cordeiro & Another vs Vishram Shamji [2015] eKLR**

5. In opposition of the said application, it was the Respondent's submission that the Applicant herein had borrowed Ksh 950,000/=from them on the 14<sup>th</sup> October 2016 therein offering the subject suit as security.

6. That the loan was to be repaid by an installment of Ksh 37,271/= within 36 months at an interest rate of 20%, That the Applicant after servicing his loan initially, defaulted and as at on the 31<sup>st</sup> December 2018, he owed the bank Ksh. 574,300/= which money continued to accrue interest.

7. That they had complied with all the provisos of the law while seeking to raise its security including the service of all the necessary notices to no avail.

8. The Respondent submitted that the Applicant had not come to court with clean hands as they had indulged his numerous proposal which had not come to pass and therefore the security had become a commodity for sale.

9. Further, that the Applicant had not discharged the onus placed on him by the principles laid down in the **Giella vs Casman Brown** case so as to be granted interim injunctive orders. He prayed that the application herein be dismissed.

10. Considering whether the conditions for issuance of an injunction have been met, this court is guided by the principles governing the grant of interlocutory injunctions as set out in the **Giella v Cassman Brown & Co Ltd [1973] EA 358** to the effect that:

*i. The applicant must show a prima facie case with a probability of success;*

*ii. An interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not be adequately compensated by an award of damages;*

*iii. If the court is in doubt, it will decide an application on the balance of convenience.*

11. A prima facie case in civil cases is 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.

12. Has the Plaintiff/Applicants in the present application established a prima facie case?

13. I note that via a registered mail dated the 10<sup>th</sup> July 2018, through the post office box given to the Respondents by the Applicant, the Respondent had properly served the Applicant with a Statutory Notice for payment of outstanding arrears of Ksh 214,416/= wherein after he was also served with the Notice of sale .

14. Section 90(1) of the said Land Act Cap 280 (Laws of Kenya) provides as follows:-

*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 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.*

15. Having found that the Statutory Notice was properly effected, and a substantial amount of money given to the Applicant as a loan facility, which money had been utilized by the Applicant who then failed to fully repay the money and the accruing interest, the suit property being offered herein by way of security to the Respondent Bank for the loan facilities availed to the Applicant, became a commodity which the chargee, the Respondent could sell off in order to recover monies lent to the Applicant together with the interest thereof.

16. In the case of **Mrao v First American Bank (2003) KLR 125** Kwach, JA (as he then was), had this to say:

*'I have always understood that it is the duty of any person entering into a commercial transaction particularly one in which a large amount of money is involved to obtain the best possible legal advice so that he can better understand his obligations under the documents to which he appends his signature or seal. If courts are going to allow debtors to avoid paying their just debts by taking some of the defences I have seen in recent times for instance challenging contractual interest rate, banks will be crippled if not driven out of business altogether and no serious investors will bring their capital into a country whose courts are a haven for defaulters. I agree entirely with the Commissioner of Assize Shah that the appellant was not entitled to an injunction upon any one of the grounds urged on its behalf.'*

17. This case brings out an important contractual principle that security pledged to a financial institution or bank stands the risk of being sold and the intended sale is within the contemplation of the parties to the loan agreement. In other words, the sale of property by the mortgagee cannot lead to irreparable loss since it is the contractual arrangement or intention of the parties and expressly provided for in the loan agreement or mortgage deed. Exceptions to the general rule must relate to issues like whether the mortgagor is in default and whether statutory power of sale has arisen. Where the agreed amount has not been paid and the borrower is still in default on the agreed amount, the right of the bank to sell is established and what the court can do is to cause the ascertainment of the right value for forced sale of the property.

18. I find that the Applicant has not established a prima facie case for issuance of an injunction herein.

19. *In determining where the balance on convenience lies*, considering the facts of this case in totality, I find that the balance of convenience is not in favour of the applicants. Since the Respondents statutory power of sale has arisen, I find that the balance of convenience lies in enforcing the contractual obligations of the parties.

20. Consequently, I find that the application under determination has no merits and that the Plaintiff/Applicant has not satisfied the tests for granting the injunction sought as laid down in the **Giella v Cassman Brown** (supra). Accordingly, I dismiss the application dated 27<sup>th</sup> February 2019 with costs to the Respondent.

21. Owing to the pecuniary jurisdiction of this court, the matter is herewith transferred to the Chief Magistrate's court for hearing and determination and/or further directions.

**Dated and delivered at Nyahururu this 2<sup>nd</sup> day of July 2019.**

**M.C. OUNDO**

