



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC 142 OF 2018

MICHEAL KAGUME GATURA.....PLAINTIFF/APPLICANT

VERSUS

EQUITY BANK (K) LTD.....1ST DEFENDANT/ RESPONDENT

ANTIQUA AUCTION AGENCIES.....2ND DEFENDANT/RESPONDENT

RULING

The matter for determination is the Notice of Motion Application dated **8th May 2018** by the Plaintiff/ Applicant herein seeking for the following orders;

1. THAT pending the hearing and determination of the suit herein this Honourable Court be pleased to issue a temporary injunction to restrain the Defendants, their agents, Servants or any other person from selling by way of public auction or Private treaty or in any other manner interfering with the Plaintiffs ownership, possession and/or interest in the suit lands known as LR NO. KIAMBU/MUNICIPALITY BLOCK 5(KIAMUMBI) 3126, RUIRU/KIU BLOCK 2/7688 AND RUIRU/KIU 7689.

2. THAT the Costs of this application be provided for.

The Application is premised on the grounds that the Plaintiff/Applicant is the registered proprietor of the suit properties and on the authority of the 1st Defendant/Respondent, the 2nd Defendant/Respondent has arranged for the sale of the suit properties by Public auction. However, the statutory power of sale has not crystallized as the Plaintiff/Applicant has never been issued with any **statutory notice** or **demand notice** as required by law. Further that for the scheduled sale, has no basis in law as the Plaintiff/Applicant has never been notified by the 1st Defendant/Respondent about any default nor has the 2nd Defendant/Respondent ever served the Plaintiff/Applicant with the proclamation or redemption notice. For the above reasons the Plaintiff/Applicant has not been given an opportunity to regularize his account and he has made plans to do the same by disposing off some of his assets. Further that the 1st Defendant/Respondent unilaterally increased the monthly instalments without involving the Plaintiff.

In his supporting Affidavit the Plaintiff/ Applicant averred that he is the registered owner of the residential house located on the suit properties and he stays on **LR NO. KIAMBU/MUNICIPALITY BLOCK 5(KIAMUMBI) 3126**. He further averred that he purchased the suit properties while still working with the 1st Defendant/Respondent being a house Mortgage of **Kshs. 6,000,000/= million** and a plot development for **Kshs. 1,200,000/= million**. The Mortgage facility was to be repaid in monthly instalments of **Kshs. 42,986/=** while the plot development was to be repaid at a monthly instalments of **Kshs.13, 322/=** per month. However, when the 1st Defendant's /Respondent's Othaya branch was robbed, the applicant was dismissed and the 1st Defendant/Respondent unilaterally increased the monthly instalments from **Kshs. 42,000/=** to **Kshs. 78,000/=** and despite him requesting for more time for repayment but on the **14th of March 2018**, he was served with a notification of sale by the 2nd Defendant, He denied ever being issued with a statutory notice or demand notice for redemption nor being served with any letter requiring him to regularize his account or a proclamation letter by the 2nd Defendant/Respondent as required by law.

It was his contention that he only learnt about the purported exercise of statutory power of sale when he was served with a notification of sale and as such the schedule sale has no basis in law. He further averred that he was willing to repay the loan if it is rescheduled as the default was no intentional.

The Application is opposed and the Legal service manager of the 1st Defendant/Respondent swore a Replying Affidavit and averred that the Plaintiff/ Applicant applied for and received two loan facilities to which the loan repayment for the **Kshs.1,200,000/=** was **ten** years while the one for **Kshs. 6,000,000/=** was **20** years. He serviced the loans until **November 2016**, when he started defaulting for **kshs. 1,200,000/=** and intervals from **October 2015** to date for **Kshs. 6,000,000/=** and since then he has never approached the 1st Defendant/Respondent with a view of remedying the situation.

He further contended that upon default, the 1st Defendant/Respondent invoked its statutory power of sale and sent out a demand notice dated **10th December 2016**, Notices to sell dated **6th July 2017**, and Redemption notice dated **12th December 2018** as evidenced by annexures **DM3a,3b,4a, 4b,5a,5b**. Further that upon no attempt to remedy the default, the 1st Defendant/Respondent instructed the 2nd Defendant/Respondent who served the Plaintiff with the **forty five (45)** days Statutory Notice of sale and the Notification of sale. Being that the Plaintiff failed to further remedy the default the 1st Defendant/Respondent advertised the set public auction.

He further averred that the 1st Defendant/ Respondent reserved the right to amend the interest charges without prior notice to the borrower and this fact was within the knowledge of the Plaintiff/ Applicant as the fact that the change of interest when he ceased being an employee of the 1st Defendant/Respondent. He also averred that the planned public auction was legal as the due process was followed and the Plaintiff/ Applicant was served with the requisite notice and his allegations are intended to mislead the Court. He urged the Court to deny the Plaintiff/Applicant the orders sought as his arrears are hurting the operations of the 1st Defendant/ Respondent.

The Application was canvassed by way of written submissions to which the Court has now carefully read and considered. The Court has also considered the pleadings in general, the annexures thereto, the relevant provisions of law and the cited authorities and renders itself as follows;

It is not in doubt that the Plaintiff/Applicant herein took a loan of **Kshs.1,200,000/= and Kshs.6,000,000/=** from the 1st Defendant/Respondent Bank and offered his land parcels **L.R Kiambu/Municipality Block 5 (Kiamumbi)3126, Ruiru/Kiu Block 2/7688 and Ruiru/Kiu 7689**, as the Security for the said loans. Once a property has been offered as security over any loan or charge, it becomes a commodity for sale. See the case of **Paul Muhoro Kihara vs Barclays Bank (K) Ltd, Milimani HCCC No. 33 of 2002 (2001) 2EA 420** where the Court held that;

‘Once land has been given as security for a loan, it becomes a commodity for sale by that very fact and any romanticism over it is unhelpful as there is no commodity for sale whose loss cannot be adequately compensated by an appropriate quantum of damages.’

The Plaintiff/Applicant has acknowledged having taken the loan facilities and further that he is in default. Having entered into a contract with the 1st Defendant/ Respondent, the Plaintiff/ Applicant is bound by the terms of the said contract and so is the Defendant/ Respondent. It is not for this Court to come in between and try to alter the terms of the said contract and even so the Court cannot alter the said terms. See the case of **Emo Investment Ltd Vs Stephanus Petrus Kiinge (2010)eklr** which quoted the case of **National Oil ...vs Pipeplastic Samkolit(K) Ltd & Prof Samson K. Ongeru (C.A No. 95 of 1999)** where the court held that;

‘A court of law cannot rewrite a contract between the parties. The parties are bound by their contract, unless coercion, fraud or undue influence are pleaded and proved.’

I have perused the charge and it is evident from the terms that in the event of any default by the Plaintiff and after the relevant notices have been issued the chargee has a right to exercise its power of sale as evident by the Land Act. The Plaintiff/ Applicant has alleged that she was never issued with the notices and hence not given a chance of redemption. On the other hand the 1st Defendant has alleged that the relevant notices were sent out to the Plaintiff/ Applicant and as evidence of having sent out the notices, the 1st Defendant/ Respondent has attached a **Postal Corporation of Kenya List of Registered Postal Packets, registered and Ordinary parcels** that bears the name of the Plaintiff/ Applicant as one of those people that was set to receive a package from the 1st Defendant / Respondent. This Court however takes note that the 1st Defendant/ Respondent failed to attach a receipt that indicates or evidences that the said notices were in fact paid for and posted to the Plaintiff/ Applicant .This Court takes note that the Certificate of postage that has been attached to the 1st respondent’s Replying Affidavit is dated the **15th of March 2018** sent out by the Auctioneer. Without a receipt indicating postage and thereby evidencing that the letter was actually posted to the Plaintiff/Applicant by the 1st Defendant/Respondent and thereby received by the Plaintiff/ Applicant. The Court cannot hold and find that indeed the relevant notices were served upon the Plaintiff/Applicant.

The Court notes that what has been annexed as evidence is a mere list that does little to persuade the Court that the notices were actually sent out. See the case of **Karige Kihoro versus Equity Bank Limited & Another (2016)eklr** where the court held that;

‘I entertain no doubt that the document referred to as a certificate of postage is the document issued by the postal corporation of Kenya to confirm receipt and postage of a registered mail. This being a matter of public notoriety the court is under section 59 of Evidence Act (Cap 80) laws of Kenya allowed to take judicial notice of such matters. The notice herein having been sent to the Respondent’s last known postal address, the Respondent is by law deemed to have been served with the notices.’

Further in the case of **Nyagilo Ochieng & Another Vs. Fanuel Ochieng & 2 Others Civil Appeal No. 148 of 1995 [1995-1998] 2 EA 260** the Court of Appeal held that:

‘Unless the receipt of statutory notice is admitted, posting thereof must be proved and upon production of such proof the burden of proving non-receipt of such notice or notices shifts to the addressee as is contemplated by section 3(5) of the Interpretation and General Provisions Act, Cap 2, Laws of Kenya’

In the instant case, this Court is not satisfied that the Notices were paid for and posted as no receipt for such payment have been produced before this Honourable Court. This is a Mandatory provision and if the Respondent missed the Mandatory requirements and provisions before undertaking to carry out the intended **Public Auction**, then the said omissions infringed on the Applicants’ rights and have indeed clogged the Chargor’s right of redemption. The Applicant has therefore demonstrated that he has a *prima-facie* case with probability of success.

On the **second limb** of if the orders not granted, the Applicants will suffer irreparable loss which cannot be compensated by an award of damages, it is evident that on the suit properties stands the 1st Applicant's home. Though it is trite that once a property has been given out as security for any loan, it becomes a commodity for sale, it is evident that the 1st Defendant/Respondent did not carry out all the relevant steps before exercising its **Statutory Power of Sale**. Though the suit properties can be quantified and award of damages can compensate the same, the payment of damages cannot compensate infringement of rights. See the case of **Joseph Siro Mosioma...Vs...HFCK & 3 Others[...]** **eKLR**;-

“On my part, let me restate that damages is not automatic remedy when deciding whether to grant an injunction or not. Damages is not and cannot be a substitute for the loss which is occasioned by a clear breach of the law..... a party cannot be condemned to take damages in lieu of his crystallized right which can be protected by an order of injunction”.

Therefore, it is evident that payment of damages is not an automatic remedy for loss occasioned by breach of law as breached herein by the Defendant/Respondent.

On the **third limb** of if the court is in doubt to decide on a balance of convenience, the Court finds that it is not in doubt. However, even if it was in doubt, the balance of convenience would tilt in favour of maintaining the **status quo** and the **status quo** herein is not to allow the sale of the suit property by **Public Auction** until the suit is heard and determined. See the case of **Agnes Adhiambo OjwangVs... Wycliffe Odhiambo Ojjo, Kisumu HCCC No.205 of 2000**, where the Court held that:-

“the purpose of injunction is to preserve the status quo and the status quo to be preserved is the one that existed before the wrongful act”.

Having now carefully considered the available evidence herein, the Court finds the Plaintiff's/Applicant's **Notice of Motion** application dated **8th May 2018** merited and the same is allowed entirely with costs to the Applicant herein.

It is so ordered.

Dated, Signed and Delivered at Thika this 4th day of July 2019

L. GACHERU

JUDGE

4/7/2019

In the Presence of

Mr. Otieno for the Plaintiff/Applicant

Mr. wanjohi H/B for Ms. Wamuyu for the Defendants/Respondents

Lucy Court Assistant

Ruling read in open court in the presence of the above advocates

L. GACHERU

JUDGE

4/7/2019