



REPUBLIC OF KENYA



KENYA LAW
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**Pramukh Chemist Limited & another v Kenya Commercial Bank & another
(Civil Case E007 of 2024) [2025] KEHC 3010 (KLR) (13 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 3010 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CIVIL CASE E007 OF 2024
REA OUGO, J
MARCH 13, 2025**

BETWEEN

PRAMUKH CHEMIST LIMITED 1ST PLAINTIFF

FALGUNIBEN ALPESHKUMAR PATEL 2ND PLAINTIFF

AND

KENYA COMMERCIAL BANK 1ST DEFENDANT

NYALUOYO AUCTIONEERS 2ND DEFENDANT

RULING

1. On the 18th of July 2024 the first and second plaintiffs/applicants filed a Notice of Motion brought under section 2, 3A, 1A, 1B and 63 (e) of the Civil Procedure Act, Order 40 Rule (1) (a) (2) (4) and (10), Order 51 (1) of the Civil Procedure Rules 2010 and Section 103 of the Land Act 2012.
2. The plaintiff/ applicants (the applicants) seek the following orders;
 - i. Spent
 - ii. That pending the hearing and determination of this application interparties the defendants/ respondents whether by themselves their servants, employees nominees, assignees, agents and any other persons acting under the instructions be restrained from disposing off, auctioning, offering for sale and or alienating L R No. Ndivisi/Muchi/ 8489 and Ndivis/Muchi/6179.
 - iii. That pending the hearing and determination of this suit the defendants/respondents whether by themselves their servants nominees assignees agents and or any other person acting under their instructions be restrained from disposing of auctioning offering for sale and or alienating L R No. Ndivisi/Muchi/ 8489 and Ndivis/Muchi/6179.
 - iv. At costs of the application be provided for



3. The applicants filed an affidavit sworn by Alpesh Kumar Mohanbhai Patel the 2nd applicant. He avers as follows; the 1st applicant is the registered owner of L.R No. Ndivisi/ Muchi/8489 which was offered as security for a loan from the 1st defendant /respondent (1st respondent). Due to the effects of Covid-19 Pandemic the 1st plaintiff lost many of its tenants and customers which reduced its rental income and the 1st plaintiff applicant's loan fell into arrears. The applicants made numerous attempts urging the 1st respondent to consider a Moratorium and Restructuring of the Loan facility to enable the applicants reorganise their finances and repay the loan. On the 18.4.2024 they received redemption notices of 45 days and Notification of Sale of the Suit premises from the 2nd defendant on instructions of the 1st defendant. On the 12.6.2024 the 2nd respondent on the instructions of the 1st respondent, advertised for sale the Suit property in a local daily newspaper for public auction scheduled for 23rd July 2024 at 11.30 am. The 2nd applicant depones further that the 1st respondent did not issue the 90-day Statutory Notice as by law required by before issuance of the redemption Notice. No forced sale valuation was done on the land to determine the current market and subsequent forced sale value contrary to the law. Since the business has picked up, he is confident that if the loan is restricted, they will be in a position to repay the same and they have been making payments in a bid to reduce the arrears. The amount claimed by the 2nd respondent is Kshs. 63,997,231.44 its apparent from the loan statement that they have paid more than 70% of the principal interest. The failure by the 1st respondent to issue Notices pursuant to the provisions of Sections 90(2) and Section 96 (2) of the Land Act 2012 renders the subsequent notices by the 2nd respondent and the entire execution process defective null and void ab nito. The subsequent notices by the 2nd respondent in exercise of the Statutory power of sale was therefore invalid and could not confer any right on the 1st respondent to proceed with such. In a supplementary affidavit dated 13.11.2024, the 1st applicant avers that the respondents did not share with them the valuation reports which the respondents have produced for the forced sale. They took the loan in 2014 and they have paid a substantial amount of Kshs. 89,886,127.40 as per their account's summary. Despite their proposal to be paying Kshs. 500,00/-monthly from April 2024 but the bank has insisted that they pay a sum of Kshs. 682,000/- monthly. They maintained that they were not served with the mandatory notices of 90 and 40 days, respectively, although the bank exhibited notices allegedly sent to them by registered post, which they did not receive. They are in dire need, and the forced sale will occasion them serious loss.
4. The 1st respondent filed a replying affidavit sworn by Jeremiah Emmanuel Washiali, the Recovery Manager. In the said affidavit, he gives a detailed background of the loans which the bank offered to the applicants, their terms and conditions of the loan facility as set out in the letter offer dated 24.7.2014, amounts, and the securities which were offered land parcel number Ndivisi/ Muchi/8489. The loan facility was secured by a deed of guarantee executed by the 2nd applicant vide a guarantee dated 24.8.2014. The applicants sought an additional loan facility of Kshs. 10 million, which was granted on 7.12.2015 against a further charge, which was registered. On 22.10.2016, another legal charge was created over Land Parcel number Ndivisi/ Muchi/6179 to secure a loan facility made to Pramukh Chemist Ltd, the 1st applicant. The said charge was drawn to secure the aggregate principal sum of Kshs. 20 million plus interest cost and other expenses. The 1st applicant defaulted in the repayment of the loan, a fact the 1st applicant admits. This prompted the 1st respondent to initiate recovery measures against the 1st applicant as the borrower/ charger as per the Charge. The bank made a demand to the 1st and 2nd applicants the borrower and guarantor respectively vide a letter dated 9.3.2021. The said letter under the subject" Statutory Notice under Section 90 (1)(2)(3) (e) of the Land Act 2012 was forwarded to the applicants both vide registered post, Post Office Box Number 1782-50205 Webuye. Subsequent to the rectification Notice under section 90 of the Land Act the 1st respondent served upon the applicant a Statutory Notice dated 29.3.2023, a Notice under the subject " 40 days Charge



Statutory Demand Notice Pursuant to Section 96 (2) (3) of the Land Act No. 6 of 2012 Laws of Kenya in respect of Legal Charge over property Title No. L.R. No. Ndivisi/Muchi/8489. The notice of intention to sell was served on the applicants, Notice is dated 29.3.2024. The applicants failed to remedy the default within the statutory timelines despite the notices being served upon them and this necessitated the 1st respondent to instruct the 2nd respondent who issued the 45 days redemption notice to the applicants as required under Rule 15 (d) of the Auctioneers Rules 1997 which was done vide a letter dated 16th April 2024. The applicants were served by a Notification by the 2nd respondent which they dully received.

5. The 1st respondent depones further that prior to issuing instructions to the 2nd respondent the 1st respondent engaged the services of Odongo Kabita & Company Valuers to conduct a valuation on the two parcels of land parcel number 6179 and 8489 which valuation was done on the 10.12.2023, the forced value for parcel number 6179 was 31,875,000/- and for parcel number 8489 it was 75,300,000/-. The said values of forced sale were disclosed to the applicants in the Notification of Sale served upon the 2nd respondent. It was further averred that the applicants have had sufficient notice to repay the amount owed to the 1st respondent, the application and suit is unmerited. The applicants will not suffer any irreparable loss and damage should the respondents be allowed to proceed with the statutory power of sale and the balance of convenience lies with the respondents being allowed to recover what is duly owed to it by the applicants.
6. Parties canvassed the application by way of written submissions. I have carefully read and considered the said submissions. The issues for determination are: did the 1st defendant/ respondent comply with the provisions of section 90 of the Land Act 2012 (the Act) and serve a proper statutory notice and has the applicant established a case to warrant an order of injunction as prayed?
7. The factual backgrounds has been given by the parties. On the Statutory Notice the applicants have submitted that service of the notice was not good and effective. The respondent on the other hand , argues that the statutory notice was issued on the 09/03/2021. This was forwarded to the applicants vide their post office box number 1782-50205 Webuye. The notices indicated the demand. The applicants deny that they were served. The respondents further submit that due to the non-compliance with the first notice by the applicants, the 1st respondent issued another notice dubbed the 40 days Statutory Notice dated 29.3.2023 to the applicants. The applicants failed to remedy the default within the statutory timelines despite the notices being served and this caused them to instruct the 2nd respondent who issued a 45-day redemption notice to the applicants as required under Rule 15(1) of the Auctioneers Act 1997 which was done vide a letter dated 16th April 2024. Did the 1st respondent comply with the provisions of section 90 Act the Land Act 2012. 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 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) The notice required by subsection (1) shall adequately inform the recipient of the following matters—
 - (a) the nature and extent of the default by the chargor;



- (b) if the default consists of the non-payment of any money due under the charge, the amount that must be paid to rectify the default and the time, being not less than three months, by the end of which the payment in default must have been completed;
 - (c) if the default consists of the failure to perform or observe any covenant, express or implied, in the charge, the thing the chargor must do or desist from doing so as to rectify the default and the time, being not less than two months, by the end of which the default must have been rectified;
 - (d) the consequence that if the default is not rectified within the time specified in the notice, the chargee will proceed to exercise any of the remedies referred to in this section in accordance with the procedures provided for in this sub-part;

and
 - (e) the right of the chargor in respect of certain remedies to apply to the court for relief against those remedies.
- (3) If the chargor does not comply within two months after the date of service of the notice under, subsection (1), the chargee may—
- (a) sue the chargor for any money due and owing under the charge;
 - (b) appoint a receiver of the income of the charged land;
 - (c) lease the charged land, or if the charge is of a lease, sublease the land;
 - (d) enter into possession of the charged land; or
 - (e) sell the charged land;
8. The 1st respondent gave the Statutory Notice on the 29.2.2021 and not in 2024. Section 90 (2) (b) of the *Land Act* 2012 provides that if the default consists of the non-payment of any money due under the charge, the amount that must be paid to rectify the default and the time, being not less than three months, by the end of which the payment in default must have been completed. There was a default of the non-payment of the money that was due under the charge to the tune of Kshs.62,974.469.54. The amount was to be paid to rectify the default and the time being not less than three months. My understanding of this section is that the applicants were given 90 days from 29.3.2021. It is apparent that the 1st respondent took no action after the 3 months and chose to move under section 96 (2) (3) on 29.3.2023, two years after the Statutory Notice. In my view, the applicant could not proceed under section 96 (2) (3) as they failed to follow up on the notice they served on the applicants within 90 days from the date the notice was served. The 1st respondent was to serve another notice and not move under section 96(2) (3) in 2023. In my view, the 1st respondent notice issued on 29.2.2021 was only valid for 90 days from the said date. The Act gives a specific time frame. The 1st respondent gave the requisite notice but erred in not following up within the time frame of 90 days.
9. The next issue is whether the applicants are entitled to a restraining order as sought in their application. The applicants have admitted to having been indebted to the 1st respondent and that they defaulted in the repayment of the loans advanced to them. The threshold of being granted an injunction was clearly stated in the case of *Giella v Cassman Brown* (1973) EA 360 where it was held as follows:-
- “The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant



might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

10. The applicants, having admitted to being indebted to the 1st respondent, have not made out a prima facie case with a probability of success. The question of the applicants suffering loss that could not be compensated by way of damages if the interlocutory judgment is not granted does not arise. The balance of convenience too does not tilt in favour of the applicants. The applicants who are indebted to the Bank may not be in a position to compensate the 1st respondent if the suit fails. In my view, the issue of a valid Statutory Notice can be regularised by the 1st defendant issuing fresh notices that strictly comply with the provisions of the law. The 1st respondent shall issue a fresh notice in compliance with section 90 of the *Land Act* 2012. The applicants have admitted that they are indebted to the 1st respondent. The conditional order granted to the applicants is set aside. This court is not inclined to grant an order restraining the 1st and 2nd respondents as sought in the application dated 18th July 2024. Each party will bear its own costs.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 13TH DAY OF MARCH 2025.

R.E.OUGO

JUDGE

In the presence of:

Mr. Angima -For the Applicants

Respondents – Absent

Wilkister - C/A

