



REPUBLIC OF KENYA



KENYA LAW
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**Muthoni v K-Unity Sacco Limited (Commercial Case
E003 of 2023) [2024] KEHC 3638 (KLR) (12 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 3638 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
COMMERCIAL CASE E003 OF 2023
DO CHEPKWONY, J
APRIL 12, 2024**

BETWEEN

ROBERT KANOBU MUTHONI PLAINTIFF

AND

K-UNITY SACCO LIMITED DEFENDANT

RULING

1. Before the court for determination is the Notice of Motion application dated 31st March, 2023, seeking the following orders:
 - a. Spent;
 - b. Spent;
 - c. THAT pending the hearing and determination of this suit, this Honourable Court be pleased to issue orders restraining the Respondent by itself, its employees and or agents from advertising, attaching, auctioning, selling by private treaty and or transferring the Applicant's property known as L.R Ndeiya /Ndeiya/2898 and or interfering with the Applicant's right to quite possession.
 - d. THAT the costs of this application be provided for.
2. The Application is based on the grounds set out on its face and the Supporting Affidavit of Robert Kanogu Muthoni sworn on the same date.
3. It is the Applicant's case that he took a loan of Kshs. 19,000,000/= in the first borrowing and Kshs 10,000,000/= in the second borrowing from the Respondent which was secured by a charge of the property known as L.R. Ndeiya/Ndeiya/2898 which he has been repaying without failure.



4. The Applicant states that he was surprised to receive a call from someone purporting to act on authority of the Respondent informing him that he had been instructed by the Respondent to advertise the subject property for sale by public auction and upon lapse of 45 days. The Applicant contends that the Respondent did not issue him with any Statutory Notice for sale as required under Section 90 of the Land Act or a Notification of Sale as required under Section 96 of the Act, and neither indicate the actual amount owed and what the Applicant would receive from the intended sale after it recovers the amount owed as required by law.
5. According to the Applicant, he has been servicing the loans and has never defaulted except for one occasion when he delayed in payment on loans leading to the Respondent taking out money from the Sacco to repay the arrears and has on numerous occasions requested for the charge documents and statement of accounts to no avail. He denies the amount claimed by the Respondent of Kshs 22,764,770/= since he has repaid a significant amount of money.
6. The Applicant holds that the impending advertisement and intended sale are not only unfair but also unprocedural and illegal, thus seeks the court's intervention to stop the sale either by public auction or private treaty.
7. The Respondent entered appearance and filed Replying Affidavit which was sworn by James Osundwa on 22nd May, 2023 as the Credit Manager of the Respondent, wherein it was confirmed that the Applicant is its customer operating an account at the Limuru Branch, from where the Applicant applied for a loan of Kshs 19,000,000/= to start a yoghurt processing plant which was granted and a legal charge was registered over the subject property with his full consent to secure the loan.
8. The Respondent avers that the Applicant defaulted on the loan and it proceeded to issue a 90-day Statutory Notice of sale dated 8th June, 2022 which was served upon the Applicant personally and he acknowledged receipt. The Respondent goes on to state that upon lapse of the ninety (90) days, the Applicant did not repay the amount and it instructed Expeditious Auctioneers who issued Notification of Sale dated 14th February, 2023 but the Applicant did not redeem the payment.
9. According to the Respondent, the application dated 31st March, 2023 is an afterthought whose intention is to obstruct the sale and contends that it instructed Circuit Valuers Limited to conduct and prepare a report dated 3rd April, 2023 in compliance with the land laws.
10. The Respondent further contends that the Applicant has not come to court with clean hands as it willingly submitted its title deed for security and was aware that the Respondent would exercise its Statutory Power of Sale in case of default. It holds that it continues to suffer loss on interest since the Applicant has continued to default on interest over and above the normal interest which he has failed to pay. The Respondent has urged the court to dismiss the application with costs.
11. The court directed that the application to be canvassed by way of written submissions which the Applicant filed his dated 5th July, 2023 whereas the Respondent filed its dated 4th August, 2023.

Analysis and Determination

12. The court has considered the application, the response thereto and respective annexures alongside the respective submissions and authorities cited thereto by the parties and finds the issue for determination being whether or not the order being sought by the Applicant is deserved.



13. The orders for interlocutory injunctions was discussed by the Court of Appeal in Nairobi in the case of Ngunuman Limited –vs- Jan Bonde Nielsen & 2 others [2014] eKLR which relied on the principles established in the Giella –vs- Cassman Brown & Co Ltd [1973] EA 358 and held as follows:-

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

- (a) establish his case only at a prima facie level,
- (b) demonstrate irreparable injury if a temporary injunction is not granted, and
- (c) allay any doubts as to (b) by showing that the balance of convenience is in his favour.

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially.”

14. On the issue of a prima-facie case, the Court of Appeal in the case of Mrao Ltd -vs- First American Bank of Kenya Ltd & 2 Others [2003] KLR 125 considered what constitutes a prima facie case and held that:

“In civil cases, a prima facie case 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 to call for an explanation or rebuttal from the latter”

15. In this case, in order to establish whether or not it has a prima-facie case, the court is called upon to determine whether the rights of the Applicant have been infringed upon by the Respondent. And on this, the following issues fall for determination.

- a. Whether there was a validly registered charge.
- b. Whether the Respondent issued the Statutory Notices of Sale as required by law.
- c. Whether valuation was done on the subject property.
- d. Whether the Auctioneers followed due process.

16. On whether there was a validly registered charge, this court finds that it is common ground that the Respondent granted the Applicant a credit facility of Kshs.20,000,000/= which was secured by the suit property being LR. No. Ndeiya/Ndeiya/2898. This is confirmed by the loan application forms and Letter of Officer dated 26th October, 2021 attached to the Respondents response and has not been disputed by the Applicant.

17. The second issue is in regard to whether the Respondent issued the Statutory Notices of Sale as required by the law under Section 90 of the *Land Act*, 2012. It is the Applicants position is that it was not served with the Statutory Notices of Sale and was only surprised by a phone call that the suit property was going to be advertised for sale by public auction. Therefore, the burden of proof is upon the Respondent to prove that they issued the Statutory Notices of Sale. Having read through the pleadings by the parties herein, the court notes that a Statutory Notice dated 8th June, 2022 was issued upon the Applicant as indicated in the letter through Registered Mail requiring him to pay all the accrued instalments within ninety (90) days or three months and a reminder dated 14th September, 2022. The Respondent further issued an undated three months Statutory Notice which was delivered through registered post on 15th



- September, 2022 and the Certificate of postage is duly attached as evidence. That the Applicant did not make any repayment or make any attempt to restructure the loan.
18. Later, the Respondent through Expeditious Auctioneers issued a 45 days Redemption Notice dated 14th February, 2023, which was indicated as having been served upon the Applicants. The Applicants on the other hand denies having been served with the said Statutory Notices of Sale but has not advanced any evidence to rebut the Respondent's evidence on the same.
 19. The burden of proof then shifts back to the Applicant to prove that he did not receive the notices sent through the registered post as was the finding in the case of Mbsa High Court Civil Commercial & Admiralty -Division Case No. 31 of 2013, Fredrick A. Makumbi –vs- Kenya Commercial Bank Limited in which the Court in its Ruling relied on the case Maithya –vs- Housing Finance Corporation of Kenya HCCC No. 1129 of 2002 as follows:-

“It is the Plaintiff who alleged that he was not served with the Statutory Notice. Once the Defendant provided evidence of that service the burden of proof shifted to the Plaintiff. This shifting of burden of proof is based on the rule that “he who asserts must prove.” See the book of Principles of Evidence by Alan Taylor 2nd Edition. The onus was on the Plaintiff to prove non-service of the Plaintiff. In view of the fact that the Plaintiff failed to prove the same the Plaintiff has failed to satisfy that burden. It is obvious that the Plaintiff could have obtained information from the Post Master General on whether the said notice was posted and the whereabouts of it. The Plaintiff did not on prima facie basis do so.”
 20. Clearly, in this case, the Applicant has not discharged the burden of proof to show that he was not served with the said Statutory Notices of Sale as evidenced by the Applicant.
 21. With regard to whether there was valuation done on the subject property, it was the evidence of the Respondent that it instructed Circuit Valuers Ltd vide a letter dated 3rd April, 2023 for valuation of the subject property. However, there is no evidence on whether the said valuation was done to prove compliance with the law. All it has attached is a letter addressed to Circuit Valuers Ltd dated 3rd April, 2023.
 22. Then there is the issue of whether the Auctioneers followed due procedure. And on this, it was the Respondent's case that it instructed Expeditious Auctioneers who proceeded to issue a 45 days Redemption Notice upon the Applicant but again, there is no proof of how this Notice was served upon the Applicant. In absence of such proof, the court finds that the Auctioneers did not serve the Redemption Notice upon the Applicant to prove compliance with all the requisite procedures by the Respondent and Auctioneers.
 23. There is also the issue of the outstanding debt which the Applicant disputes claiming that he has repaid a significant amount of money to the Respondent towards the loan advanced to it. According to the Applicant, he does not know how much is the outstanding amount as the 1st Respondent has failed to provide him with any updated statements of accounts and charge documents despite the numerous requests. However, the Applicant has not provided any evidence either through letters or efforts he has made to request for the said statements and neither has he made a formal request for the supply of the statement of accounts and therefore cannot address the issue. Apart from stating that the Applicant has an outstanding loan amount which it is seeking to redeem and is continuing to accrue default interest, it has not disclosed how much the said outstanding amount is.
 24. It is trite law that the court cannot grant an injunction where the amount of debt is in dispute or where the redemption exercise has begun or on the manner in which it has begun. This was the decision of



the Court of Appeal in the case of Giro Commercial Bank Limited –vs- Halid Hamad Mutesi [2002] eKLR, where it was stated that:-

“It has been held time and again that a mortgagee cannot be restrained from exercising his power of sale because the amount due is in dispute or that the mortgagee has commenced a redemption action or because the mortgagor objects to the manner in which the sale is being arranged. In that case, where the debt is admitted as due and the loan is not being serviced, the court should not grant an injunction”.

25. In the instant case, the debt has not been admitted and although the Applicant has stated that he has been servicing the loan, he has not provided proof for the same. In view of this, the court finds that the subject property should be preserved until all the issues are addressed.
26. Having found that the Respondent has not complied with all requisite provisions of law in trying to exercise its Statutory Power of Sale, the balance of convenience tilts towards the Applicant. Therefore, the Notice of Motion application dated 31st March, 2023 is found meritable and is hereby allowed in the terms presented as follows:-
 - a. The Respondent be and is hereby restrained by itself, its employees and or agents from advertising, attaching, auctioning, selling by Private Treaty and/or transferring the Applicant’s property known as LR. No.Ndeiya/Ndeiya/ 2898 and or interfering with the Applicant’s right to quiet possession.
 - b. The parties to proceed with the hearing of the main trial.
 - c. The Respondent to file and serve its defence and all documents in support of its case within fourteen(14) days from the date hereof.
 - d. The Plaintiff be at liberty to file and serve a reply to defence within seven(7) days of being served with the defence.
 - e. Mention on 6th May, 2014 before the Deputy Registrar for Pre-trial Conference and further directions.

It is so ordered.

RULING DELIVERED, DATED AND SIGNED AT KIAMBU THIS12THDAY OF... APRIL,...., 2024.

D. O. CHEPKWONY

JUDGE

In the presence of:

M/S Anyiela holding brief for Mr. Okatch for the Applicant

M/S Stowa holding brief for Mr. Mbithi counsel for the Respondent

Court Assistant - Martin

