



Kimutai & another v Family Bank Limited & another (Civil Case E003 of 2022) [2024] KEHC 14049 (KLR) (12 November 2024) (Ruling)

Neutral citation: [2024] KEHC 14049 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAPSABET
CIVIL CASE E003 OF 2022
JR KARANJA, J
NOVEMBER 12, 2024**

BETWEEN

PETER KIMUTAI 1ST PLAINTIFF

JOHANNES HENRY KIBIY 2ND PLAINTIFF

AND

FAMILY BANK LIMITED 1ST DEFENDANT

RAZORS SHARP AUCTIONEERS 2ND DEFENDANT

RULING

1. The Notice of Motion dated 6th December 2023 filed by the Plaintiffs/ Applicants seeks against the Defendants/ Respondents the following substantive orders: -
 - a. That the sale of Land Parcel No. Nandi/Kamobo/5169, Kapsabet Municipality/332, Kapsabet Township/338 and Kajiado/Kaputei North/50051 scheduled for 14th December 2023 by the Defendants be suspended pending the hearing and determination of this application.
 - b. That the Defendants be ordered/ compelled to comply with the judgment of the court delivered on 10th February 2023 prior to exercising the statutory power of sale.
 - c. That, the Chief Executive Officer of the 1st Defendant Family Bank Limited be summoned to show cause as to why he/she ought not be cited for contempt of court for failure to comply with the Judgment delivered on the 10th February 2023.
 - d. That, the Chief Executive Officer of the 1st Defendant be found guilty of contempt of court and appropriate sanctions be meted out for failure to comply with the judgment delivered on the 10th February 2023.



2. Essentially, Order 40 Rule [3] of the Civil Procedure Rules and Section 3A of the *Civil Procedure Act* are the anchor of this application and on the periphery, Section 90, 91 and 104 of the *Land Act* 2012, are invoked.

Rule 3 of Order 40 provides for consequences of any terms and/ or order made by a court as follows: -

- “(1) In cases of disobedience, or of breach of any such terms, the court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached and may also order such person to be detained in prison for a term not exceeding six months unless in the meantime the court directs his release.
- (2) No attachment under this rule shall remain in force for more than one year, at the end of which time, if the disobedience or breach continues, the property attached may be sold, and out of the proceeds the court may award such compensation as it thinks fit, and shall pay the balance, if any, to the party entitled thereto.”

3. The grounds for this application are set out in the Notice of Motion and include that: -

- (1) The court delivered judgment in this suit obligating the Defendant to reactivate the process of carrying out the statutory power of sale by following the regime set out by the law.
- (2) The Defendants in breach of the judgment have failed to comply with the law in seeking to exercise the statutory power of sale.
- (3) The Defendants have never challenged the decision of the court on appeal, thus it is binding on them.
- (4) The Defendants acted in defiance of the judgment of which they are aware of.
- (5) The Defendants are undermining the dignity of the court and the administration of justice.
- (6) The Defendants are in contempt of court and they ought to be cited accordingly unless they comply with the terms of the judgement.
- (7) This matter ought to be considered urgently since the sale of the charged property will be carried out irregularly and the Plaintiffs will suffer loss of their property in breach of Article 40 of *the Constitution* of Kenya 2010.

4. The grounds are buttressed by the averments and annexures contained in the supporting affidavit dated 6th December 2023 and the supplementary affidavit dated 13th May 2024, both deponed by the First Plaintiff/ Applicant, Peter Kimutai Bii.

The Defendants are vehemently opposed to the application on the basis of the averments and annexures in the replying affidavit dated 18th February 2024 deponed by the First Defendant’s legal manager, Sylvia Wambani.

5. The hearing of the application was by way of written submissions which were filed by the Applicants through Wambua Kigamwa & Company Advocates and by the Respondents through C & K Advocates LLP.

Having considered the rival submissions and the pleadings it became apparent to this court that the gist of this application is the alleged breach by the Defendants/ Respondent of the terms or/and



orders made by the court in its judgment delivered in favour of the Plaintiffs/Applicant on the 10th February 2023 and which had the effect of putting to a halt, hitherto temporarily, the exercise of the First Defendant's statutory power of sale and indeed, the scheduled sale by public auction of the aforementioned suit properties.

6. In that regard grounds two [2] and four [4] would be the most crucial for the purposes of this application. Ground one[1] is indicative of the term of the court allegedly breached by the defendants while grounds five [5] and six[6] alludes to the defendant's disobedience of the term and the sanction which ought to be placed upon the First Defendant through its Chief Executive Officer [C.E.O].
7. The basic issue for determination is therefore whether indeed the Defendants and in particular the First Defendant has breached and/or is in breach of the terms and/or orders made against itself in the judgment delivered in 10th February 2023, which marked the culmination of this suit which was instituted by the Plaintiffs against the Defendants when the First Defendant made its first attempt to exercise its statutory power of sale against the Plaintiff's suit properties through the Second Defendant.
8. The sale was initially scheduled for 11th November 2022, thereby prompting the institution of this suit together with an application for a temporary injunction to restrain the Defendants from proceeding with their intended action. The court indulged the Plaintiffs and granted them a temporary injunction order pending the hearing and determination of the suit in which the Plaintiffs prayed for two [2] basic orders viz: -
 - (1) A declaration do issue that the intended exercise of the chargee's statutory power of sale is a nullity for want of compliance with the Law, an injunction do issue restraining the Defendants whether by themselves, their servants and/or agents from selling, transferring or in whatever way alienating the parcels of land known as Kajiado/Kaputiei North/50051, Kapsabet Township/338, Kapsabet Municipality/332 and Nandi/Kamobo/5169.
 - (2) an order suspending or postponing the sale for period of [1] year or such reasonable period to enable the principle debtor to rectify any default and the chargors upon due compliance by the Defendants with due service of notices pursuant to Section 104 of the *Land Act*, 2012.
9. The Court after hearing the suit concluded as follows: -

“Consequently, and in the end, I am satisfied that the process order Section 90[1],91 and 104 of the *Land Act* 2012 on the statutory power of sale be reactivated by the Respondent following the regime set out in the law. The right of redemption and valuation of the properties shall take effect as clearly expressed in the provisions of the enabling statute. The valuation so declared is in respect of the whole of the properties known as Kajiado/Kaputiei North/50051, Kapsabet Township/338, Kapsabet Municipality/332 and Nandi/Kamobo/5169. I further direct that 1st Defendant to carry out a proper and current valuation of the properties as identified above. For purposes of clarity, the Plaintiff/Applicants be and are hereby directed to grant the 1st Defendant and/or its agents access to the property in question for purpose of undertaking a current valuation of the subject land.

Each party shall bear their own costs.

It is so ordered.”



10. In the judgment, the court clearly recognized the importance of the law in relation to mortgages/charges in the following terms: -

“The importance of this branch of the law has to be emphasized over and over again that the power of sale arising and the power of sale being exercisable should not be under-estimated by the parties to the mortgage contract. Once a conveyance is made in exercise of power of sale conferred by the Land Act 2012 under Section 90[1] and 91[1] the title of the charge shall not be impeachable unless on grounds of fraud, mistake, undue interference, unconscionability or subject to any contrary intention appearing in the deed creating the mortgage or charge. Unfortunately, that is not the case here prosecuted by the Applicant. The obligation of the Respondent is against the Applicant to pay the monies due arising out of the deed duly signed, endorsed and agreed between both parties.”

11. This finding was arrived at on the basis of the legal principle pronounced at page 752 of the 4th Edition Halsbury, Laws of England Vol. 32, to wit: -

“It is trite law that court will not restrain a mortgagee from exercising the power of sale because the amount due is in dispute or because the mortgagee has begun a redemption action or because the mortgagor objects to the manner in which the sale is being arranged. It will be restrained however, if the mortgagor pays the amount claimed in court, that is the amount which the mortgagor claims to be due to it.”

12. Clearly, the Defendants right to exercise the statutory power of sale under a charge instrument cannot be curtailed unless it is shown that the chargee in exercising the power failed to adhere to the procedural requirements set by the applicable law and/or deliberately ignored the requirements altogether thereby encumbering the Plaintiffs right of redemption.
13. A chargee, in the realization of security is expected and indeed, required to properly exercise its statutory power of sale and this is dependant on the statutory notice and adherence to the procedure applicable. The First Defendant was thus required to issue a-fresh the statutory notices and adhere to the lawful procedure in its second attempt to put into effect its statutory power of sale.
14. The impugned judgment of the court handed to the Plaintiffs a second chance to redeem their property and to the first Defendant on opportunity to correct the mistakes made in its first attempt to realize its security. This was made absolutely clear when the court in the impugned judgment stated that the process under Section 90[1], 91 and 104 of the Land Act 2013 be reactivated by the First Defendant under the regime set out in the law.
15. It was therefore incumbent upon the Plaintiffs to establish and prove by necessary evidence that the First Defendant is in breach of the orders of the court issued on the delivery of the impugned judgment on 10th February 2023, by its failure to properly exercise its statutory power of sale in the repeat exercise thereby undermining the dignity of the court and the administration of justice and for it to be cited for contempt of court and be punished accordingly.
16. It is in structure to note that the application comes under Order 40 of the Civil Procedure Rules which therefore means that the jurisdiction of this court under the provision for contempt of court is independent of the jurisdiction conferred under the provisions of the Judicative Act.

Be that as it may, it is the contention of the Defendants that they are not in disobedience and/or breach of the judgment of the court in as much as they fully complied in totality with the order issued.



17. In that regard, the defendants submitted that fresh statutory notices were issued under Section 90[1], [2] and [3][e] of the *Land Act* and Section 56[2] of the *Land Registration Act* and served upon the Plaintiffs who signed the Principal copies on 11th May 2023. That, after the expiry of the notices without compliance by the Plaintiff, the forty [40] days statutory notices and the notice of intention to sale were issued on 14th July 2023.
18. The Defendants further submitted that after the expiry of the notice of intention to sale without rectification by the Plaintiff, the First Defendant instructed the Second Defendant to issue the forty five [45] days redemption Notice and the notification for sale. That, fresh valuation of the suit properties was undertaken on 14th August 2023. The contentions and submissions by the Defendants are duly confirmed and established by the averments and annexures contained in the first defendants replying affidavit dated 18th February 2024, without any substantial dispute from the Plaintiffs other than alleging that the Defendants are in disobedience and/or breach of the impugned judgment.
- No substantial and contrary evidence has been availed by the Plaintiff to establish and prove the alleged disobedience and/or breach of the material court orders.
19. In the circumstances, this court must find and hereby finds that the application is devoid of merit. It is therefore ordered that: -
- (1) The Application dated 6th December 2023 be and is hereby dismissed.
 - (2) The costs of the application be borne by the Applicants.

DELIVERED AND DATED THIS 12TH DAY OF NOVEMBER, 2024

J. R. KARANJAH,

JUDGE

