



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISII**

**CORAM: A.K NDUNG'U J**

**CIVIL CASE NO 8 OF 2019**

**TOM OTWOMA OMOSA.....PLAINTIFF**

**RHODA BOSIBORI OTWOMA.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**BANK OF AFRICA KENYA LIMITED.....1<sup>ST</sup> DEFENDANT**

**IGARE AUCTIONEERS.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. The application before this court is the notice of motion application filed before this court on 9<sup>th</sup> September 2019 seeking the following orders;

1. *THAT the application herein be certified urgent and the same be heard ex parte in the first instance.*

2. *THAT the Honorable court be pleased to issue a temporary injunction to restrain the 1<sup>st</sup> and 2<sup>nd</sup> defendants their employees, agents, servants, assignees or any person working under their express and or implied instructions or authority from selling by public auction or private treaty, alienating, disposing, entering, leasing, appointing a receiver, trespassing, wasting, or in any other way dealing with the land parcel comprised in the parcel of land, KISII NYARIBARICHACHE/B/B/BOBURIA/10542 and land parcel Title Number WEST KITUTU/MWAGICHANA/2838 pending the hearing and determination of this application.*

3. *THAT the Honorable court be pleased to issue a temporary injunction to restrain the 1<sup>st</sup> and 2<sup>nd</sup> defendants their employees, agents, servants, assignees or any person working under their express and or implied instructions or authority from selling by public auction or private treaty, alienating, disposing, entering, leasing, appointing a receiver trespassing, wasting, or in any other way dealing with the land parcel comprised in the parcel of land, KISII NYARIBARICHACHE/B/B/BOBURIA/10542 and land parcel Title Number WEST KITUTU/MWAGICHANA/2838 pending the hearing and determination of the suit herein.*

2. The application is supported by the affidavit of the 2<sup>nd</sup> applicant who is the wife to the 1<sup>st</sup> applicant. The 1<sup>st</sup> applicant also filed his affidavit in support of the application.

3. According to the 1<sup>st</sup> applicant he is the registered owner of Land Parcel Title Number Kisii/NyaribariChache/B/B/Boburia/10542 and West Kitutu/Mwagichana/2838 (hereinafter known as the "suit properties") which he holds in trust for the 2<sup>nd</sup> Applicant. In 2014 he applied for a loan facility from the 1<sup>st</sup> Respondent whereupon he was granted a letter of offer dated 10<sup>th</sup> July 2014 and he accepted the terms therein by executing it.

4. According to a term of the 1<sup>st</sup> Letter of Offer the loan advanced would be secured by a first legal charge over property title number KISII/NYARIBAKI CHACHE/B/B/ BOBURIA/10542 for the sum of Kshs. 14,000,000/-and a First Legal Charge over property Title Number WEST KITUTU/ MWAGICHANA/2838 for the sum of Kshs.3,000,000/-. Both charge Instruments were to include the spousal consent. Subsequently in 2015, he applied for additional loan facilities from the 1<sup>st</sup> Respondent and a facility was approved via a Letter of Offer dated 24<sup>th</sup> August 2015 and secured by among other securities, a Further Legal Charge over property title number KISII NYARIBARI CHACHE/B/B/ BOBURIA/10542 for Kshs. 5.000.000/- together with spousal consent.

5. The 1<sup>st</sup> appellant advanced that although he has been servicing the loan facilities, he was unable to meet his obligations due to financial constraints and health problems. He advances that the 1<sup>st</sup> respondent caused him to execute the Charge and Further Charge instruments as well as spousal consent on behalf of the 2<sup>nd</sup> respondent
6. The 1<sup>st</sup> applicant further averred that at the time he applied for the loan his address was P.O. BOX 2623-40200, KIsii but since January 2019 he changed his postal address to P.O. BOX 2720-40200, and informed the 1<sup>st</sup> Respondent through a letter.
7. However on 24<sup>th</sup> July 2019, he was served with a 45-Days Redemption Notice purporting to be pursuant to Rule 15(d) of the Auctioneers Rules, 1997 giving him 45 days Equity of Redemption in default of which the property title number KISII NYARIBARI CHACHE/B/B/BOBURIA/10542 would be sold by Public Auction in exercise of the 1<sup>st</sup> respondent's statutory power of sale. He averred that the purported exercise of statutory power of sale by the 1<sup>st</sup> respondent is irregular, unprocedural, illegal, null and void and of no legal consequences.
8. The 2<sup>nd</sup> applicant in her supporting affidavit avers that the 1<sup>st</sup> applicant is the registered Owner of Land Parcel Title Number Kisii/Nyaribari Chache/B/B/Boburia/10542 and West Kitutu/Mwagichana/2838 (hereinafter known as the "suit properties."
9. According to the 2<sup>nd</sup> applicant although the proprietor in the title documents is indicated as the 1<sup>st</sup> applicant, he hold the suit properties in trust for the 2<sup>nd</sup> applicant and her children as the properties constitute matrimonial properties. She explained that the 2<sup>nd</sup> applicant had recently informed her that he applied for loan facilities and executed a Charge and Further Charge documents and upon advise of the officials at the 2<sup>nd</sup> Respondent's Kisii Branch office he also executed documents on behalf of the 2<sup>nd</sup> plaintiff to expedite the transaction. She avers that on 24<sup>th</sup> July 2019, the 1<sup>st</sup> appellant was served with a 45-days Redemption Notice purporting to be pursuant to Rule 15(d) of the Auctioneers Rules, 1997 giving him 45 days Equity of Redemption in default of which the suit properties would be sold by Public Auction in exercise of the 1<sup>st</sup> respondent's statutory power of sale.
10. According to the 2<sup>nd</sup> applicant the purported exercise of statutory power of sale by the 1<sup>st</sup> respondent is irregular, unprocedural, illegal, null and void and of no legal consequences. The actions of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents are only intended to diminish or extinguish the 1<sup>st</sup> and 2<sup>nd</sup> applicant's rights over the suit properties and the same warrants an order of injunction. The 2<sup>nd</sup> applicant further averred that if an order of Injunction is not issued the 1<sup>st</sup> and 2<sup>nd</sup> Respondent would suffer irreparable injury or loss which cannot be adequately compensated by an award of damages and the suit, the Application and proceedings herein will be rendered nugatory.
11. In response to the application Titus Ikarot, a Recoveries Officer at the 1<sup>st</sup> respondent swore an Affidavit on behalf of the respondent. He averred that the applicants' application has been made in bad faith and an abuse of court process with the sole aim of frustrating the respondent's recovery efforts.
12. The applicants' contention that the 2<sup>nd</sup> applicant did not consent to the creation of the Legal Charge is an outright lie used by the applicants to frustrate the recovery proceedings by the Defendant whose right of statutory sale has accrued. Through various letters of offer, the 1<sup>st</sup> respondent agreed to advance to the 1<sup>st</sup> applicant various loan facilities on terms and conditions accepted by the 1<sup>st</sup> applicant. The loan facilities were to be secured by among others, were a First legal charge dated 18<sup>th</sup> September 2014 duly registered over property Title Number Kisii/Nyaribarichache/ B/ B/ Boburia/ 10542 securing a principal sum of Kshs.14,000,000.00.The Legal charge was duly executed and accompanied by an affidavit of spousal consent signed by Rhoda Bosobori Migosi .
13. A further legal charge dated 30<sup>th</sup> June 2015 duly registered over the property Title Number Kisi/Nyaribarichache/ B/ B/ Boburia/ 10542 securing a principal sum of Kshs. 5, 000.00.00. The Legal charge was duly executed and accompanied by an affidavit of spousal consent signed by Rhoda Bosobori Migosi .
14. A first legal charge over property Title Number West Kitutu/Mwagichana/2338 securing the sum of Kshs.3, 000,000.00. The Legal charge was duly executed and accompanied by an affidavit of spousal consent signed by Rhoda Bosobori Migosi.
15. It was averred that all the facilities were governed by the Standard Terms and Conditions applicable to all banking facilities which conditions were duly accepted by the Plaintiff by executing the said terms and conditions.
16. According to a search conducted by the 1<sup>st</sup> defendant the suit properties were in the name of the 1<sup>st</sup> applicant and there was no indication that the property was held in trust for any other party. The loans were disbursed to the 1<sup>st</sup> applicant who poorly conducted the facilities and fell in arrears. The 1<sup>st</sup> applicant failed to rectify the default despite receipt of various the demand notices and the 1<sup>st</sup> respondent therefore issued the 3 months' Statutory Notice dated 24<sup>th</sup> August 2018 to both applicants requiring them to clear outstanding sum then in the tune of Kshs. 19,906,763.86 in strict compliance to the provisions of the Land Act. The 1<sup>st</sup> respondent avers that despite service of the notice to the 1<sup>st</sup> applicant refused or rejected to clear the outstanding sum and the Defendant issued the 40 days Notices to sell dated 6<sup>th</sup> February 2019 to both applicants demanding for clearance of arrears then in the sum of Kshs. 20,727,944.97 failure to which the suit property would be sold. Upon lapse of the 40 days' notice, the 1<sup>st</sup> respondent through the 2<sup>nd</sup> respondent served upon the 1<sup>st</sup> applicant the 45 days Redemption Notice together with Notification of sale. According to the 1<sup>st</sup> respondent it has followed due process in law and has issued all the requisite notices in compliance with the Land Act thus the right to sell the charged property and to recover the outstanding sum has crystalized. Since the 1<sup>st</sup> plaintiff has not disputed his indebtedness an injunction cannot issue.
17. The parties filed their respective submissions in support of their case.

18. The applicants in its submissions identified the following issues for determination;

1) Did the 2<sup>nd</sup> plaintiff issue her consent in the creation of the charge and the further charge over the suit properties?

2) Has the Bank followed the necessary laid down procedure in the commencement and the exercise of the statutory power of sale for the suit properties?

3) Has the Applicants satisfied the criteria for the grant of interlocutory injunction?

19. The applicant's case is primarily based on **Section 79 (3)** of the **Land Act** and **Section 93** of the **Land Registered Act** and the **Matrimonial Act Cap 49 of 2013**.

20. It is not in dispute that the suit properties were acquired in 2013 during the subsistence of the applicants' marriage. This is after around 14 year years of handwork and toil in the marriage. It was submitted that apparent that the charge documents and spousal consent were signed by one person. The 2<sup>nd</sup> applicant did not sign the documents and thus the documents are null and void as provided for by **Section 93(4)** of the **Land Registration Act**. They urged the court to find that the said charge instruments were never executed by the 2<sup>nd</sup> applicant and thus null and void as provided for by **Section 93(4)** of the **Land Registration Act**.

21. On the second issue identified by the applicants, it was submitted that the 1<sup>st</sup> applicant changed his address and he notified the respondents who effected the said changes as evidenced by the 1<sup>st</sup> applicant's loan statement. Although the 1<sup>st</sup> applicant admits to receiving the 45-Days' notice that was delivered to him by the auctioneer, he never received the 90-Days Notice and the 40-Days Notice. They submitted that the failure of the 1<sup>st</sup> respondent to serve the 90 Days and the 40 Days notices pursuant to the provisions of section 90 and 96(2) of the Land Act vitiates the exercise of the statutory power of sale that had been commenced by the 1<sup>st</sup> respondent. They cited the case **DAVID NGUGI NGAARI V KENYA COMMERCIAL BANK LIMITED [2015] eKLR** where the court held that;

*[28]On the basis of the above, in the absence of a Notice to sell under section 96(2) of the land Act, the Statutory Power of Sale cannot be exercised even if the Statutory Notice, the Notification of Sale and the Redemption Notice have been issued. This is a potent ground for an injunction. None was issued. However, the failure to issue this Notice under section 96(2) of the Land Act will not invalidate a statutory Notice which has been issued properly under section 90 of the Land Act.*

22. The applicants submitted that they had established the elements for the granting of injunctive orders.

23. The respondents in their submissions argued that it was a sign of bad faith that the applicants having spent millions they borrowed from the bank, now intend to use this honorable court to renege on their agreement to repay the debt. They maintained that they obtained spousal consent and that in any event if the same were obtained through fraud as alleged then the applicants ought to have reported the same to the police.

24. On the issue of the notices it was submitted that the Respondent issued demand letters however none elicited any response. The bank then issued all the requisite statutory notices to both plaintiffs, but it did not elicit any positive response from either of them. Although, the 1st applicant now claims that he had changed his postal address from 2623-40200 Kisii to 2720-40200 Kisii, he has not annexed any evidence indicating that he notified the bank of this change.

25. They submitted that the applicants have not established a prima facie case and cited the case of **Mrao Limited -vs- First American Bank of Kenya Limited [2003]KLR 125** where Kwach JA as he then was stated;

*"In recent times a tendency has developed in the superior court of treating applications by a mortgagor for a temporary injunction to restrain a mortgagee from exercising his statutory power of sale just like any application for injunction... This is a clear case of default, the appellants admitted this, there was no basis, upon which the appellants would obtain an injunction.*

26. They submitted that the value of the suit properties was ascertainable through valuation and the Applicant has not shown that the Respondent would be unable to meet the damages in the event he succeeds in the main suit. In any event, such loss can be compensated in damages as the Applicant is protected by **Section 99 (4)** of the **Land Act, 2012** which provides that "a person prejudiced by unauthorized, improper or irregular exercise of the power of sale shall have a remedy in damages against the person exercising that power."

27. Should the suit property not be sold now and the suit is dismissed, it will be impossible for the Respondent to recover the sums owed. They relied on the case of **Mary Wanjiku Mwaniki & Another v Dream Credit Limited [2017] eKLR**.

#### **ANALYSIS AND DETERMINATION**

28. Having considered the evidence tendered by both parties it is common ground that the 1<sup>st</sup> applicant took financial facilities with the 1<sup>st</sup> respondent and failed to repay the loan. It is also not in dispute that the properties were registered in the 1<sup>st</sup> applicant's name.

29. The issues emerging from this case are threefold, first the status of the suit properties as a matrimonial property; secondly, the validity of the notices; and thirdly whether the applicants have established a case for an injunction to restrain a mortgagee from exercising the statutory power of sale.

30. Upon careful consideration of the charge instruments prepared by the 1<sup>st</sup> respondent, I note that an Affidavit of Consent by Spouse was

also prepared and the 2<sup>nd</sup> applicant's appended her signature on the document.

31. Although it was the applicant's case that the Affidavit of Consent by Spouse was signed by the 1<sup>st</sup> applicant on advice of the 1<sup>st</sup> respondent so as to expedite the transaction, no evidence was given in support of the fraud.

32. The alleged involvement of the 1<sup>st</sup> respondent in the illegality required the applicants to plead fraud with particularity and the court should not be left to infer fraud from the applicant's case. Similarly for the applicants to succeed on such an allegation they were required to prove their case beyond a balance of probabilities. In **RG Patel v Lalji Makanji (1957) EA 314** the court expressed itself as follows:

*"Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require prove beyond reasonable doubt, something more than a mere balance of probabilities is required"*

33. If the 1<sup>st</sup> plaintiff was to be believed, it is dumbfounding that he readily admits on oath to have been involved in forgery by signing Spousal Consent on behalf of the 2<sup>nd</sup> plaintiff in order to expedite the charge transaction. It is equally mind boggling that the 2<sup>nd</sup> plaintiff has chosen to visit her wrath on the respondents for the acts of the 1<sup>st</sup> plaintiff conveniently failing to take a decisive legal action against the 1<sup>st</sup> plaintiff including, and not limited to, instituting criminal proceedings against the 1<sup>st</sup> plaintiff. This whole scenario smacks of collusion, hypocrisy and lack of candidness on the part of the applicants.

The attempt to shift blame on officials of the bank who "advised" the 1<sup>st</sup> plaintiff to sign on behalf of the 2<sup>nd</sup> plaintiff is a feeble one, unconvincing and begs belief.

34. The plaintiffs/applicants are seeking an equitable relief. He who comes to equity must come, with clean hands. The applicants' hands in my evaluation of the facts before court are tainted. The burden to show that she did not sign the Spousal Consent lay on the 2<sup>nd</sup> plaintiff/applicant. She has not moved this burden an inch. She has misdirected her arsenal to the wrong target; the respondents, whereas her target was clearly close to her and within reach if she was to be believed and that is her husband, the 1<sup>st</sup> plaintiff.

35. The 1<sup>st</sup> respondent's right to statutory power of sale cannot be denied where the chargor fails to repay the loan and where there is evidence that spousal consent was obtained and that all requisite notices were served on the appellants. The court in **Julius Mainye Anyega v Eco Bank Limited [2014] eKLR** stated;

*"The suit property may be a matrimonial home. But what is startling is the Applicant's argument which, properly understood, suggest that matrimonial homes should never be sold under the Mortgagee's Statutory Power of sale. These statements have become quite common in applications for injunction to restrain a Mortgagee from exercising the statutory power of sale. I want to disabuse Mortgagees from what seems to be a misplaced posture especially by defaulters. The true position of the law on matrimonial properties is that a Mortgage will not be created on such property without first obtaining the consent of the spouse. Similarly, no sale of the matrimonial property will be carried through without giving the necessary notices to the spouse or spouses of the Mortgagee. These protections once availed will not prevent sale of a matrimonial home where the necessary consents have been obtained and all notices given to all parties with an interest in the matrimonial home, which is given as security for a loan or credit facility."*

36. I also agree with the court's holding in **Jimmy Wafula Simiyu vs. Fidelity Bank Ltd [2014] eKLR** where the court observed that;

*"It is quite arrogant for the Applicant to think that conversion of a Mortgaged property into a matrimonial home will provide some form of indomitable shield from realization of a security given in a Mortgage under the law. The law on creating Mortgage on and sale of matrimonial home only aims at ensuring the consent of the spouse or spouses is sought before such property is Mortgaged, and relevant notices are served on the spouse who had given consent to the Mortgage before the exercise of Mortgagee's statutory power of sale. The protection of a matrimonial home within the set-up of the law on mortgages and the Land Act is not, therefore, to be used as the spear by a defaulter on or as absolution of contractual obligations under a Mortgage. On this, see PART VII and specifically sections 79 and 96 of the Land Act. The argument by the Applicant that the suit property is a matrimonial home, has been used improperly and totally misplaced in this application and the less I say about it the better."*

*The fact that the Mortgaged property is a matrimonial property will only become relevant if the Applicant is alleging lack of consent of the spouse in the creation of the Mortgage herein or notice on the spouse or spouses has not been accordingly issued as by law required. But where the right of Mortgagee's statutory power of sale has lawfully accrued, it will not be stopped or postponed because the Mortgaged property is a matrimonial home."*

37. I now turn to the second issue concerning service of the 90 and 40 day Notice under **section 90 and 96 of the Land Act**. The applicants admit to receiving the 45 day notice before the statutory notice of sale. This shifts the burden to the respondent to prove that it indeed served the notices as required under section 90 and 96 of the Land Act. The 1<sup>st</sup> respondent in its replying affidavit annexed a 90 day statutory notice dated 24<sup>th</sup> August 2018 and a 40 day Notice dated 6<sup>th</sup> February 2019. The respondent proved service of the notices as he availed the certificate of postage receipts.

38. Majanja J in **Beatrice Atieno Onyango v Housing Finance Company Limited & 3 others [2020] eKLR** while considering the issue of service of notices under **Section 90 and 96 of the Land Act** stated;

*"19. Before exercising the statutory power of sale, the Bank must issue a 90-day notice in writing under **section 90(1) of the Land Act**. The notice which must state the nature and extent of the default by the chargor and if the default consists of the non-payment of*

any money due under the charge, it must state 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. The notice must also state 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 the section, including sale of the property, in accordance with the procedures provided. The notice must also state the right of the chargor to apply to the court for relief in respect of certain remedies.

20. The 90-day notice is a prerequisite for the exercise of the chargee's remedies including the power of sale. It must be served on the chargor in order to give him or her the opportunity to remedy the breach or otherwise redeem the property as security. In **Nyagilo Ochieng & Another v Fanuel Ochieng & 2 Others [1995-1998] 2 EA 260**, the Court of Appeal held that the burden of showing that the statutory notice has been served is on the chargee. Once the chargor alleges non receipt of the statutory notice, it is for the chargee to prove that such a notice was in fact served. In this instance, the Bank has the burden of showing that it served the defendant with the notice under **Section 90 of the Land Act.**"

39. The notices were sent to the applicant's postal address which I have ascertained from the charge documents and notices were indicated as 2623-40200 Kisii. Although the respondent intimates that they changed their address to 2720-40200 Kisii and notified the bank of the change of address, there was no evidence to support his assertion.

40. I need to, even if in passing, mention something more about the service of notices for recovery of Loans under **S 90(1) and 96 of the Land Act**. The courts have often times been bombarded with suits where the only contested issue is whether a notice was issued in the timelines and manner prescribed. In my view a lot of judicial time is lost in such litigation which litigation end up taking more time than the statutory period provided for the notices. Going forward, I would consider it more prudent that where such a dispute arises and cannot be easily resolved at once, then the parties should consider a re-issue of the notices to avoid convoluted litigation over sideshows when the indebtedness is not denied. In the end this would end up being beneficial to all and particularly to the lender whose sole aim is recovery.

41. I now turn to consider whether the applicant has established the conditions for the granting of an injunction as laid down in the case of **Giella vs Cassman Brown [1973] EA 358 where the court stated;**

*"The conditions for the grant of an interlocutory injunction are now 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 doubtful, it will decide an application on the balance of convenience."*

42. A prima facie case was defined in the case of **Mrao Limited V First American Bank Limited & 2 Others, [2003] KLR 125** to mean:-

*"... 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.*

...

*But as I earlier endeavored to show, and I cite ample authority for it, a prima facie is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the Applicant's case upon trial. That is clearly a standard, which is higher than an arguable case"*

43. Bearing the conditions in mind, I find that the applicants have failed to demonstrate that their rights would be infringed. It was not in dispute that the 1<sup>st</sup> applicant failed in his obligation to repay the amounts due under the loan to the 1<sup>st</sup> respondent. The 1<sup>st</sup> respondent served him with all the notices to his postal address and this court finds no reason to deny the 1<sup>st</sup> respondent of its right to statutory power of sale.

44. I have earlier on in this ruling alluded to the maxim that *"he who comes to equity must come with clean hands."* The applicants have not demonstrated that they are before court with clean hands. Indeed the facts on record show the contrary.

45. Having now carefully read and considered the instant Application the Affidavit in support, the Replying Affidavit and the written submission by the parties, the Court finds and holds that the Notice of Motion Application dated 9<sup>th</sup> September 2009, is not merited and the same is dismissed entirely with costs to the Respondents.

**DATED, SIGNED AND DELIVERED AT KISII THIS 15TH DAY OF APRIL, 2021**

**A. K. NDUNG'U**

**JUDGE**