



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

HCCC NO. 052 OF 2020

JOYCE WANJIRU NDIRANGU.....PLAINTIFF

VERSUS

SOSPETER GITONGA

T/A TEPPER ELECTRICAL SUPPLIERS1ST DEFENDANT

FAMILY BANK.....2ND DEFENDANT

ANTIQUA AUCTIONS AGENCIES3RD DEFENDANT

RULING

1. By the Notice of Motion dated 7th September 2020, the Plaintiffs seek to restrain Family Bank Limited (Family Bank or the 2nd Defendant) from exercising its statutory power of sale over land parcel Number 20301/5 and 20302/2 Kiambu (jointly the charged properties).
2. It is common ground that on the strength of a charge dated 25th September 2014 over the charged properties a facility for the sum of Kshs.12,000,000/= was granted by the Bank to Sospeter Gitonga Njiru (the 1st Defendant). Further facilities of Kshs.3,000,000/= were also granted to the 1st Defendant and a further charge of 25th September 2015 was registered against the titles.
3. The 1st Defendant's appetite for further facilities did not end there and he was granted Kshs.8,400,000/= secured by a charge of the same amount over other properties. He was again, through a letter of offer of 15th October 2015, granted facilities of Kshs.12,000,000/= secured by a second set of properties.
4. It does not seem in dispute that the 1st Defendant has defaulted in payment of the loan for which the charges over the Plaintiffs' properties were taken. Further the Bank is not assailed for breaching any of the statutory steps required towards realization.
5. What the Plaintiffs seek is a separation of the default in respect to what was secured by their properties and the other properties. This Court has looked at the "covenant to pay" clauses of the two charges provided by the Plaintiffs. In it, the chargor's covenant is to pay not only the principal sums but also interest that will accrue in respect to the debt.
6. In the statutory demand dated 22nd August 2016 issued under Section 90(1) of the Land Act, the Bank makes a demand of Kshs.16,615,350.17 in respect to the debt secured by the plaintiffs' two properties. In the redemption notice issued on 5th January 2017 the Bank, through Antique Auctions Agencies (the 3rd Defendant), made a demand of Kshs.45,685,385.99. While the rise of the amount demanded in 4 months is substantial (about 30 Million) and may be curious, the Plaintiffs have failed to prove that the amount demanded is in breach of the covenant to pay clauses of the charge instruments. For that reason, no prima facie case has been made out and the application fails the first test in Giella vs Cassman Brown [1973] E.A 358.
7. The Motion of 7th September 2020 is dismissed with costs.

Dated, Signed and Delivered in Court at Nairobi this 11th Day of May 2021

F. TUIYOTT

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 17TH April 2020, this Ruling has been delivered to the parties through virtual platform.

F. TUIYOTT

JUDGE

PRESENT:

No appearance for the Plaintiffs.

No appearance for the Defendants.