



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

COMM. SUIT NO. 37 OF 2018

PATRICK GITHINJI NDICHU.....1ST PLAINTIFF

FLORENCE WAITHERERO MAINA.....2ND PLAINTIFF

SOLEX BUILDING CONTRACTORS LTD.....3RD PLAINTIFF

VERSUS

EQUITY BANK (KENYA) LIMITED.....1ST DEFENDANT

ANTIQUA AUCTIONS AGENCIES.....2ND DEFENDANT

RULING

1. Before me is a Notice of Motion dated 13/01/2021 by the 1st defendant. It is brought under *sections 1A & 1B of the Civil Procedure Act, Cap 21 Laws of Kenya, sections 90, 94 & 96 of the Land Act 2012 as amended by Legal Notice No. 28 of 2016.*

2. The application seeks orders *inter alia* that: -

“2) THAT upon hearing inter parties, an order be issued directing the 1st and 2nd Respondents herein to allow the Applicants, their servants and/or agents to peaceably or by use of reasonable force enter and/or gain possession of the charged property and the premises erected on the parcel of land to wit LR NO. 13868/11, IR NO. 120297 situated in Karen Plains within Nairobi County.

AND/OR IN THE ALTERNATIVE

3) THAT upon hearing inter parties an order be issued directed to the Respondents herein, their servants and/or agents to forthwith give and yield vacant possession to the Applicants herein of the charged property and the premises erected on the parcel of land to wit LR NO. 13868/11, IR NO. 120297 situated in Karen Plains within Nairobi County.

4) THAT upon grant of either prayer 1 and 2 herein above, the Officer in Charge of Station- Karen Police Station be hereby directed to supervise the enforcement of the said Order.

5) That costs of this Application be provided for”.

3. The application was supported by the affidavit of **ARTHUR NJUGUNA** sworn on 12/1/2021. It was averred that the 3rd respondent applied for and was advanced various banking facilities by the 1st applicant Bank totalling **Kshs. 87,000,000/=**. The same was secured by the 1st and 2nd respondents' property known as **LR NO. 13868/11, IR NO. 120297** situated in Karen Plains within Nairobi County (hereinafter “the suit property”).

4. However, the respondents failed to honour their financial obligations to the 1st applicant as a result of which, the bank's statutory power of sale arose and the bank issued the respondents with the requisite Statutory Notices. That despite service thereof, the respondents failed to discharge the debt which as at October 2020 stood at **Kshs. 114,922,830/=**. The suit property had been valued at **Kshs. 81,500,000/=** as at 1/7/2019.

5. It was further averred that the 1st applicant had served the respondents with a Notice of Intention to Enter. However, the respondents had continued to frustrate the 1st applicant's effort to exercise its statutory power of sale by denying the prospective buyers unimpeded access to the charged property. That vide two rulings delivered on 14/3/2018 and 1/10/2019, this Court found that the debt was due and owing and that the 1st applicant had the right to exercise its statutory power of sale. That another ruling delivered on 11/6/2020 held the same position but declined the orders sought due to the Covid 19 Pandemic.

6. The applicants contended that the 1st applicant has the right to access the suit property and/or exercise its statutory power of sale under the provisions of clause 10.1 of the Further Charge dated 7/11/2014. That unless the orders sought are granted the 1st applicant is likely to suffer irreparable loss as the debt owed has since surpassed the value of the suit property and continues to grow due to interest and other charges.

7. The respondents opposed the application vide the Replying Affidavit of **Florence Waittherero Maina** sworn on 9/2/2021. They contended that they had commenced this suit seeking declaratory orders, including, that the intended sale of the suit property was premature, the supply of accurate accounts, that the 1st applicant's remedy lay against the 3rd respondent and not the 1st and 2nd respondent.

8. They further contended that the issues raised in the suit are weighty and touch on unlawful opening and operation of bank accounts by the 1st applicant, its non-compliance with the provisions of the **Banking Act and the Central Bank Act** and the intended sale of the suit property by the applicants without issuance of the necessary notices and valuation prior to the intended sale.

9. It was the respondents' case that the applicant had filed a joint Statement of Defence and counterclaim dated 21/5/2018 denying the claim. That the claim against the respondents is a liquidated claim which they have denied and which the applicants ought to prove instead of seeking possession of the suit property. That the orders sought are an attempt of having them condemned unheard.

10. That the parties had held meetings to sort out the issue of the amount due both before and after the suit was filed. That the prayers sought in the application are in collision with the prayers sought in the counterclaim. They also challenged the valuation report as it was prepared without the valuer gaining access to the suit property. That the claim for Kshs. 114,922,830/= was premature as the applicants had failed to demonstrate whether the loan had become non-performing, when and the amount recoverable.

11. That unless the application is denied the applicants will forcefully take possession of the suit property and evict the respondent's family from their sole matrimonial property and dispose the property at a gross undervalue.

12. The parties filed their respective submissions which are on record and which the Court has carefully considered. It was submitted for the applicants that the requisite notices had been served and the issue was *res judicata*. That there was admission of debt and the issue of valuation had been previously dealt with and determined by this Court in its rulings of 14/3/2018, 1/10/2019 and 11/6/2020.

13. It was submitted that the prayers sought were provided for under **Clause 10.1 of the further charge. Section 90 (1) & (3) of the Land Act 2012**, which provides for remedies available to a Chargee in case of breach by a Chargor, was relied on. **Sections 94 and 96 (1) & (2) of the Land Act** were also relied on.

14. The applicants concluded that the pendency of the suit did not preclude the bank from realizing its security. That the Covid-19 restrictions have since been eased by the Ministry of Health and the Chargee should not be deprived of its right on the basis of mere excuses without settlement of the outstanding amount.

15. It was submitted for the respondents that no case had been made for the grant of the orders sought. That the claim by the applicants was for general damages for breach of contract and special damages of Kshs. 91,547,770/19 as at 27/1/2018 amongst other claims. That in the premises, the orders of access to the suit property that were being sought were contrary to the judgment sought in the counterclaim.

16. It was further submitted that the applicants had not disclosed whether the loan had become non-performing to warrant the intended action and if so, when it so became non-performing and the amount recoverable in contravention of **Section 44A of the Banking Act**. That the intention of the applicants was to scuttle the hearing of the suit. That there was no prove that the amount due was the alleged sum of Kshs. 114,922,830/=. That the grant of the orders will deny the respondents the opportunity of prosecuting their case.

17. The sole issue for determination is whether the 1st applicant's right to statutory power of sale has arisen to warrant granting of the orders sought. On record is a ruling of this Court (Ochieng J) dated 14/3/2018. In that ruling, the Court granted the 1st and 2nd respondent an injunction on the basis that the 1st applicant had not properly served the requisite notices. The Court observed therein: -

***“Therefore, if the defendants had served statutory notices appropriately, there would have been no basis upon which the court could have granted an injunction to restrain the Defendants from realizing the security.*”**

...

The injunction order herein will remain in force until the Bank and the auctioneers will have served new and compliant notices”

18. In that ruling, the Court found that the respondents were in arrears and the 1st applicant's statutory right to sell the suit property had arisen save for improper service of the redemption notice.

19. Subsequently, by a ruling made on 1/10/2019, the Court (Kasango J) found that the 1st applicant had properly served the required

statutory notices. Accordingly, the Court declined to grant the respondents the injunction they were seeking.

20. Finally, by a ruling made on 11/6/2020, which was on an application similar to the present one, the Court declined to grant the orders on the basis that the country then, and the world at large, was facing the Covid-19 pandemic. At the time, the Ministry of Health had issued directives with a view to combating the pandemic including social distancing. There was also a restriction of movement in and out of Nairobi County where the subject property is situated. The court also appreciated that the virus was transmitted through droplets or direct contact with infected persons or contaminated objects. In that ruling, the Court gave a rider that once the pandemic situation normalizes, the 1st applicant was at liberty to apply for similar orders.

21. From the foregoing, it is not in dispute that the 1st applicant's statutory power of sale is not impaired. That the issue of service of statutory notices and valuation had been raised and fully determined by this Court in its previous rulings. That the grant of the orders now being sought was only prevented by the Covid-19 pandemic which was at the peak at the time the last ruling was made.

22. It is now roughly one year since the ruling of 11/6/2020. What is the country's position in light to the Covid-19 pandemic? Schools re-opened in January 2021, as well as businesses. Other social places including places of worship have re-opened and normal operations have continued in line with the Covid-19 guidelines. The country has since opened its borders to international and national movement. Restrictions on movement have been lifted among other developments.

23. In my view, the situation is completely different from what it was on 11/6/2021. There is more semblance of normalcy now than it was then. This means that the orders sought then can now be safely granted.

24. What is the position of the parties herein? The 1st applicant lent monies to the 3rd respondent which it fully consumed and enjoyed. The 1st and 2nd respondent gave the suit property as security therefor. In **Clause 10.1 of the Further Charge dated 7/11/2014** provided: -

“At any time after the occurrence of any of the events specified in Clause 9, the Bank may serve notice on the Chargor and the Borrower in accordance with Section 90 of the Land Act, demanding payment of the monies secured by the First Charge and this Security and if the Chargor does not comply with the notice served under Section 90 of the Land Act the Bank may: -

a) ...

...

d) enter into possession of the Charged Property; or

...”.

25. The applicants have been able to demonstrate that there has been default. That the requisite notices have been issued. That the 1st applicant's statutory power of sale has arisen. That the contract between the parties entitles the 1st applicant to gain entry to the suit property. That is one of the legal remedies provided for by the law.

26. The monies lent by Lenders belong to depositors who require the same as and when they present themselves before the bank demand for the same. The same must be available to them upon demand. If borrowers would have consumed such monies and hold tight to securities given in respect thereof without any justifiable cause, the lending business in this country will be in jeopardy. That is the position the 1st applicant finds itself in.

27. The reasons given by the respondents are not plausible. The fact that the applicants filed a counterclaim did not extinguish or hinder the 1st applicant's rights under the law and the Charge. Vacant possession of the suit property is one of the remedies. The respondents can still prosecute their suit notwithstanding the 1st applicant having realized its security.

28. In view of the foregoing, I find the application to be meritorious and allow the same as prayed. I also award costs of the application to the applicants.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 10TH DAY JUNE, 2021.

A. MABEYA, FCIArb

JUDGE