



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**COMMERCIAL AND TAX DIVISION**  
**HCCC NO. E377 OF 2019**

PAULINE WANGECI WARUI.....1<sup>ST</sup> PLAINTIFF  
PETER MATHENGE GITONGA.....2<sup>ND</sup> PLAINTIFF

VERSUS

HFC LIMITED.....1<sup>ST</sup> DEFENDANT  
GARAM INVESTMENT AUCTIONEERS.....2<sup>ND</sup> DEFENDANT  
KEYSIAN AUCTIONEERS.....3<sup>RD</sup> DEFENDANT

**RULING**

1. Through the application dated 24<sup>th</sup> October 2019 the applicant seeks the following orders: -

1) *Spent*

2) *Spent*

3) *THAT pending the hearing and determination of this suit herein, an interlocutory injunction order do issue to restrain the defendants herein either by themselves or their agents and/or servants from interfering, alienating or otherwise howsoever, dealing with the House no 8 situated at LR. No NGONG/NGONG/47118, Karen*

4) *THAT in any event, the costs hereof be awarded to the plaintiffs herein.*

2. The application is brought under Order 40 rules 1 & 2 Civil Procedure Rules and is supported by the 1<sup>st</sup> applicant's affidavit. It is premised on the following grounds: -

1) *The plaintiffs are the registered joint owners as lessee in respect of house No 8 situated at LR No LR. No NGONG/NGONG/47118, Karen having purchased the same with the assistance of a mortgage facility from the 1<sup>st</sup> Defendant on or about 5/7/2012.*

2) *At inception, the plaintiffs serviced the mortgage reasonably well especially so because the 1<sup>st</sup>*

*plaintiff former employer Safaricom PLC Limited had negotiated a special mortgage facility with the 1st defendant charging interest at a rate of 6% p.a.*

*3) As fate would have it, when the 1<sup>st</sup> plaintiff lost her job on 20/3/2015, the negotiated rate of 6% shot up to 14% a base rate with a spread of 9% thereby forcing the plaintiffs into a default. This fact was drawn to the 1<sup>st</sup> defendant's attention.*

*4) The 1<sup>st</sup> defendant without service of a statutory notice of sale nor a redemption notice has advertised the suit property for sale as 25/10/2019.*

*5) This auction by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants has come about due to a disagreement between the plaintiffs and the 1<sup>st</sup> defendant concerning the restructuring of the mortgage account No [...] due to the plaintiffs reduced income levels.*

*6) There being an express violation of the law, there is no doubt a prima facie case with a high probability of success is established as against the defendants.*

*7) That if indeed the intended sale is illegal, it is pointless to go into questions of the adequacy or otherwise of damages*

*8) The balance of convenience is in favour of the plaintiff*

3. The 1<sup>st</sup> respondent opposed the application through the replying affidavit of its Legal Officer **Mr. Joseph Lule** who avers that the 1<sup>st</sup> respondent advanced the plaintiffs a loan facility for the sum of 30,000,000 which was secured by a charge over the property known as L.R. NGONG/ NGONG/47118 (hereinafter the suit property). He states that the terms of the charge was that the facility would be paid over a period of 192 months in installments of Kshs 264,957 at a negotiated interest of Kshs 6% p.a. He further states that it was a term of the contract that should the plaintiff cease being an employee of Safaricom PLC the loan interest rate would revert to 14% p.a.

4. The 1<sup>st</sup> respondent's deponent avers that the plaintiff's account fell into arrears when she ceased to be an employee of Safaricom PLC thus precipitating the 1<sup>st</sup> respondent's issuance of the requisite statutory notices before instructing the 2<sup>nd</sup> defendant to issue a notification of sale after which the suit property was sold by way of public auction to the highest bidder for the sum of Kenya shillings 36,700,000.

5. The application was disposed by way of written submissions. The plaintiff's counsel submitted that no public auction was conducted by the 1<sup>st</sup> defendant who instead purchased the suit through its representative property for Kshs 37 million. It was submitted that the 1<sup>st</sup> defendant was under Section 100 (1) and (3) of the Land Act obligated to seek the leave of the court before purchasing the suit property. It was further submitted that the property was of a higher value than the value it was sold for and that the sale was defective, null and void *ab initio*.

6. On his part, counsel for the 1<sup>st</sup> defendant submitted that the plaintiffs did not produce a valid counter valuation report to demonstrate that the suit property was not properly valued. With regard to section 100(1) and (3) of the Land Act counsel submitted that the chargee was allowed to take part in the auction and that no leave was required prior to purchasing the suit property. Counsel further submitted that should the sale be eventually found to be invalid, the plaintiff/applicant could be compensated by way of damages.

7. The 3<sup>rd</sup> defendant's advocate submitted that the auction was held on 25<sup>th</sup> October 2019 where there were three bidders and that the representative of the 1<sup>st</sup> defendant participated in the auction.

## **Analysis**

8. I have carefully considered the pleadings filed by the parties herein, the rival arguments that they presented and the cited authorities. The main issue for determination is whether the application meets the requirements for grant of equitable remedy of injunction.

9. The principles for grant of temporary injunctions are well set out in the case of **Giella –v- Cassman Brown and Company Limited (1973) E.A 385, at page 360** where Spry J. held that: -

**“The conditions for the grant of an interlocutory injunction are now, I think, 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 in doubt, it will decide an application on the balance of convenience.”**

10. These Principles were further discussed in **Nguruman Limited v Jan Bonde Nielsen & 2 Others**, CA NO. 77 of 2012,

**“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) ally 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. See Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant’s claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit “leap-frogging” by the applicant to injunction directly without crossing the other hurdles in between.”**

11. The first limb is to establish a prima facie case. A prima facie case is well defined in the case of **Mrao Limited –v- First American Bank of Kenya and 2 Others (2003) KLR 125**, where the Court of Appeal in determining what amounts to a prima facie case stated;

**“A prima facie case in a Civil Case includes but is not confined to a “genuine or arguable” case. It is a case which on the material presented to the court; a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but 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.”**

12. The applicants seek an injunction to restrain the respondents from interfering, alienating or dealing with the suit property. The applicants’ case is that the 1<sup>st</sup> defendant sold the suit property at a gross undervalue where the sale did not attain 75% of the market value. The applicants aver that the said auction did not take place and that the 1<sup>st</sup> defendant bank ought to have sought the leave of the court before selling the property to itself.

13. On its part, the 1<sup>st</sup> defendant states that the chargee was entitled to exercise its right to sell the charged property once the chargor fell in default. The 1<sup>st</sup> defendant asserted that Section 100(3) of the Land Act makes an exception to the effect that no leave was required prior to the 1<sup>st</sup> respondent purchasing the suit property.

14. It was not disputed that the applicant herein obtained a loan facility from the 1<sup>st</sup> respondent and that the applicants did not service the loan as agreed thereby falling into arrears. The applicants also concede that the suit property was sold, albeit irregularly, according to them. In dispute, however, is the manner in which the 1<sup>st</sup> respondent conducted the sale of the suit property.

15. My finding is that the applicants have not demonstrated that they have a prima facie case with high chances of success in view of the fact that they are not only indebted to the 1<sup>st</sup> respondent but that they have also not demonstrated that they are willing to settle the debt. Needless to say, the remedy of injunction is an equitable remedy that is only available to those who come to court with clean hands which is not the case in the present application.

16. Section 97 of the Land Act mandates the respondents to carry out a valuation of the property and sell it at a value that gives or fetches the best price. Section 97(2) of the Land Act provides as follows: -

***(2) A chargee shall, before exercising the right of sale, ensure that a forced sale valuation is undertaken by a Valuer.***

17. Under the above section, the chargee has the duty of care to the chargor to obtain the best price. This is in line with Rule 11(b)(x) of the Auctioneer rules which requires that a valuation be conducted not more than 12 months prior to the proposed sale.

18. In the case of *Palmy Company Limited -v- Consolidated Bank of Kenya Limited* [2014] eKLR the Court stated as follows:

***“The onus of establishing on prima facie basis, that the Applicant’s right has been infringed by the Respondent by failing to discharge the duty of care under section 97(1) of the Land Act lies on the Applicant...The court needs cogent evidence and material in order to say that prima facie, there has been an undervaluation of the suit property which is an infringement of section 97(2) of the Land Act by the Respondent as to entitle the court to call for an explanation or rebuttal from the Respondent.”***

19. I have perused the evidence on record, and more specifically the valuation report marked as exhibit (PMGB) where the property was valued at Kshs 80,000,000. The 1<sup>st</sup> respondent also attached a valuation report by Landmark Realtors Limited dated 16<sup>th</sup> August 2019 which placed the value of the property at Kenya shillings 50,000,000 with a reserve price of Kshs 37,500,000. The 1<sup>st</sup> defendant also attached a valuation report dated 17<sup>th</sup> July 2018 from Nishani Management who valued the property at market value of Kshs 65,000,000 with a forced sale value of 48,750,000.

20. In view of the foregoing valuation report, it is clear that the defendants did not explain how the value of the property depreciated from Kshs. 65,000,000 to Kshs. 50,000, 000 within a period of one year. Having regard to the big difference between the value placed on the suit property by the different valuation report and the alleged value at which it was eventually sold for, one can say that the applicants claim that the sale was cannot be ignored. Be that as it may, the plaintiffs’ recourse, in the event of undervaluation is to seek damages under Section 99(4) of the Land Act in view of the fact that it is not in dispute that the suit property was sold.

21. With regard to irreparable harm, the damage caused to the applicant should be such that it cannot be remedied by damages. In *Nguruman Limited v. Jan Bonde Nielsen & 2 Others* [2014] eKLR, the Court stated as follows on irreparable injury or damage:

*“On the second factor, that the applicant must establish that he “might otherwise” suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima face, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot “adequately” be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy.”*

22. In the present case, I find that the applicants did not demonstrate how they might suffer irreparable injury which cannot be remedied by damages. In ***Bomet Beer Distributors Ltd & Anor. v Kenya Commercial Bank Ltd & 4 Others*** (2005) eKLR. The court held that;

*“What is clear is that once a property has been knocked down and sold in a public auction by a chargee in exercise of its statutory power of sale, the equity of redemption of the chargor is extinguished. The only remedy for the chargor who is dissatisfied with the conduct of the sale is to file suit for general or special damages.”*

23. With regard to the balance of convenience, Ojwang J. (as he then was) stated in ***Amir Suleiman v Amboseli Resort Limited*** [2004] eKLR that the courts in responding to the prayers of interlocutory relief should always opt for the lower risk of the injustice. I find that by offering their property as security the applicants were aware of the risk involved should they default on the payment. In the present case, I find that the 1<sup>st</sup> defendant is more likely to suffer greater prejudice should the prayers of injunction be allowed considering that it is not disputed that the plaintiffs are indebted to them.

24. The applicants argued that they would suffer irreparable loss if the orders sought are not granted in view of the fact that the suit property is their matrimonial home. Courts have however taken the position that 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. (See ***T W M v P K M & 2 others*** [2017] eKLR).

25. Having regard to the findings that I have made in this ruling, I find that the instant application is not merited and I therefore dismiss it with orders that costs shall abide the outcome of the main suit.

Dated, signed and delivered via Microsoft Teams at Nairobi this 1<sup>st</sup> day of July 2021 in view of the declaration of measures restricting court operations due to Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17<sup>th</sup> April 2020.

**W. A. OKWANY**

**JUDGE**

**In the presence of:**

Mr. Mbogo for 1<sup>st</sup> Defendant/Respondent.

Mr. Kyalo Mbobu for Plaintiffs/Applicants

Miss Auma for Mungla for 3<sup>rd</sup> Defendant/Respondent

Court Assistant: Sylvia.