



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NO. 44 OF 2017

LONGONOT GATE DEVELOPMENT LIMITED.....PLAINTIFF/APPLICANT

VERSUS

EQUITY BANK LIMITED.....DEFENDANT /RESPONDENT

RULING

1. The **Notice of Motion** dated **16th February 2021** prays that pending the determination of this suit the respondent its servants and or agents be restrained by means of a temporary injunction from selling, advertising for sale land parcels numbers **Naivasha /Maraigushu Block 10/4013, Naivasha /Maraigushu Block 10/4014, Naivasha /Maraigushu Block 10/1130 and Naivasha /Maraigushu Block 10/1498**. (Hereinafter referred to as the properties.)
2. The application is supported by the grounds on the face of it as well as the sworn affidavit of **Lee Karuri** the applicant's director. The application has been opposed by the respondent vide the replying affidavit of **Kingori Kariuki** dated **3rd May 2021** and the grounds of opposition dated the same date.
3. The issues between the applicant and the respondent are not disputable. The applicant obtained a loan facility from respondent in March 2014 totalling Kshs.200 million or thereabouts. It secured the same by charging the above properties. It appears that the applicant defaulted in servicing the loan and it filed this suit. Honourable Justices Korir and Prof. Ngugi heard separate applications by the applicant and concluded that there were no adequate statutory services upon the applicant and its relevant directors *inter alia*. Honourable Prof. Justice Ngugi in particular advised the respondent to proceed if necessary but must comply with the provisions of the **Land Act** which dictates how the notices ought to be issued.
4. In line with the above directives which in essence it did not stop the respondent from recovering the loan, the applicant issued as per the replying affidavit of Kariuki Kingori, the notices dated **8th October 2018** notifying the applicant of its intention to sale the securities within 90 days if it failed to pay the sum of Kshs122.5 million or thereabouts.
5. Vide another notice dated **17th April 2019** the respondent issued another notice to the applicant indicating that it was to exercise its statutory power of sale if within 40 days it failed to pay the sum of Ksh.54 million which amount was advanced to **James Gatune Wathigo**, one of the applicant's directors.
6. On **19th September 2020** the respondent issued a 14 days' notice to the applicant intending to auction the securities if the applicant failed to pay a sum of Kshs.136.2 million or thereabouts.
7. The applicant thereafter rushed to file this application under certificate of urgency. The applicant averred that the respondent failed to comply with the earlier rulings of this court which directed that proper services ought to be done before advertising for sale of the charged properties.
8. The applicant went on to state that it was an express term of the agreement and in line with **Section 84(1) (a) and (b) of the Land Act 2012** that in the event of change in interest rates the respondent ought to notify the applicant. This the respondent failed to comply.
9. He went on to state that the respondent has failed to comply with **Section 90 and 96 of the Land Act** where it was required to issue statutory notices. In any case whatever was alleged to be notices were not served upon the applicant.
10. That the only valid notice if any was to do with one property namely **Naivasha /Maraigushu block 10/1130(Kedong)**. There were no valid notices in respect to the other properties.

11. As indicated above the replying affidavit of Kingori Kariuki essentially went to establish or prove that the applicants and or its directors were properly served. He attached copies of Postal Corporation of Kenya parcels booklets which were handwritten and which indicated the addresses of the recipients.

12. He further deponed that the application was *res judicata* as the court had pronounced itself over similar applications. At any rate the applicant had not made any payments to liquidate the debt and discharge the securities. He prayed that the application be dismissed.

13. When the matter came up for hearing the court directed that the same be disposed by way of written submissions. Apparently as at the time of writing this ruling it was only the applicant's submission that was on record.

14. The applicant gave a chronology of the matter and in summary submitted that the respondent failed to comply with **Section 90 and 96 of the Land Act** in so far as there were no valid notices issued and there was no evidence that the respondent was served. The records from the courier company were not legible for one to reach a meaningful conclusion that indeed the applicant received the notices.

15. It submitted that if there was any notice then the same was in relation to one property namely **Naivasha /Maraigushu Block 10 /1130/Kedong** and not the other properties. There was no notice in respect to the other three properties.

16. The applicant in the premises faulted the said action by the respondent for it did not comply with the earlier orders of Prof Justice Ngugi which required it to issue proper notices. He relied on the case of **MANASEH DENG V. ECOBANK KENYA LTD & ANOTHER (2015) eKLR** and **DESIRE DERIVE LIMITED V. BRITAM LIFE ASSURANCE CO. LTD & ANOTHER (2016) eKLR**.

ANALYSIS AND DETERMINATION.

17. There are four issues majorly in this application for determination, **namely whether the respondent issued a proper statutory notices, whether the said notices referred to the three properties, whether the applicants were properly served and whether the matter was res judicata.**

18. The letter dated **8th November 2018** was addressed to the applicant and copied to the County Commissioner and the other directors. The said letter gave the applicant notice of 90 days to pay up or else property numbers **Naivasha /Maraigushu block 10/4013(Kedong) and Naivasha /Maraigushu block 10/4014(Kedong)** would be sold by way of private or public sale.

19. The said letter was delivered to the applicants vide Postal Corporation of Kenya as per the attached annexure therein.

20. The letter dated **17th April 2019** by the applicant to the respondent issued a 40 days' notice indicating that land parcel number **Naivasha /Maraigushu block 10/1130** would be sold so as to recover the sum of kshs. 54,150,000. Again the same was registered and dispatched through the Postal Corporation of Kenya as per the attached annexure therein.

21. On **19th September 2020** the respondent issued a 14 days' notice to the applicant indicating that it shall offer for sale land parcels numbers **Naivasha/Maraigushu block 10/4013(Kedong),4014, and 1130**. The same was also registered and dispatched vide the same courier namely Postal Corporation of Kenya as per the attached copy of the bill.

22. Were these notices proper? In my view the same were in line with **Section 90 as well as Section 96(3) of the Land Act (2012)**. **Section 90** states as hereunder.

1. .” If a chargor is in default of any obligation, fails to pay interest or any other periodic payment or any part thereof due under any charge or in the performance or observation of any covenant, express or implied, in any charge, and continues to be default for one month, the chargee may serve on the chargor a notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be.

2. The notice required by subsection (1) shall adequately inform the recipient of the following matters—

a) The nature and extent of the default by the chargor;

b) If the default consists of the non-payment of any money due under the charge, the amount that must be paid to rectify the default and the time, being not less than three months (emphasis court), by the end of which the payment in default must have been completed;

c) If the default consists of the failure to perform or observe any covenant, express or implied, in the charge, the thing the chargor must do or desist from doing so as to rectify the default and the time, not being less than two months, by the end of which the default must have been rectified;

d) The consequence 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 this section in accordance with the procedures provided for in this sub-part; and

e) The right of the chargor in respect of certain remedies to apply to the court for relief against those remedies.”

23. Section 96 states as follows;

1. Where a chargor is in default of the obligations under a charge and remains in default at the expiry of the time provided for the rectification of that default in the notice served on the chargor under section 90(1), a chargee may exercise the power to sell the charged land.

2. Before exercising the power to sell the charged land, the chargee shall serve on the chargor a notice to sell in the prescribed form and shall not proceed to complete any contract for the sale of the charged land until at least forty days have elapsed from the date of the service of that notice to sell.

3. A copy of the notice to sell served in accordance with subsection (2) shall be served on—

a) “The Commission, if the charged land is public land;

b) The holder of the land out of which the lease has been granted, if the charged land is a lease;

c) A spouse of the chargor who had given the consent;

d) Any lessee and sub lessee of the charged land or of any buildings on the charged land;

e) Any person who is a co-owner with the chargor;

f) Any other chargee of money secured by a charge on the charged land of whom the chargee proposing to exercise the power of sale has actual notice;

g) Any guarantor of the money advanced under the charge;

h) Any other person known to have a right to enter on and use the land or the natural resources in, on, or under the charged land by affixing a notice at the property; and

i) Any other persons as may be prescribed by regulations, and shall be posted in a prominent place at or as near as may be to the charged land. A chargee who has withdrawn from possession of charged land may not again enter into possession of that land, otherwise than by complying with the provisions of section 94 if the chargor is in a fresh default under the charge.”

24. This court contrary to the applicant’s submissions is satisfied that the 90 days and 40 days’ notices were properly issued. There was no evidence that the applicant failed to receive the notices or that the address used by the respondent did not belong to the applicant.

25. Looking at the subject of the said notices however, it appeared to me that the notice dated **8th November 2018** giving 90 days related to land parcel number **Naivasha/Maraigushu block 10 4013(Kedong) and 4014.**

26. The letter dated **17th April 2019** giving a 40 days’ notice related to land parcel number **Naivasha /Maraigushu block 10/1130(Kedong).**

27. Whereas the letter dated **19th September 2020** giving a 14 days’ notice is in relation to land parcels numbers **Naivasha/Maraigushu block 10 /4013(Kedong), 4014 and 1130.**

28. Looking at the above it is clear that 90 days’ redemption notices were issued in respect to land parcels numbers **Naivasha /Maraigushu block 10/4013 and 4014.** The same did not apply to land parcels numbers **Naivasha /Maraigushu 1130 and 1498.**

29. On the same breath 40 days’ redemption notice were not issued in respect to land parcels numbers **Naivasha /Maraigushu block 10/4013 and 4014 and 1498.**

30. The 14 days’ notice were however issued in respect to all the three parcels of land except number **1498.**

31. In view of the above observations this court easily concludes that the Provisions of **Sections 90 and 96 of the Land Act** cited above were not fully complied with. The respondent although aware that the titles to the said parcels are fully encumbered chose to cherry pick what kind of notices to be issued. My brother Ngugi J was clear in his ruling of **24th October 2018** namely that the statutory notices must be properly served. In this case although properly served as found above the same were to say the least not consistent with the provisions of the Act cited above.

32. In other words, the said letters did not tally as to the description of the parcels of land. If indeed the respondent was careful then the 90 days,40 days and 14 days’ statutory notices ought and must fully describe the securities. This is not without cause as the potential suitors ought to know which bride the owner is offering. At the same time, it removes any doubt from the chargor in terms of the description of the collateral.

33. This court does not find the matter *res judicata* as advanced by the respondent. All that the court ruled earlier was that the respondent was to issue proper notices to the applicant. In this case the notices were proper but the contents were improper as found above. There was no injunction issued to stop the respondent from realising its securities. All that was directed was the proper procedures of redemption were to be followed.

34. It may be true that the applicant has failed to service the loan but on the other hand it is imperative that the law applicable in exercise of the statutory power of sale must be followed through. A party deprived of his property through an illegal process would suffer an irreparable loss. (See **KWANZA ESTATES LIMITED V. DUBAI BANK LIMITED (2013) eKLR**).

35. For the foregoing reasons the court finds that there is merit in the application and **the same is allowed to the extent** that;

a) **The notices though properly issued failed to describe properly the securities to be realised.**

b) **Should the respondent intent to exercise its statutory power of sale then it ought to comply with all the legal requirements provided under the law.**

c) **Until order (b) above is compiled the respondent is hereby injuncted from exercising its statutory power of sale.**

d) **Costs in the cause.**

DATED SIGNED AND DELIVERED VIA VIDEO LINK AT NAKURU THIS 4TH DAY OF OCTOBER 2021.

H K CHEMITEI

JUDGE