



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VIHIGA

CIVIL CASE No. E001 OF 2021

B E T W E E N:

1. **WILLY TSIALANGO IMBITI**..... Plaintiff/Applicant
2. **MOSES AYODI TSIALANGO**.....Plaintiff/Applicant

AND

1. **MOLYN CREDIT LIMITED**Defendant/Respondent
2. **JAKACHA AUCTIONEERS**Defendant/Respondent

R U L I N G

1. The Application now before the Court was brought under a certificate of urgency filed during the vacation and first heard in Siaya High Court. The Plaintiff/Applicants are customers of the First Defendant and borrowed some monies from it which are secured on a property owned by the First Plaintiff. The Application is brought under “**Sections 89, 90, 84 (1), 96 (2), 97 (2) of the Land Act 2012, Section 74 (1) and (2) of the Registered Land Act (repealed), Sections 1A (2) of the Civil Procedure Act, Order 40 Rule (1) of the Civil Procedure Rules and all other enabling provisions of the law**)

2. The Application is supported by the Affidavit of Willy Tsianlango Imbiti and the grounds that appear on its face as well as further grounds to be adduced at the hearing. The stated grounds are:

(a) *The Plaintiffs obtained a financial facility against a charge of a matrimonial property known as **NORTH MARAGOLI/LYADUYWA/2143** from the 1st Defendant of Kshs. Four Hundred and Thirty Six Thousand (Kshs. 436,000/=) out of which sum, the Plaintiffs/Applicants have so far paid in excess of Kenya Shillings Five Hundred Thousand (Kshs. 500,000/=).*

(b) *From the financial loan agreement with the Defendants, the Plaintiffs ought to have paid Kenya Shillings Five Hundred Thousand (Kshs. 500,000/=) which included the Principal sum together with interest.*

(c) *The interest rate as per the loan/contractual document was capped at specificities and the 1st Defendant has unilaterally decided to impose interest rates which are both punitive and exaggerated bring the amount to be repaid at an excess of over Kenya Shillings Four Million six Hundred and Fifty Thousand One Hundred and Forty One Only (Kshs. 4,650,141/=) an abnormal figure which the Plaintiffs have requested clarifications to avail.*

(d) *The regime under which the financial facility was obtained by the 1st Defendant is the old regime of the Registered Land Act which does not recognize the abolishment of the charges right to have ownership interest in the security surrendered which then guarantees the Plaintiffs/Applicants a right of redemption of the security as opposed to the right of ownership by the charge as it were before.*

(e) *Being matrimonial property where spousal consent was obtained, no notices of statutory sale from the Plaintiffs have been served upon the Plaintiffs and the spouse of the notification of sale as is required by law but rather notices notifying the general public of the purported auction on 26th day of March 2021 have been pinned in public places.*

(f) *Unless valid statutory notices containing the following:*

(i) *Nature and extent of the default.*

(ii) *If the default is for non-payment of monies.*

(iii) If the default is for non-performance of any of the covenants in the charge instrument, are served upon all the parties concerned, the purported public auction by the 2nd defendant of the Applicant's property remain illegal, unlawful, irregular and an abuse of the statutory power of sale by the 1st Defendant.

(g) The plaintiffs have been repaying the loan facility to the 1st Defendant of course with approved variations from the 1st Defendant save that the 1st Defendant unilaterally decided to increase the interest rates, refused to disclose the outstanding balance owed and declined to accept any balance repayment for which the Plaintiffs are willing and ready to pay upon disclosure of the amount owed.

(h) A notice to conduct a public auction for the sale of the charged property; though not served on the plaintiffs or the spouse as is required by law, have been pinned in public places to sell the charged property on the 26th day of March 2021 without stipulating the amount to be recovered out of the said public auction as is required by law.

(i) The purported sale by auction of the plaintiff's charged property scheduled for 26th day of March 2021 is therefore a nullity, irregular and fraudulent and is only aimed at enriching the Defendants in total disregard to well laid down procedures in the spirit and file of the Land Act 2012.

(j) The Plaintiffs stand to suffer irreparable loss as the charged property is the only home known to them and have paid a substantial, if not the whole amount under the charge document and would be rendered homeless if the court declines to grant the orders so sought.

(k) Even at the time of renegotiating for varied payments of the loan facility advanced, the Plaintiffs had explained the existing financial hardships facing Kenyans across the country courtesy of the ravaging Covid-19 Pandemic but which allowed them to repay the entire loan facility which was accepted by the 1st Defendant. However, the thirst for arbitrary variation of interest rates and penalties which remain unexplained is the focal driving point of the 1st Defendant to abuse his power of sale to instruct the 2nd Defendant to advertise for the sale of the charged property.

(l) Statutory provisions.

(m) Interests of justice and fair play.

(n) Other or further grounds to be adduced at the hearing.

3. The facts of the case as appear from the Affidavits are that the Plaintiffs obtained a financial facility from the First Defendant. The borrowing was secured on the Matrimonial home known as **NORTH MARAGOLI/LYADUYWA/2134** for the sum of KShs 436,000/-. The Plaintiffs complain that they have repaid the principal together with the interest. They say that the Charge they entered was under the old regime and therefore the Creditor will not allow them to redeem the property and have the security surrendered. They complain that the First Defendant is attempting to repossess the Property and the process used is inequitable, unfair and unlawful. They say that the Defendants did not serve any statutory notices upon them they say that they have seen various notices pinned in public places offering the charged property for sale on 26th May 2021. They say the auction notices do not have a reserve price therefore suggesting that the Defendants are intending to sell the property at an undervalue and then pursue them for the balance, thereby compounding their mistreatment.

4. When the matter came before the Court in Siaya on 25th March 2021 the Learned Duty Judge made an interim order in the following terms that "There shall be a temporary order of injunction restraining the defendants Molyne Credit Ltd and Jakacha Auctioneers, their agents, assigns or their representatives from advertising for sale, selling, disposing or otherwise interfering or dealing with land Parcel No LR No. North Maragoli/Lyadywa/2134 pending interpartes consideration of this application on 8th April, 2021 before the duty Judge in Kakamega High Court".

5. The Second Defendant has not participated in the proceedings. The First Defendant filed a Replying Affidavit on 8th April 2021. The Affidavit is deponed by a Moses Manayi Anyangu who states that he is the financial director of the First Defendant. The Affidavit is a mixture of legal argument and fact. The Legal argument is that the High Court does not have any jurisdiction because the Environment and Land Court is seized of the matter. That statement is in fact untrue. He states further that the matter is res judicata. That remains to be seen.

6. The Financial Director says that in 2019 the Parties appeared before Vihiga ELC. The case number quoted is **Vihiga ELC Case No. 134 of 2018**. He exhibits an order of the Court where the Order was made. It transpires that in fact the COURT is the Principal Magistrate's Court. The Reference to ELC is an internal categorization of that Court for environment and land matters. In 2019 there was no Environment and Land Court (as described by **Article 162(2) of CoK**) in Vihiga. He says that the Parties entered into a consent and the order was adopted by the (PM's) Court. He says that pursuant to the consent the Plaintiffs agreed to pay Kshs.250,000/= per month until payment in full. He does not say what that payment in full was – whether at the date of the order or subsequently. It is noteworthy that the Plaintiffs say they have made full payment. The Defendants do not say that payment was not made.

7. The Finance Director states – what his advocate told him "that there is no appeal or review of the orders/judgment entered in Vihiga ELC" (that should be a reference to Vihiga MELC) and therefore the consent order is binding. However, he then goes on to contradict himself (on oath) immediately thereafter to say that there were application for a review but they were not successful.

8. What the consent order states is that in default of payment the injunction is lifted. What is to be paid is KShs.25,000/- per month. The First Plaintiff states in his Supporting Affidavit that notwithstanding the financial challenges he has made payment so much so that he believes that he has paid off his debt in its entirety. He does say that the First Respondent has applied further arbitrary charges to his

account. That suggests that either interest rates were varied or there were other charges applied to the account. Although that may prevent redemption, under the Consent Order they are not part of the Order. What is stated is “until payment in full”. Payment in full as at the date of the Consent can only relate to those amounts outstanding as at the date of the order and cannot be used as carte blanche for a lender to further charge whatever they like willy nilly.

9. In response the Respondent has alluded to non-payment. However, the First Respondent, nor its finance director has provided a complete account to demonstrate that there has been default by the Plaintiffs. This is additionally of concern because the Exhibited correspondence shows that the First Plaintiff expressly sought a complete account.

10. The Plaintiff states that the conduct of the First Respondent is unfair, high handed and amounts to extortion. Given the tone and misleading statements in the Replying Affidavit this Court is inclined to agree.

11. Dealing first with the issue of jurisdiction. The Parties entered into a consent order to settle the original claim. The Plaintiff’s are not asking the Court to make any decision on the Claim. What the Plaintiff is saying, is that the state of affairs which would allow the First Respondent to sell the Property has not arisen. The First Respondent does not admit or refute. Instead, its finance director says the Court cannot hear this matter. A more reasonable response would have been to produce a statement of account to demonstrate exactly where, when and for how much the default occurred. The First Respondent has not done so. In the circumstances, that evidence is not before the Court. The bare assertion of a deponent who qualifies his affidavit with the statement that he is basing his evidence on what his Advocate tells him to say, is not persuasive.

12. In the circumstances and for the reasons set out above, the Application is allowed for the reasons that the Respondent has failed to demonstrate a breach of the consent order – even on a prima facie basis. The Court is satisfied that both Respondents are liable to behave in a way that results in the sale of a matrimonial home without the knowledge of the family living there. In the circumstances an injunction until final hearing and determination of the underlying suit is justified to preserve the status quo and/or prevent an irreversible injustice.

13. It is therefore Order that;

1. the Respondents and each of them whether by themselves, their servants, agents, assigns or howsoever are forbidden from:

(1) selling and/or attempting to sell the Property known as NORTH MARAGOLI/LYWADUYWA/2143 hereinafter referred to as “the Property”.

(2) Offering or attempting to offer the Property for sale

(3) Advertising or suggesting any other person should advertise the Property for sale

Until the Hearing and determination of suit.

2. The First and Second Respondents shall pay the Plaintiff’s costs of the Application. That shall be joint and several liability.

3. Leave to tax and enforce the costs order before the determination of the suit.

Order accordingly,

FARAH S. AMIN

JUDGE

DELIVERED SIGNED AND DATED THIS THE 18TH DAY OF NOVEMBER 2021 IN KAKAMEGA (VIRTUALLY USING THE MS TEAMS PLATFORM) AND IN OPEN COURT

In the Presence of :

Court Assistant: Dennis Wasilwa

Counsel were given a time allocation earlier in the day but did not attend at the allocated time.