



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL SUIT NO. 54 OF 2018

PRAYOSHA VENTURES LIMITED.....1ST APPLICANT

SAMMY KIPKETER CHERUIYOT.....2ND APPLICANT

STEPHEN KIPKIYENY TARUS.....3RD DEFENDANT

VERSUS

NIC BANK LIMITED.....1ST RESPONDENT

GARAM INVESTMENTS AUCTIONEERS.....2ND RESPONDENT

RULING

1. The applicants filed this application under a Notice of Motion dated 21st January, 2020 seeking for orders that: -
 - a. There be a stay of sale of that property known as **Title No. ELDORET MUNICIPALITY BLOCK 4/335** slated for 30th January, 2020 pending hearing and determination of this suit.
 - b. The chief executive officer of the 1st defendant, **Mr. John Gachora, the Eldoret Branch Manager** of the 1st defendants and **Mr. Joseph Gikonyo**, the proprietor of the 2nd defendant be punished by being detained at Eldoret G. K prison facility for a period of six (6) months or for such period and/or such terms as this honorable court may determine.
2. The application is based on the ground that on 5/3/2019 a consent order of status quo was issued which order is still in force. However, the 2nd defendant has advertised the sale of the suit property for sale on 30th January, 2020.
3. The matter was referred to court annexed mediation where all the parties attended. The outcome is yet to be communicated to the interested party.
4. By advertising the suit property while the orders are still in force, the 1st and 2nd defendant are demonstrating how malicious they are undermining the dignity of the court.
5. That in order to protect the said dignity, the 1st defendant's CEO Mr. John Gachora, the Eldoret Branch Manager of the 1st defendants and Mr. Joseph Gikonyo, the proprietor of the 2nd defendant ought to be punished for contempt of court.
6. The 1st respondent filed grounds of opposition in response to the application on the grounds that the application is lodged in violation of Section 5 of the Judicature Act, Chapter 8 Laws of Kenya the appropriate application being the APPLICATION NOTICE.
7. The said Notice of Motion is an abuse of the court process as no orders were alive for them to be in contempt as at the time alleged. Further, that the applicant has not identified separately and numerically which each alleged act of contempt and set out fully the grounds on which the committal application is made.
8. The applicant has not attached the order that was allegedly disobeyed neither is there proof of extraction and personal service to the contemnor of the said order.

9. Lastly, that the alleged contemnors are not parties to the suit and that no orders can be issued against strangers.
10. The 1st respondent further filed a replying affidavit stated that the bank advanced huge sums of money to the plaintiff's who secured it by a charge over **L.R NUMBER ELDORET MUNICIPALITY BLOCK 4/335** and two other properties.
11. Despite the clear provisions of the charges and the facilities granted to the plaintiffs/applicants, they went ahead to default in repayment of the loan.
12. As of 7th March, 2017, the arrears were **Kshs. 319,649,027.80** which continued to accrue interest at the contractual rate and the outstanding monies in respect of the facilities stood at **Kshs. 470,105,380.86**.
13. When the bank sought to realize the securities, the applicants and the interested parties brought several suits similar to this application and the same was dismissed by this court vide a ruling dated 15th March, 2019.
14. Consequently, a re-introduction of the application for injunction is res judicata and thus contra- statute.
15. The applicants counsel pointed out that on 15/3/2019 granting the orders for status quo were made, and the respondents being aggrieved with the same, file an application dated 19/3/2019 seeking to set aside the orders.
16. To date, the said orders have never been vacated and therefore are still in force. That the respondents were fully aware of these orders. The matter was taken to court annexed mediation however he is not conversant with the outcome.
17. That the respondents have advertised the suit property for sale when preservatory orders are still in force and the court annexed mediation has not been concluded.
18. The respondents have blatantly disregarded court orders despite the fact that they were duly served. They further talk about half a billion shillings yet the interested party guaranteed only Kshs. 80,000,000.
19. The respondents are also faulted as having failed to comply with **Section 96(3) of the Land Act** as **Sammy Kipketer Cheruiyot** the lessee of the charged property has never been served with any orders.
20. The respondents counsel submitted that the court in the ruling dated 15/3/2019 observed that the respondents had adhered to all the requirements before exercising its statutory power of sale which ruling has never been set aside or appealed.
21. Parties appeared before court for a ruling on 14th March, 2019 which was not ready, where counsel instructed Edwin Barmao to hold their brief. The instructions were limited to only holding the brief and not entering into consents.
22. The suit was taken to court annexed mediation which never bore fruits and it was directed that the suit be taken back to court for hearing and determination.
23. As regards to the prayers being sought, the respondents submitted that contempt of court proceedings cannot be granted through a notice of motion. The mistake is incurable and the prayers must be struck out.

Issues for determination.

- a) Whether the Applicant established a Prima facie case
 - b) Whether damages will be an adequate remedy
 - c) Where does the Balance of Convenience lie?
24. In order to determine whether the applicant has a prima facie case there are a number of issues that have to be determined. These are;
- a. Whether the requirements statutory notice of sale under section 90 were complied with.
 - b. Whether the requirements of Section 96 of the land Act were complied with
 - c. Whether the requirements of Rule 15(d) of the Auctioneers Rules was complied with
25. Section 90 of the Land Act provides;

(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 in 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, 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, being not less than two months, by the end of which the default must have been rectified;

d) the consequence that 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.

26. The respondents annexed a copy of the ruling marked as SA -1 where the court dismissed a similar application for injunction. Prior to the application, the Respondent had complied with the requirements of issued a statutory notice under Section 96 of the Land Act provides;

96. Chargee's power of sale

(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;

(e) any lessee and sub lessee of the charged land or of any buildings on the charged land;

(f) any person who is a co-owner with the chargor;

(g) 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;

(h) any guarantor of the money advanced under the charge;

(i) 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

(j) 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.

27. The 1st respondent served a 40-day notice on the applicant on 17th May 2018 and the same is marked as EQ 7 in its replying affidavit.

Under Rule 15 of the Auctioneers Rules;

Upon receipt of a court warrant or letter of instruction the auctioneer shall in the case of immovable property—

a) record the court warrant or letter of instruction in the register;

b) prepare a notification of sale in the form prescribed in Sale Form 4 set out in the Second Schedule indicating the value of each property to be sold;

c) locate the property and serve the notification of sale of the property on the registered owner or an adult member of his

family residing or working with him or where a person refuses to sign such notification, the auctioneer shall sign a certificate to that effect;

28. The applicant has not annexed any copy of the status quo allegedly issued by the court. Therefore, the applicants have satisfied the burden of proof for service of the notices consent upon the respondent.

29. The upshot of the foregoing is that the statutory power of sale was in accordance with the statutory provisions. In my opinion there is no prima facie case with probability of success. As **per Kenya Commercial Finance Co. v Afraha Education Society (2001) Vol 1. EA it was held;**

“...If a prima facie case is not established, the irreparable injury and balance of convenience need no consideration”

30. The applicant has not proven that damages will not be an adequate remedy. In **Nahasho K Mbatia v Finance Company Limited (2006) eKLR** the court held;

In any event, having charged the property, the Plaintiff converted it to a commercial commodity with a monetary value that can be easily ascertained. Its loss can always be made good by an appropriate award of monetary compensation. There is no allegation that the Defendant will not be in a position to meet such award. I hold, therefore, that the Plaintiff may not suffer irreparable loss.

40. The 1st defendant is a financially sound institution whose paid up capital is provided for by law and would have no challenges compensating the Applicant.

41. The applicants did not prove that there was no compliance with the statutory requirements as the same had already been complied with. Further, that failure to extract and serve the orders for status quo upon the defendant meant that there was no order to be enforced. The applicants have also not established that by advertising the property for sale, and upon the sale of the same, the applicants will be exposed to unrecoverable losses.

42. In the case of **Andrew Ouko v Kenya Commercial Bank Ltd & 3 others (2005) eKLR** where the court held;

“if the defendants were restrained from selling off until the suit was heard and determined there is a very real risk that the debt may outstrip the value of the suit property. this persuades me that the balance of convenience is in favour of the said defendants. The stoppage of intended sale by the chargee would result in continuous growth of debt and thus expose them to irrecoverable losses.”

43. I completely ascribe to the foregoing approach and find that the application is part of the delaying tactics the applicant is trying to engage in. The application is not merited and is dismissed with costs to the respondents

Delivered Signed and Dated this 20th day of February 2020 at Eldoret

H.A. OMONDI

JUDGE