



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

CIVIL CASE NO. 11 OF 2019

LENARD OLE SEME.....1ST PLAINTIFF/APPLICANT

PETRO SARUNI OLE KOITAAT.....2ND PLAINTIFF/ APPLICANT

NTUKUSIOI OLE SAPAI.....3RD PLAINTIFF/ APPLICANT

VERSUS

EQUIYT BANK LIMITED.....DFENDANT/RESPONDENT

(From the original Narok ELC Case No 468 of 2017)

RULING

The case for the plaintiffs.

Pursuant to the provisions of Order 40 Rules 1,2,4 and 10 of the 2010 Civil Procedure Rules and sections 1A, 1B,3A and 63 (e), Civil Procedure Act (Cap 21) Laws of Kenya and sections 97 and 99 of the Land Act No 6 of 2012 and articles 10 (2), (a), (b) and 19 (1),23,27 (1), 47 (1), 48, 50 (1) and 258 of the 2010 Constitution of Kenya and all other enabling provisions of law, the plaintiffs have applied for the following major orders.

1) *Spent*

2) An order to grant an interim order of injunction to restrain the defendant either by herself agents, servants and anyone claiming or acting under the said defendant from exercising her statutory power of sale over and in respect of LR Numbers Trans-Mara/Moyoi/ 1159, 1489 and 1690 respectively, hereafter referred as the suit properties pending the hearing and determination of the instant application.

3) In the alternative and without prejudice to the foregoing, an order to maintain the status quo of the suit properties pending and determination of the hearing of the instant application.

4) An order that the costs of this application be borne by the respondent.

The application is brought by way of the notice of motion and is supported by 33 grounds that are set out on the face of the notice of motion. The major grounds are as follows. The plaintiffs are registered owners of LR numbers Trans-Mara/Moyoi/1159, 1489 and 1690 respectively. In February July 2014 the plaintiffs applied and obtained monetary loans from the defendant. The plaintiffs executed charges over the suit properties. The banking facilities stipulated the maximum rate of interest chargeable upon the loans; as being 23.99% per annum. The bank reserved the right to change the interest rate, subject to giving notice to the plaintiffs. The bank then proceeded to charge interest at the rate of 29% and 34% per annum contrary, to the banking laws and the loan agreements. As a result, the bank mismanaged the loan accounts of the plaintiffs. The bank demanded Kshs 5,467,342.78 from the first plaintiff as at 27th March 2017.

The amounts claimed by the bank are neither owing nor due.

Despite the fact that the sums claimed are neither owing nor due, the bank has since proceeded to and served a statutory notice of sale in exercise of its power of sale. The bank also issued and served the secondary statutory notice in terms of section 96 (2) of the Land Act, No.6 of 2012. Furthermore, the bank failed to carry out valuation of the suit properties as required by section 97 (2) of the Land Act, No. 2 of 2012. The intended sale is being taken in a vacuum and is illegal and it also defeats the plaintiffs' right of redemption. The intended sale will cause irreparable loss. The plaintiffs state that this is a fit case to grant orders of temporary injunction and/or maintenance of the status quo.

In addition to the grounds in support of the application, the first applicant has deponed to a 27 paragraphs affidavit. He has deponed to the following major matters. The 1st plaintiff has replicated the grounds in support of the application in his affidavit; except for the following major averments. Based on the information from his advocate which he believes the issuance and service of all statutory notices is an essential and integral process prior to exercising its statutory power of sale. The plaintiffs are ready and willing to give an undertaking as to damages, pursuant to granting the orders a temporary injunction and/or maintenance of the status quo.

The case for the defendant

The defendant through its credit manager (Kennedy Irungu) has deposed to a 37 paragraphs replying affidavit in opposition to the application. The following are the major averments. The 1st plaintiff and one Joseph Molinka Ole Kipila (the borrower) were customers of the bank. The bank advanced a loan in the sum of Kshs 3,750,000/= to the borrower. The 1st plaintiff executed a guarantee for the loan facility in favour of the borrower and a charge was registered over LR Trans-Mara/Moyoi/1159 on 12th March 2014 in favour of the defendant. On 28th May 2014 the 1st plaintiff applied and was granted a loan in the sum of Kshs 4,500,000/= by the defendant, which loan was guaranteed by the 2nd and 3rd plaintiffs and was secured by a legal charge over property LR No Trans-Mara/Moyoi/1489 and 1690 belonging to the 2nd and 3rd plaintiffs respectively, hereinafter referred as suit properties.

The loan facilities attracted an interest rate of 20% per annum, which was subject to revision by the respondent upon notifying the plaintiff. The plaintiff defaulted in his monthly installment payments and as a result failed to liquidate the loan facility, to which the deponent has annexed the plaintiff's bank account statements as annex marked "KI 3".

By its letter dated 30th July 2015 the bank notified the plaintiff that it was going to exercise its statutory power of sale. Thereafter the bank issued notices of its intention to exercise its statutory power of sale over the subject properties upon the 2nd and 3rd plaintiffs on 7th December 2015 by registered mail.

Thereafter the bank issued redemption notices upon the 2nd and 3rd plaintiffs on 11th May 2016 by registered mail, copies of the notices are annexed to the affidavit as annex marked "KI 5 a and b." The 2nd and 3rd plaintiffs acknowledged receipt of the redemption notices vide their letters erroneous dated 9th May 2016, which were delivered to the bank's Kilgoris branch on 16th September 2016.

Following the failure of the plaintiffs, the defendant instructed Josrick Merchants Auctioneers to sell the charged properties. The deponent has also averred in response to the 1st plaintiff's paragraphs 10,11 and 12 of the supporting affidavit of Lenard Ole Seme, the loan facility attracted an interest rate at the defendant's base lending rate of 17% per annum plus 3% totaling to 20% per annum.

In response to paragraph 15 of plaintiff's affidavit, the deponent has averred that the bank instructed the Josrick Merchants Auctioneers to auction the suit property; who adhered to the strict conditions of sale including the preparation of a valuation report on the property as required by section 97 (2) of the Land Act.

The auctioneers issued and served the notifications for the sale of the properties upon the 2nd and 3rd plaintiffs and they prepared an affidavit of service. Thereafter they placed an advertisement of the sale of the charged properties in the "Daily Nation" newspaper of 10th April 2017 for an auction of the said property which was scheduled for 5th May 2017, a copy of the advertisement was annexed to his affidavit as annex marked "KI 9." LR Trans-Mara/Moyoi/ 1489 was not sold as planned and as a result another advertisement for sale was done scheduling the auction for 26th May 2017 in the same newspaper.

The deponent has confirmed that Trans-Mara/Moyoi/1489 was sold to one Bhavin Ashwin Gudka, who was the highest bidder at the auction held on 26th May 2017, to which are annexed copies of a letter informing the bank of the sale together with the certificate of sale and the memorandum of sale, marked as "KI 11."

The deponent has deponed that the bank recovered the outstanding loan from the 1st plaintiff by properly and rightly exercising its statutory power of sale of land No. Trans-Mara/Moyoi/1489. Therefore, the sale by public auction of the suit property was carried out in accordance with the law and as such an order of stay of execution is misguided and is not available to the plaintiffs.

The deponent has deponed that the court orders stopping the sale were obtained on 14th June 2017 way after the sale by public auction was conducted on 26th May 2017; by which time the suit property had changed hands.

The defendant's grounds of opposition

Messrs Migos-Ogamba, advocates for the defendant have in addition to the replying affidavit of Kennedy Irungu, have filed seven (7) grounds of opposition. The major grounds are as follows. First, the application is incompetent, mischievous and an abuse of the court process. Second, the application lacks merits both in law and fact. Third, the defendant followed all the requirements provided for in law in exercise of its statutory power of sale. Fourth, the process under challenge has long been completed in accordance with the law. Fifth, the charged property LR NO. Trans-Mara/Moyoi/1489 was sold by way of public auction and is no longer in the possession of the bank. Finally, the application has been overtaken by events and the orders sought cannot be issued in the prevailing circumstances.

ISSUES FOR DETERMINATION

I have considered the affidavit evidence of the parties and the defendant's grounds of opposition. As a result, I find the following to be the issues for determination.

- 1) Whether or not the subject matter of the instant suit LR NO. Trans-Mara/Moyoi/1489 is in law capable of being the subject of this court's injunctive relief.
- 2) Whether or not it is proper for the court to issue the orders sought.
- 3) Who bears the costs of this application

Issue 1

The subject matter of this suit namely LR NO. Trans-Mara/Moyoi/1489 was sold by auction on 26th May 2017, to the highest bidder (Bhavin Ashwin Gudka), who became the owner of the subject property at the fall of the auctioneer's hammer. It therefore follows that the suit property is no longer the property of the defendant bank.

The suit property is not capable of being the subject of this court's orders, as it is no longer the property of the defendant. A court does not make orders in a vain. To do so will bring into disrepute the administration of justice. In reference to declining to make orders in vain, J.B. Ojwang, J,(as he then was) in *B. V. Attorney General [2008] Family and Gender, 1 KLR 535 at page 536, paragraphs 25,30*, held in part that a court does not, and ought not to be seen, to make orders in vain as this would expose the court to ridicule; which principle applies to the instant suit, although the pronouncement was made in a case of a dispute over the custody of a minor, who was a ward of the court.

Issue 2

In the light of the foregoing findings, it is not proper to make any orders in the matter. If the plaintiff has suffered any damage, he is at liberty to seek redress.

Issue 3.

The defendant has succeeded in this application. It will therefore have the costs of this application.

Ruling signed, dated and delivered in court at Narok this **21st day of May, 2020** in the absence of both counsel namely Messrs Oguttu-Messrs Oguttu-Mboya & Co. Advocates for the plaintiff and Messrs Migos-Ogamba & Co. Advocates for the defendant by posting to their electronic mail addresses.

J M Bwonwong'a

Judge

21/05/2020