



REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL CASE NO. 44 OF 2018

BEATRICE WATHANU MWANGI.....PLAINTIFF

VERSUS

EQUITY BANK LTD.....1ST DEFENDANT

EAGLE EYE AUCTIONEERS.....2ND DEFENDANT

RULING

The applicant (**BEATRICE WATHANU MWANGI**) filed an application on 20th September seeking the following orders;

- a) A temporary injunction against the respondents **EQUITY BANK LTD** and **EAGLE EYE AUCTIONEERS** restraining them from taking possession or otherwise disposing off the parcel of land known as **L.R. NYANDARUA/KIRIITA/MAIROINYA BLOCK 2 (NGAINDEITHIA) /4230** pending the hearing and determination of the suit.
- b) In the alternative, time for compliance or rectifying any default to redeem the parcel of land known as **L.R. NYANDARUA/KIRIITA/MAIROINYA BLOCK 2 (NGAINDEITHIA) /4230** be extended for 24 months or any other period the court may determine.
- c) In the alternative, the respondents power of sale be postponed/suspended for a period of 24 months or any other period the court may determine to enable the applicant redeem the parcel of land known as **L.R. NYANDARUA/KIRIITA/MAIROINYA BLOCK 2 (NGAINDEITHIA) /4230**

The applicant is the registered owner of the suit land and on 24th February 2016 the 1st respondent advanced her a loan facility of kshs. 3,100,000/-. On 15th August 2018, she was served with a notification of sale dated 27th July 2018 and a 45 days' redemption notice from the 2nd respondent notifying her of the intended sale of the land should she fail to pay the loan balance of kshs. 6,671,063.19/- owing to the 1st respondent. she filed the suit seeking more time to pay the loan and sought the prayers in the application above on various grounds.

APPLICANT'S CASE

The applicant filed submissions in support of the application where she submitted that she has a prima facie case with a probability of success. The applicant further submitted that she was not served with any notice pursuant to section 96(2) of the Land Act and that no such notice was annexed to the replying affidavit filed by the respondent. She relied on the case of Alberto Mario Cordeiro and another v Vishram Shamji [2015] eKLR.

She submitted that from the foregoing she had proven that there existed a prima facie case that warrants the issuing of injunctive orders.

She submitted that if the respondents are allowed to continue with the sale of the property without following due process, she will be greatly prejudiced since she would lose her property and issues of land are emotive and cause mental anxiety and stress. She further submitted that no amount of damages would be an adequate remedy.

The applicant submitted that the balance of convenience lies in maintaining the status quo and that she has clearly demonstrated that the respondents never complied with statutory requirements which are obligatory before they can exercise the chargee power of sale. Failure to comply with the same makes the entire process void and she shall suffer untold prejudice. She relied on the case of E&L No. 11 of 2016 – Samwel Mwaura Ndongoro v Rafiki Microfinance Bank Limited [2017] eKLR.

1st RESPONDENT'S CASE

The respondent in a replying affidavit and written submissions filed on 26th February 2019 submitted that the applicant did not dispute indebtedness and therefore should not claim any equitable remedies. She has not shown any evidence that she is paying the demanded amount.

The 1st respondent relied on the case of **Mrao Ltd vs American Bank of Kenya Ltd and Anor (2003) eKLR** on the standard of what a prima facie case is.

The 1st respondent further submitted that it sent a demand notice on 18th July 2017 annexed as EQ5 in the replying affidavit followed up by a statutory notice under section 90 of the Land Act dated 29th September 2017 marked as EQ6. The applicant was served with a 40-day notice under section 96 of the Land Act on 17th May 2018 which was followed up by a 45-day redemption notice from the auctioneers marked as EQ8. All of these were received by the applicant.

The respondent followed the provisions of **section 96(3) of the Land Act** on service of the notices as they were carbon copied to the applicant's spouse and the County Commissioner Nyandarua County.

The applicant has come to this court with unclean hands having not discharged her duty of repaying the loan and thus she is not entitled to any equitable remedies. It relied on the case of **Jackson Mokaya v James Onchangwa Macharia (2014) eKLR**.

The respondent submitted that once property is given as a security it becomes a commodity subject to sale. The value of the property is ascertainable and the property is remediable by an award for damages.

The court should take judicial notice that the 1st respondent is a sound financial institution and stands a better chance to compensate the applicant should she succeed in trial. It relied on the case of **Sammy Japheth Kavuku v Equity Bank & Another (2014) eKLR**. further, section 94 of the Land Act provides a remedy of damages against a person irregularly exercising power of sale. As such it recognizes that damages can be an adequate remedy.

The respondents further submitted that the balance of convenience lies in disallowing the application and cited the case of **Andrew Ouko v Kenya Commercial Bank Ltd & 3 others [2005] eKLR** where the court held that restraining the defendants held the risk of the debt outstripping the value of the property. this would expose the respondents to irrecoverable losses. They also relied on the case of **Mohammed Khaled Khashoggi v Equity Bank [2013] eKLR** to fortify the argument that the suit land was a commodity once given as security.

The terms of offer were clear on the repayment schedule and a court of law cannot rewrite a contract between parties. The respondents relied on the case of **National Bank Kenya Ltd. V Pipe Plastic Samkolit Kenya Ltd Civil Appeal no. 95/1999**. The respondents urged the court to dismiss the application with costs.

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?

WHETHER THE APPLICANT ESTABLISHED A PRIMA FACIE CASE

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;

- Whether the requirements statutory notice of sale under section 90 were complied with.
- Whether the requirements of Section 96 of the Land Act were complied with
- Whether the requirements of Rule 15(d) of the Auctioneers Rules was complied with

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.

The respondents annexed the demand notice to their replying affidavit as EQ-5. The same was issued 18th July 2017. The 1st respondent also issued a statutory notice under section 90 on 29th December 2017 annexed as EQ6.

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.

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;

The 1st respondent annexed the redemption notice and notification of sale issued by the 2nd respondent as EQ 8. The respondents provided receipts as proof that the notifications were served upon the applicants.

In **Elizabeth Wanjiku Kariungi v Equity Bank (Kenya) Limited [2017] eKLR** the court held;

20. Whilst I do share the view expressed by my learned brother concerning the fact that service of a valid statutory notice of sale on the chargor is a condition precedent to the exercise of the chargee's statutory power of sale, I am unable to find the legal basis for the contention that the chargee has an obligation of ensuring that the chargor collected or received the notice which was sent by registered post.

21. In my considered view, when the court imposes upon the chargee the obligation of demonstrating knowledge of when the chargor received or collected the notice which had been dispatched by registered post, that constitutes an extra burden, which was not anchored in statute.

Therefore, the respondents have satisfied the burden of proof for service of the notices upon the applicant. 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”

However, I shall still proceed to analyze the other limbs.

b) Whether damages shall be an adequate remedy

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.

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.

Where does the Balance of Convenience lie?

The applicants did not prove that there was no compliance with the statutory requirements. Further, in the event that the debt outstrips the value of the property, the respondents will be exposed to unrecoverable losses.

I rely on 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.”

Consequently, from the afore-going I hold and find that the application is not merited and it is dismissed with costs to the respondent.

Delivered and Dated this 7th day of May 2019 at Eldoret

H. A. OMONDI

JUDGE