



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 43 OF 2019

ESTHER NUGARI GACHOMO.....PLAINTIFF

VERSUS

EQUITY BANK LIMITED.....DEFENDANT

RULING

1. **Easter Nugari Gachomo**, the Plaintiff filed this suit against **Equity Bank Limited**, the Defendant.
2. The plaintiff is the registered owner of **Title Number Nyandarua/Kipipiri/5297**. The Plaintiff as guarantor of a company known as Petra International Limited (**Principal Debtor**) charged her aforesaid property a security for a loan facility extended by the Defendant to the Principal Debtor. It is not denied that the Principal Debtor defaulted in the repayment of that loan and consequently the Defendant; by letter dated **16th August 2017** gave the Principal Debtor **3 months notice** of exercise of its Statutory Power of Sale. Also by letter dated **2nd January 2018** the Defendant wrote a letter to the Plaintiff giving the Plaintiff 3 months notice to exercise its Power of Sale. By letter dated **23rd April 2018** the Defendant gave the Plaintiff **40 days** notice to sell the charged property in exercise of its Statutory Power of Sale.
3. **Cleverline Auctioneers**, on being instructed by the Defendant, served upon the Plaintiff, on **4th July 2018**, the 45 days notice of sale of the charged property. The said Auctioneer scheduled sale by auction of the charged property on **21st September 2018**. That auction was advertised through the newspaper on **3rd September 2018**.
4. The Plaintiff by her undated letter, but which was received by the Defendant on **12th September 2018** wrote requesting for three months extension to pay the loan. This is what she stated in her said letter:

“PETRA INTERNATIONAL LIMITED

P.O BOX 67767- 00200

NAIROBI

KENYA

PHONE : 0722878549

EMAIL: petraintl.ltd@gmail.com

GENERAL MANAGER

DEBT RECOVERY UNIT

EQUITY BANK

Dear Sir/Madam

RE: REQUEST FOR AN EXTENTION OF LOAN PAYMENTS

This is a formal request to have a three months extension on the Kinangop land loan. I have already made payments of 400,000. I have been unwell for the past one year making me unable to work that is why I was unable to meet the initial terms of agreement. Thankfully (sic) I have started working again. I am requesting to make 100,000 payments at the end of October 2018, 200,000 at the end of November 2018 and the remaining balance at the end of December 2018.

Thank you for considering my request. I can be reached via the above phone number and email address. I hope to receive a favourable answer from you soon.

Yours faithfully

Esther Nungari Gachomo

5. The Plaintiff filed a **Notice of Motion** Application dated 5th February 2019, to stop the auction slated for 8th February 2019. In that Application the Plaintiff deponed that the Defendant failed to inform her of the intended auction of the charged property; and that the sale would be conducted in the absence of a valuation.

6. That sale was temporary stopped by consent on 8th February 2018. The Defendant filed Replying Affidavit of its Credit Manager setting out the background by which the property was scheduled to be sold. That back ground is set out herein above. The Plaintiff did not file a further affidavit to contradict what the Credit Manger of the Defendant deponed in his said affidavit. The presumption is that the Plaintiff does not contest she was served with demand letters, as set out above, that she was served with notification of sale by the auctioneers; or that she wrote to the Defendant requesting for time to settle the arrears.

7. In the light of non contestation of these facts the Plaintiff's application must and does fail. It fails because she, in seeking to stop the auction in February 2019, stated that she was unaware of the said auction, that she had not been served with the prerequisite statutory demands. That was proved by the Defendant to have been untrue. He who comes to equity must come with clean hands. The application for injunction being an application seeking equitable relief must fail the moment the Court finds the applicant's hands are tainted. This is what was stated in the case; Caliph Properties Limited –vs- Barbel Sharma & Another [2015] eKLR, where the Court stated:

“Secondly, the injunction sought is an equitable remedy. He that comes to equity must come with clean hands and must also do equity. The conduct of the Plaintiff in this case betrays him. It does not endear him to equitable remedies. ... He who comes to equity must fulfill all or substantially all his outstanding obligations before insisting on his rights. The Plaintiff has not done that. Consequently he has not done equity.”

8. It is also important to state that, contrary to what the Plaintiff stated, by her application, the Defendant did indeed value the charged property before setting up the auction.

9. On the whole, and bearing what is stated above, the Plaintiff's application fails the test, and the most essential test of GIELLA –VS- CASSMAN BROWN & CO. LIMITED [1973] EA 358. The Plaintiff has failed to show a *prima facie* case with probability of success.

10. It is for the above reasons that the Notice of Motion dated 5th February 2019 fails and is dismissed. Having been dismissed the costs, which must in this case follow the event are awarded to the Defendant.

11. Orders accordingly.

DATED, SIGNED and DELIVERED at NAIROBI this 9TH day of MAY, 2019.

MARY KASANGO

JUDGE

Ruling Read and Delivered in Open Court in the presence of:

Sophie.....COURT ASSISTANT

.....FOR THE PLAINTIFF

.....FOR THE DEFENDANT