



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL CASE NO. 48 OF 2018

PHILIP MUSILI KYUMA PLAINTIFF

VERSUS

EQUITY BANK LTD 1ST DEFENDANT

IMMEDIATE AUCTIONEERS 2ND DEFENDANT

RULING

The plaintiff is the proprietor of land parcel ELDORET MUNICIPALITY, KING’NG’O BLOCK 21 1458, a piece that was charged to the 1st defendant.

The 1st defendant now seeks to exercise its statutory power of sale pursuant to Sections 90 and 96 of the Land Act. The court takes judicial notice of two advertisements to that effect.

Interim injunctions had earlier been issued restraining the defendants from interfering with the plaintiff’s property. An injunction that was later discharged by the same court.

The contentious issues for determination are:-

- (i) Whether the defendants adhered to all statutory and procedural requirements in seeking to exercise their statutory power of sale over the charged property.
- (ii) Whether the plaintiff has sufficient grounds to halt defendant’s actions of selling the property.
- (iii) Whether the current application for an injunction is res judicata pegged on another earlier application that was determined.

The court takes notice that the defendants didn’t provide substantial proof that they adequately served the plaintiff with notice of their intention to exercise their statutory power of sale over the charged property. The spouse to the plaintiff, being an interested party to this suit ought to have been served as well. There is no proof on record that this was adhered to.

Section 90(1) of the Land Act provides that:-

“if the 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 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 the chargor a notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be.

According to Section 90(2) of the Land Act, the notice to be served shall adequately advise the chargor of:

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 (3) months, by the end of which the payment in default must have been completed.

c.....

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.

And 90(3), provides that if the chargor does not comply within two (2) months after the date of service of the notices under subsection (1), the chargee may:-

- a. Sue the chargor for any money due under the charge,**
- b. Appoint a receiver of the income of the charged land,**
- c. Lease the charged land, or if the charge is of a lease, sublease the land,**
- d. enter into possession of the charged land; or**
- e. sell the charged land.**

Rule 15 of the Auctioneers Rules provides that a Notification of sale must be served prior to a sale of immovable property. The Notification of sale should give the chargor Forty Five (45) days upon which to redeem the property. The Notification ought to be served on the registered owner or an adult member of his family residing or working with him, and where the person refuses to sign the Notification, the auctioneer needs to sign a certificate to that effect. There is no proof on record that this statutory requirement was adhered to by either the 1st or the 2nd defendant.

Further, Section 96 of the Land Act provides that;

“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 sale of the charged land until at least forty days have lapsed from the date of the service of the notice to sell”.

This court notes that the defendant did not comply with the provisions prescribed under Sections 91-96 of the Land Act. The statutory power of sale should be exercised as a last resort but even then, it does not extinguish the owner or the chargor from redeeming himself before the fall of the hammer at a public auction.

The property in question is a residential block occupied by tenants. The 1st defendant didn't consider exercise of the remedy under Section 92 where it could take possession of the property and collect rent.

In view of the arguments for and against the plaintiff, and in the best interest of justice in the matter, the court holds as follows:

- (a) The application by the plaintiff is hereby allowed and interim injunction against the 1st and 2nd defendants do issue.
- (b) The defendants are hereby restrained from selling, entering and getting into possession or in any way interfering with the suit property unless and until they have complied with all legal requirements required of them in doing so.
- (c) Parties to consider resolving this matter through Court Annexed Mediation.
- (d) Costs be in the cause.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 7th day of May, 2019.

In the presence of:-

Ms Wamalwa for the plaintiff/applicant

Ms Kosgei for the defendant/Respondent

Sarah - Court clerk