



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL CASE NO. 22 OF 2018

RAJAB KIPKOSKEI MAGUT.....PLAINTIFF

VERSUS

SIDIAN BANK LTD.....1ST DEFENDANT

IGARE AUCTIONEERS.....2ND DEFENDANT

RULING

The applicant filed this application on 6th June 2018 under certificate of urgency seeking the following orders:

A temporary injunction against the defendants seeking to stop the disposition of **UASIN GISHU CHEPSAITA SETTLEMENT SCHEME/682,819,820 & 829** and/or in the alternative an order for time for compliance and/or rectifying any defect to redeem said parcels be extended for a period of 24 months or as the court deems fit. The applicant also sought orders for the Respondent's statutory power of sale be suspended for 24 months to enable the applicant redeem the parcels.

The grounds for the application are;

- a) The Applicant is the registered owner
- b) The Applicant has a prima facie case and will suffer irreparable loss or damage unless injunction is issued
- c) The plaintiff is willing and ready to offset the debt and has been repaying the loan.
- d) Damages shall not be an adequate remedy.

APPLICANT'S CASE

The respondent advanced to the applicant a loan facility of Kshs. 16,000,000/- and an overdraft facility of Kshs. 1,000,000/- making the total loan facility of Kshs. 17,000,000/-. This was evidenced by a letter of offer marked RKM1. As security for the loan he charged plots No. UASIN GISHU CHEPSAITA SETTLEMENT SCHEME/682, 819,820 & 829. He had been repaying the loan but at some point he was unable to pay and began to fall into arrears.

On 5th June 2018 he received a redemption notice from Igare Auctioneers purportedly served upon him on 5th March 2018. He annexed the same as RKM3. The redemption notice indicated the date of auction of his property as 7th June 2018 and there were newspaper adverts of 28th April and 9th May 2018 that advertised the auction. (Annexure RKM 5)

The land contains his matrimonial home and it is where his first wife resides. He annexed a marriage certificate as RKM 7. He married his wife on 28th September under customary law and they have cultivated the land ever since.

According to the applicant the sale is irregular for the following reasons:

- **No proper statutory notice of sale was issued as per section 90(2) of the Land Act.**
- **No valuation of the property has been carried out.**
- **No spousal consent was obtained prior to charging the property**

· **Equity of redemption is already being clogged.**

He quoted *Section 90* and *96(2)* of the *Land Act* on the process of issuing Notice for sale and a statutory notification of sale and further stated he was never served with the notices.

He relied on *Albert Mario Cordeiro & another v Vishram Shamji [2015] eKLR* the upshot of which was that the absence of a proper notice to sell will amount to a clog on the chargor's equity of redemption. He further cited

Section 79(3) of the *Land act* and cited *Section 93(3)* of the *Land Act*.

He contended that his spouse was never informed and her consent was not obtained and it was the responsibility of the 1st defendant to ensure that the plaintiff acquired all consents. He cited *Section 79(2)* of the *Land Act* which provides that spousal consent is required for a charge on a matrimonial home to be valid.

The defendants' valuation report which was annexed as BC 14 in the replying affidavit was, according to the applicant, prepared on 28th May 2018, 2 weeks after the date of the auction. He submitted that there was no compliance with *Section 97(2)* of the *Land Act*.

These are the submissions he relied upon to establish a prima facie case.

IRREPARABLE LOSS

On irreparable loss he submitted that the Respondents had not annexed evidence that they were in a position to compensate the Plaintiff if the auction is conducted and the plaintiff succeeds.

BALANCE OF CONVENIENCE

The Applicant cited the case of *Giella v Cassman Brown & Company Limited (1973) EA 358* and *American Cyanamid Co v Ethicon Ltd [1975] 1 AER 504*.

He submitted that he had demonstrated ownership of the parcels and that the defendant had not complied with the law hence the balance of convenience tilts in his favor.

RESPONDENT'S CASE

The respondent swore a replying affidavit filed on 19th July 2018 and filed submissions and a further affidavit as well.

The respondent contends that the terms of the loan facility were that it would be payable with interest by 60 consecutive monthly installments of Kshs. 450,221/-. The loan was secured by existing securities which were;

- A legal charge over property title nos. UASIN GISHU CHEPSAITA SETTLEMENT SCHEME/682, 819 & 820 which were to cover 8,400,000/-, 2,100,000/- and 1,400,000/- respectively.
- A new security by way of charge over UASIN GISHU CHEPSAITA SETTLEMENT SCHEME/829 to cover 15,400,000/-.

The 1st defendant enquired from the applicant his marital status and he swore affidavits stating he was a widower. He annexed the death certificate of his widow, *Zahra Chepkoech Magut*. The Affidavits appear at pages 40, 68, 98 and 128 of the Replying Affidavit. The 1st defendant also annexed as BC-6, evidence of the disbursement of the loan.

The plaintiff defaulted on the payment of the installments in breach of terms of the facility letter. He was served with a statutory notice dated 13th January 2017 and later on a notice to sell dated 20th April 2017. The same are marked as BC-7.

Before the defendant could instruct auctioneers the applicant came forward with a request to restructure the facility. The request was accepted and a restructuring letter dated 5th May 2017 was issued. The outstanding amount was Kshs. 28, 504,130.72.

The terms of the restructure were that the repayment would be made in 120 consecutive monthly installments of Kshs. 237,535 and that existing securities be retained. The defendant annexed BC-8 as evidence on pgs. 152-154 of the replying affidavit.

The applicant swore an affidavit stating that he was a widower and produced his wife's death certificate. He affirmed he hadn't remarried. The same is annexed at page 155 of the replying affidavit as BC-9.

Following persistent defaults on payment, the 1st defendant served a 3 months' statutory notice of sale on the applicant. The notice was dated 22nd August 2017 and was served by registered post. It is annexed as BC-11.

Following the lapse of 3 months the 1st defendant sent a 40 day notice to sell dated 4th December 2017 as per *Section 96(2)* of the *Land Act*.

The same is annexed as BC-12. After the lapse of the 40 day period the 1st defendant instructed the 2nd defendant to sell the property via auction.

On 5th March 2018 the 2nd defendant served the applicant with a redemption notice dated 5th March 2018. The same is annexed as BC-13. The 1st defendant retained Advent valuers to conduct a valuation of the properties and they did the same. A valuation report is annexed as BC 14. There is also a valuation report annexed to the further affidavit.

After the lapse of 45 days the 2nd defendant advertised the properties for sale vide a newspaper advert annexed as BC 15. During the auction on 7th June 2018 the auction was stopped and the defendants were served with an order.

The respondent contends that the applicant has approached the court with unclean hands by repeatedly perjuring himself on account of his marital status and is undeserving of any equitable remedies. He further submits that the plaintiff has failed to indicate which of the 4 properties contains his matrimonial home. Further the 1st defendant is a bank and has business presence all over Kenya and is in a position to compensate the Plaintiff if he is successful.

On a balance of convenience, the respondent contends that the continuing default on the part of the plaintiff and the escalating amount in arrears may in time surpass the forced sale value of the property and as a result the balance of convenience tilts in favor of denying the injunction.

ISSUES FOR DETERMINATION

This being an application for injunction it follows that there are 3 limbs which must be satisfied for it to be granted;

- a) Whether the Applicant has a prima facie case with a probability of success**
- b) Whether the Applicant will suffer irreparable loss that cannot be compensated by damages**
- c) Whether the Balance of Convenience tilts in favor of the applicant.**

Notably the prayers in the main suit are more or less similar to those in the application save for the fact that the injunction in the main suit is permanent.

Whether the Applicant has a prima facie case

To determine if the applicant has a prima facie case we need to determine whether the statutory power of sale was exercised according to the law. This includes the issuance of the notices.

- **Were the requirements of statutory notice of sale under section 90 complied with?**

Section 90 of the Land Act states;

(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.**

On page 36 of the further affidavit there are 2 certificates of posting attached as evidence of service of both notices and the applicants' name

appears as one of the recipients of the said posted letters/notices. One was served on 11th December 2017 (Section 90 Notice) and another on 22nd August 2017 (Section 96(2) Notice).

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;

d) give in writing to the owner of the property a notice of not less than forty-five days within which the owner may redeem the property by payment of the amount set forth in the court warrant or letter of instruction;

e) on expiry of the period of notice without payment arrange sale of the property not earlier than fourteen days after the first newspaper advertisement.

The 2nd defendant served the applicant with the redemption notice on 5th March 2017 and he received the same and acknowledged receipt by signing. He annexed it as RKM 3 on his supporting affidavit. He never disputed the validity of the signature. Therefore, he should be deemed as having been properly served.

The 2nd defendant advertised the sale of 7th June 2018 vide a newspaper advertisement in the daily nation paper of 21st May 2018 as per page 194 of the replying affidavit. This was in compliance with *Rule 15(e)* of the

Auctioneer's rules as it was past 14 days.

The upshot of the foregoing is that the applicant was properly served.

Valuation Report

The applicant contended that there was no adequate valuation report. The 1st defendant produced a valuation report dated 8th may 2017 and stated that the notification of sale values were based on this valuation. The valuation report was annexed as BC1-A on the further affidavit. An analysis of the documents proves this to be the position. The valuation was therefore conducted and the report used in accordance with the law.

Spousal Consent

The applicant swore affidavits on 4 occasions deponing that he was a widower. He went to the extent of annexing his alleged widows' death certificate at pgs. 40, 68, 128 and 155 of the replying affidavit. In the application he now states that he is married. The applicant is bound by his averments in the affidavits. The lender carried out their duty to enquire about his marital status for the purpose of spousal consent and he repeatedly affirmed he was a widower. He is at the least estopped from claiming otherwise to simply get out of unserviced debt. He further seems to have conducted himself fraudulently at the time of obtaining the facility or is being fraudulent with regards to his alleged first wife. The fact that he appears to have sold parts of the properties as per pg. 173 of the affidavit feeds the narrative that he is still not telling the truth about one of these positions on his marital status.

As per *Section 93(4)* of the *Land Registration Act*, the instrument can only be void at the option of the spouses who have not consented to the disposition. The misleading borrower cannot void the disposition. It is for the alleged wife to file suit seeking to void the disposition, not the spouse who misled the lender.

The evidence shows that the statutory power of sale was properly exercised and due process followed by the 1st Defendant.

The applicant has failed to establish a prima facie case. 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.

IRREPARABLE LOSS

The applicant failed to indicate which of the properties contains the matrimonial home. Further, there are reports that parts of the properties

have been sold. This casts aspersions on whether the matrimonial home exists. Coupled with the affidavits deponing that he was a widower, it seems more probable that the matrimonial home does not exist on that property.

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.

By charging the property the applicant converted it into a commercial commodity and cannot claim any sentimental attachment to the same as a basis for it not to be sold.

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.

BALANCE OF CONVENIENCE

The Applicant seems to have started irregularly disposing of the properties and there is likelihood that this will frustrate the 1st defendant's ability to recover the sums claimed from him. The applicant has not approached the court with clean hands as he appears not to be truthful on the issue of his spouse. He is undeserving of the courts' discretion.

Further, he has not demonstrated that the matrimonial home indeed exists and that the same will be lost and what he will lose if it is sold. If the applicant continues to indiscriminately dispose of the parcels of land in issue, the 1st defendant stands to lose colossal sum of money. On the contrary, if the applicant succeeds in his suit the 1st defendant is in a position to compensate him.

The bottom line is that the application lacks merit and is dismissed with costs to the Respondent.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 8th day of May 2019.

In the absence of:-

Mr. Otieno for defendant/Respondent

Mr. Mathai for Plaintiff/Applicant

Mr. Mwelem - Court clerk