**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL & TAX DIVISION- MILIMANI**

**CIVIL SUIT NO.506 OF 2017**

**WILLY KIPYEGO ARAP BUTIA.............PLAINTIFF/APPLICANT**

**-VERSUS-**

**KENYA COMMERCIAL BANK........DEFENDANT/RESPONDENT**

**RULING**

**BACKGROUND OF THE APPLICATION**

By an Application dated 18th December 2017, the Plaintiff prayed the court for orders that: -

> **1. This Court be pleased to issue a temporary injunction against the Defendant/ Respondent from repossession, attaching, selling by private covenant and or public action the residential premises known as Unit G2 & F12 on L.R. No. 209/11872-Nairobi pending the hearing and determination of this application inter-parties**.

The Plaintiff filed his Affidavit dated 18th December 2017 and filed on 20th December 2017 in support of the Application. In the Affidavit the Plaintiff states as follows;

That in the year 2015, the Plaintiff approached the Defendant for a mortgage facility to enable him purchase two properties in Kileleshwa, Nairobi. The Defendant accepted the obligation and advanced some funds to the Plaintiff after entering into various agreements in the form of a mortgage & charge, sale agreement and management agreement.

The Plaintiff had been servicing his loan on a monthly basis until 2016 when he realized that the bank's claim was excessive as there was interest being charged on interest and the charge had been amalgamated for both properties hence making it impossible for him to meet his obligation.

On 4th December 2017, the Plaintiff learnt that the Defendant through Purple Royal Auctioneers had advertised the mortgaged properties for public sale on 20th December 2017. However, the Plaintiff was not served with any notice as to the impending sale of the said properties by public auction.

The Plaintiff hence prayed this court to issue a temporary injunctive order directed at the Defendant to enable him to approach the Defendant for an amicable settlement upon favourable discussions on extension of time and withdrawal of the public auction notice.

However, the Plaintiff did not file or serve his Written Submissions in support of the Application.

**DEFENDANT'S/ RESPONDENT'S SUBMISSIONS**

The Plaintiff filed his Written Submissions dated 12th November 2018 on 13thNovember 2018 in response to the Defendant's Application.

The Defendant started by submitting that the sale is pursuant to a statutory power of sale that arose due to the Plaintiff's default in repayment of the two mortgage facilities advanced to him by the Defendant and secured by the suit properties. It was the Defendant's submission that the statutory power of sale of financial institutions arises when the borrower fails or it becomes apparent that the borrower cannot discharge its obligations under the agreement. The Defendant through its Replying Affidavit dated 16th March 2018, demonstrated that since receiving the facility disbursement of **USD 420,273.00**, the Plaintiff has thereafter defaulted and the amounts in arrears and necessary to regularize the Plaintiff's accounts as at 4th May 2017 was **USD 45,391.80.** It was the Defendant's submission that even the Plaintiff himself in his own pleadings, has also stated that it has become difficult for him to discharge his obligations. Therefore, there is no plausible reason as to why

the Defendant should be restrained from foreclosing.

With regard to favorable discussions on extension of time, the Defendant submitted that the Plaintiff is seeking judicial means to restructure the agreement between himself and the Defendant and this is against trite law which provides that the duty of courts is to enforce the intention of parties and not rewrite contracts for parties.

Furthermore, it was the Defendant's submission that the Plaintiff's claims that the Defendant is charging interest upon interest is contrary to clause 5.3 of the loan agreement which provides that every default by the Plaintiff would attract a default interest in addition to the interest charged on the facility. Allegations as to imposition of interest on interest and/or excessiveness of the amount claimed by a bank is a dispute as to the amounts owing and courts have held that it does not form a basis enough to stop a bank from exercising its statutory power of sale. The Defendant relied on the case of ***Palmy Company Limited v Consolidated Bank of Kenya Limited [2014] eKLR*** where it was held that:

> "***Where a court is deciding on disputes on the sum owing under a mortgage, the court should not grant an injunction restraining a mortgagee from exercising hi statutory power of sale solely on the ground that there is a dispute as to the amount due under a mortgage."***

On the issue of service, it was the Defendant's submission that a perusal of the affidavit of service reveals that service was indeed effected upon the Plaintiff through his agent and personally to the Plaintiff through his mobile phone messaging application and email.

In regards to the injunctive reliefs sought by the Plaintiff, the Defendant relied on the case of ***Giella vs Cassman Brown and Company Ltd [1973] EA 358*** to demonstrate that the Plaintiff has not established a *prima facie* case with any probability of success or on balance of convenience, irreparable damage incapable of redress by way of damages.

It was thus the Defendant's submissions that the Plaintiff's Application is frivolous and vexatious, a waste of court's time and an abuse of court process and ought to be dismissed with costs.

**DETERMINATION**

The Court considered the submissions of the parties and the issue to be determined by this court is;

> ***i. Whether the court should grant the temporary injunctive orders***

**The law governing granting of a temporary injunction was settled in the case of** *Giella vs Cassman Brown and Company Ltd [1973] EA 358* where the court laid down the principles as follows:

> "***First an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."***

> ***a. Prima facie case with a probability of success***

The sale is pursuant to a statutory power of sale that arose due to the Plaintiff's default in repayment of the two mortgage facilities advanced to the Applicant by the Defendant.

**Section 90 (1) of the Land Act provides:**

> ***"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."***

It is very clear that the borrower has failed or cannot discharge its obligations under the agreement. Therefore, the Defendant was well within its writ to exercise its statutory power of sale pursuant to section 90 (1) of the Land Act. Furthermore, the Defendant served the Plaintiff with Statutory Notices dated 21st November 2016 and 3rd May 2017 pursuant to **Section 90 (1) (2) (3) (e) and 96 (2) (3) of the Land Act** respectively.

The Respondent complied fully with the statutory procedure provided by the law in exercising their statutory power of sale. Therefore, the Applicant has failed to establish a prima facie case with a probability of success.

> ***b. Irreparable damage which would not adequately be compensated by an award of damages***

*In* ***Nancy Wacici v Kenya Women Micro Finance Bank Ltd [2017] eKLR*** the court held:

> ***"The Plaintiff freely and voluntarily charged the subject property and was clearly aware that in the event of default in servicing the debt the property would be liable to be sold."***

Further, in the case of ***<u>Andrew Muriuki Wanjohi –vs- Equity Building Society Ltd (2006) eKLR</u>*** the Judge stated as follows;

> "***Whenever the Applicant offered the suit property as security, he was conscious of the fact that if the borrower did not meet his obligations, the suit property could be sold off. Therefore, in the event that it later became necessary for the suit property to be sold off, by the charge, the chargor could not be heard to complain that his loss was incapable of being compensated in damages."***

**By offering the suit properties** as security, the Applicant charged the suit property as collateral and security to the loan, which the Respondent may dispose of, so as to recover the loan together with interest thereon. Therefore, damages would suffice as an adequate remedy and an injunction can thus not be granted.

The Court finds that the Applicant admits obtaining facility from Respondent Bank , he defaulted and has not shown evidence of payment of arrears or approached bank for restructuring of the loan, instead he chose to sue the Bank and did not indicate any irregularity the Bank engaged in save to realize the charge based on a valid contract. There has been ample time from 2017 to date to regularize and comply with obligations under the Contract.

**<u>DISPOSITION</u>**

1. **The Application dated 18th December 2017 is dismissed with costs.**

2. **The Respondent/Bank is at liberty to realize its security in default of the Applicant repayments of the loan facilities as long as it is within the statutory mandatory procedures.**

3. **The main suit/application may proceed for hearing and determination on a date to be taken at the registry.**

**DATED, SIGNED & DELIVERED IN OPEN COURT ON THIS 22ND JULY 2019.**

**M. W. MUIGAI**

**JUDGE**

**<u>IN THE PRESENCE OF</u>;**

**N/A FOR PLAINTIFF**

**N/A FOR DEFENDANT**

**COURT ASSISTANT- ISAIAH OTIENO**