



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND TAX DIVISION

CIVIL SUIT NO. 424 OF 2018

CHARITY WANGUI NGUMOPLAINTIFF/APPLICANT

VERSUS

CHASE BANK LIMITED (In Receivership).....1ST DEFENDANT/RESPONDENT

SBM BANK (KENYA) LIMITED.....2ND DEFENDANT/RESPONDENT

ROBERT WAWERU MAINA T/A ANTIQUE AUCTIONS AGENCIES....3RD DEFENDANT/RESPONDENT

RULING

1. The applicant seeks the following orders in the application dated 20th December 2018:-

a. Spent

b. Spent

c. Pending the hearing and determination of the application, the defendants jointly and severally whether by themselves, their agent, officers, employees, servants, assigns, or any person acting under their authority/mandate however be restrained from selling, disposing of, transferring, alienating, advertising for sale, offering for sale either by public auction on private treaty, taking possession of or leasing in any way interfering with the ownership and quiet possession of land title Number MAGUTU/GATEI/438 NYERI by the plaintiff/applicant.

d. Pending the hearing and determination of the suit herein, the defendants jointly and severally whether by themselves, their agents, officers, employees, servants, assigns, or any person acting under their authority/mandate howsoever be restrained from selling, disposing of, transferring, alienating, advertising for sale, offering for sale either by public auction on private treaty, taking possession of or leasing in any way interfering with the ownership and quiet possession of land title number MAGUTU/GATEI/438 NYERI by the plaintiff/applicant

e. The honourable court be pleased to grant and or make such further and/or other orders it may deem necessary in the interests of justice.

f. The costs of this application be provided for.

2. The application is brought under Order 40 Rules 1, 2, 3 and 8 of the **Civil Procedure Rules**, is supported by the applicant's affidavits and is premised on the grounds that the 3rd defendant has, on the instructions of the 1st and 2nd defendants, initiated the process of selling **LR No. MAGUTU/GATEI/438 NYERI** (hereinafter "**the suit property**") in exercise of the 1st and 2nd defendant's power of sale. The applicant contends that the said sale is illegal, null and void as she was not served with the mandatory statutory notices and that unless the orders sought are granted, the plaintiff's equity of redemption will be clogged against the express provisions of Section 89 of the **Land Act**.

3. The applicant further contends that the process of realizing the security is illegal as funds were not disbursed to the principal borrower and/or secured on the suit property.

4. The applicant's case is that she is an elderly lady aged 85 years and that the suit property, which is her only source of livelihood, is an

ancestral/family land.

5. The 2nd respondent opposed the application through the replying affidavit of its Assistant Legal Manager, one **Kevin Kimani**, who invites the court to take judicial notice of the fact that the 1st defendant has been acquired by the 2nd defendant who took over its assets and liabilities.

6. He avers that an initial loan facility of kshs 5,000,000 secured by the principal borrower was fully repaid and the borrower discharged but that the 2nd respondent now seeks to recover a subsequent loan facility of kshs 8,000,000 advanced to the Borrower.

7. He states that through a letter of offer dated 3rd March 2014, the respondent granted a term loan facility of kshs 8 million to Three Stones Limited(“ **the Borrower**”) that was secured by a 1st legal charge over the suit property registered in the applicant’s name which loan was to be repaid over a period of 36 months at an interest rate of 25% per annum and that pursuant to the said letter of offer, a legal charge dated 12th August 2014 executed by the plaintiff as the chargor/borrower was registered over the said property. He attached a copy of the letter of offer and the charge as annexures “**KK2**” and “**KK3**” respectively.

8. He further avers that the loan was also secured by a personal guarantee and indemnity of the 3 directors of the borrower namely; the plaintiff herein, **Rose Wairimu Kimotho** and **David Nguru Kimotho**. He annexed a copy of the duly executed letter of guarantee as annexure “**KK3**”.

9. He avers that the borrower defaulted in the loan repayments and is indebted to the respondent to the tune of kshs 10,473,614.75 as at 12th June 2017. A copy of the Borrower's statement of accounts was annexed to the replying affidavit as annexure “**KK4**”.

10. He further avers that numerous demand letters that the respondent sent to the borrower did not elicit any positive response from the applicant thereby necessitating the issuance of the statutory notices that were served upon the applicant by registered mail as shown in annexures “**KK6(a)**”, “**KK6(b)**”, and “**KK7(a)**”.

11. It is the respondents’ case that it complied with all the legal requirements before instructing the 3rd respondent to issue the chargor with a 45 days Redemption Notice which notices were also served on the borrower.

12. The respondents contend that the application does not meet the threshold set for granting orders of injunction. Parties canvassed the application by way of written submissions which their counsel highlighted at the hearing.

13. I have carefully considered the application, the respondents’ response and the parties’ submissions together with the authorities that they cited. The main issue for determination is whether the applicant has made out a case for the granting of the orders of injunction.

14. The principles governing the issuance of orders of injunction were set out in the celebrated case of *Giella v Cassman Brown Co. Ltd* (1971) EA 358 where the court expressed itself on the condition’s that a party must satisfy for the court to grant an interlocutory injunction:-

"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."

15. The above principles together with their mode of application were restated in *Nguruman Limited v Jan Bonde Nielsen & 2 Others*, CA No. 77 OF 2012, as follows:

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

(a) establish his case only at a prima facie level,

(b) demonstrate irreparable injury if a temporary injunction is not granted, and

(c) allay any doubts as to (b) by showing that the balance of convenience is in his favour.

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant’s claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit “leap-frogging” by the applicant to injunction directly without crossing the other hurdles in between.” (Emphasis added).

16. Having regard to the known principles of injunction as set out in the above cited cases, I will now turn to consider if the application meets the threshold set therein. It is well established that, in order to secure the injunctive relief sought, the applicant must first establish a

prima facie case with a high chance of success.

17. In the instant case, the applicant contends that the suit property is in danger of being alienated. The 2nd respondent does not deny that it intends to sell the suit property but contends that it has a legal right to exercise a statutory power of sale in view of the fact that the applicant has defaulted in the loan repayments. The Plaintiff/Applicant, on the other hand, challenges such a right while contending that she was not only not served with the mandatory statutory notices, but that the funds were not disbursed to the principle borrower or secured on the suit property. According to the Plaintiff/Applicant, the 2nd Respondent therefore has no right whatsoever to purport to exercise its statutory power of sale over the suit property.

18. I have considered annexures “KK2” and “KK3” attached to the 2nd respondents replying affidavit which are the letter of offer and charge document respectively duly executed by the applicant herein in respect to loan facility in question. The 2nd respondent also attached annexure “KK4” to the replying affidavit to demonstrate that as at 12th June 2017, the borrower had defaulted in the loan repayments and was indebted to the 2nd respondent to the tune of Kshs. 10,473614.75. The 2nd respondent also stated that it served the applicant with the requisite statutory notices as shown in annexures “KK6 (a), (b)” and “KK7 (a)”.

19. The applicant did not deny that she signed the letter of offer and charge document. I therefore find that the 2nd respondent proved that it extended credit facilities to the Borrower for which the applicant agreed to charge her suit property as security. The 2nd respondent demonstrated that the Borrower is a company in which the applicant is one of the directors. It was not disputed that there was a default in the loan repayment thereby entitling the respondent to set in motion loan recovery process through the issuance of statutory notices of intention to sell the suit property so to recover the debt.

20. The applicant’s contention that she was not served with the statutory notices was countered by the respondents through annexures “KK6 (a)”, “KK6 (b)”, “KK7 (a)” and “KK7 (b)” which clearly indicate that the notices were properly served upon the Borrower and the applicant. The respondents further produced a copy of a letter from the Borrower dated 25th July 2016 (annexure “KK8”) which letter shows that the Borrower acknowledged the receipt of the statutory notices and requested the 1st respondent to rescind the 40 days’ notice so as to allow it to make monthly repayments of kshs 180,000/-. I am therefore satisfied that the applicant and the Borrower were duly served with the requisite statutory notices.

21. Be that as it may and even assuming that the said notices were not served on the applicant and the Borrower, courts have severally held that lack of or improper service of statutory notices is not a ground for stopping a chargee in exercising its statutory power of sale and that in such instances, an injunction may only be issued for a limited duration of time to enable the chargee issue fresh notices in compliance with the law. This was the finding of the Court of Appeal in *National Bank of Kenya Limited v Shimmers Plaza Ltd* [2009] eKLR wherein the learned judges held:

“We venture to say that where the court is inclined to grant an interlocutory order restraining mortgagee from exercising its statutory power of sale solely on the ground that the mortgagee has not issued a valid notice, then in our view, the order of injunction should be limited in duration until such time as the mortgagee shall give a fresh statutory notice in compliance with the law. We respectfully think that the learned judge did not exercise his discretion judicially in the circumstances of this case when he granted an order of injunction until the determination of the suit.”

22. Turning to the claim that the respondent charged illegal interest on the loan facility, I find that according to the already existing jurisprudence, a dispute touching on the amount payable or interest chargeable, without more, is not a ground for restraining a chargee from exercising its statutory power of sale. In the case of *Priscillah Krobought Grant v. Kenya Commercial Finance Co. Ltd. and 2 Others*, Civil Application No. Nai 227 of 1995 (108/95 V.R) (unreported), the Court of Appeal stated as follows: -

“Finally, it will bear repetition, we think if we were to state that a court does not normally grant an injunction to restrain a mortgagee from exercising its statutory power of sale solely on the grounds that there is a dispute as to the amount due under the mortgage – see Barmal Kanji Shah & Another Vs. Shah Depar Devji (1965) E. A. 91, 32 Halsbury’s Laws of England (4th Edition) paragraph 725 and Uhuru Highways Development Ltd. Vs. Central Bank Kenya and 2 Others, Civil Application No. Nai 140 of 1995 (unreported) per Kwach J. A.”

23. Similarly in *Mrao Ltd v First American Bank of Kenya Ltd* [2003] K.L.R. 125, it was held:

“I have always understood that it is the duty of any person entering into a commercial transaction particularly one in which a large amount of money is involved to obtain the best possible legal advice so that he can better understand his obligations under the documents to which he appends his signature or seal. If courts are going to allow debtors to avoid paying their just debts by taking some of the defences I have seen in recent times for instance challenging contractual interest rate, banks will be crippled if not driven out of business altogether and no serious investors will bring their capital into a country whose courts are a haven for defaulters. I agree entirely with the Commissioner of Assize Shah that the appellant was not entitled to an injunction upon any one of the grounds urged on its behalf.”

24. The circumstances in which a mortgagee or charge may be restrained from exercising his statutory power of sale are set out in *Halsbury’s Laws of England Vol. 32 (4th Edition) paragraph 725* as follows: -

“725. When mortgagees may be restrained from exercising power of sales—

“The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or

because the mortgagor has begun a redemption action, or because the mortgagor objects to the manner in which the sale is arranged. He will be restrained however if the mortgagor pays the amount claimed into court, that is, the amount which the mortgagee claims to be due to him, unless, on the terms of the mortgage, the claim is excessive.”

25. Having considered the parties’ affidavits, the written and oral submissions and the case law in support of their respective cases and having applied the principles of granting an interlocutory injunction pending the hearing and determination of the suit herein, this court is not satisfied that this is an appropriate case for it to exercise its discretion in favour of the Plaintiff herein. My finding is that the application does not satisfy any of the conditions for the granting of orders of injunction.

26. The most glaring fact in this application is the undisputed fact that the Borrower, a company in which the applicant is a director, has defaulted in paying the loan advanced to it by the 2nd respondent. In effect therefore, the applicant has come to this court to seek an equitable relief of injunction when the Borrower has not made good its accounts with the 2nd respondent. The applicant has come to this court with unclean hands and has not shown the efforts or plans that have been put in place by the Borrower to settle the outstanding debt or to negotiate the terms of settlement.

27. My take is that the applicant cannot have her cake and eat it through this application by keeping the subject property and at the same time restraining the 2nd respondent from realizing its security.

28. Considering the lapse of time since the filing of this suit and the amount of money advanced to the applicant, one can say that there is the likelihood that the outstanding amount could outstrip the value of the property thereby putting the respondents’ interests in further jeopardy. In the case of Andrew *Muriuki Wanjohi v Equity Building Society Limited & 2 others* [2006] eKLR the court observed as follows:-

“... In my considered view, if the 1st and 2nd Defendants were restrained from selling off the property until the suit was heard and determined, there is a very real risk that the debt may outstrip the value of the property as the borrower has not made repayments for more than three years...”

29. It is trite law that the court’s discretionary power to grant an order for interlocutory injunction must be exercised judicially based on the law and evidence and that an applicant seeking such orders must satisfy the threshold set out in the famous case of *Giella v Cassman Brown Company Limited* (supra). In the present case, I find that the applicant’s claims that she is ailing and advanced in age or that the suit property is ancestral land do not qualify as considerations for the granting of the injunctive orders sought.

30. Accordingly, having found that the applicant has not made out a *prima facie* case with a probability of success, I find that the question of the applicant suffering loss that cannot be compensated by way of damages if the interlocutory judgment is not granted does not arise and that the balance of convenience does not tilt in her favour.

31. For the above reasons I find that the application dated 20th December 2018 is not merited and the same is hereby dismissed. The interim orders for maintenance of status quo issued herein on 20th December 2018 are hereby vacated and/or set aside.

32. The costs of the application shall abide the outcome of the main suit.

It is so ordered.

Dated, signed and delivered in open court at Nairobi this 3rd day of October 2019.

W. A. OKWANY

JUDGE

In the presence of:

Miss Wainaina for defendant/respondent

Mr. Thuku for the plaintiff/applicant

Court Assistant – Margaret