



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION

CIVIL SUIT NO. 37 OF 2018

PATRICK GITHINJI NDICHU.....1ST PLAINTIFF

FLORENCE WAITHERERO MAINA.....2ND PLAINTIFF

SOLEX BUILDING CONTRACTORS LIMITED.....3RD PLAINTIFF

VERSUS

EQUITY BANK (KENYA) LIMITED.....1ST DEFENDANT

ANTIQUA AUCTIONS AGENCIES.....2ND DEFENDANT

RULING

1. The application, dated **27th August 2019** by **Notice of Motion**, which is before court is filed by the plaintiffs, namely **Patrick Githinji Ndichu** the 1st plaintiff, **Florence Waitherero Maina** the 2nd plaintiff and **Solex Building Contractors Limited** the 3rd plaintiff. The plaintiffs seek an order of injunction to restrain the defendant **Equity Bank (Kenya) Limited** from selling by auction the charged property, **title number 13868/11**, registered in the names of the 1st and 2nd plaintiffs.

2. It is not denied that the 3rd plaintiff had obtained banking facility from the defendant Bank which facility was secured by a charge over the 1st and 2nd plaintiffs' property.

3. The application before court is supported by the affidavit of the 1st plaintiff. He deposed that on **2nd August 2019** the 2nd plaintiff was informed by the defendant bank that the charged property was due to be sold by auction on **28th August 2019**. That the defendant bank had failed to serve the 1st and the 2nd plaintiff with requisite statutory notices as required under the Law. The deponent further deposed that the defendant bank had failed to undertake valuation of the charged property before scheduling the auction and that consequently there no reserve price set for that auction. He deposed further as follows:

“That the suit property is of unique character and in peculiar location within Karen. It is the crystallization of our sweat of many years of toil. The suit property is of great sentimental value to us and our family and impossible to replace in the event of a forced sale and cannot be adequately compensated by damaged”

4. It is on the above ground that the 1st and the 2nd plaintiff seek injunctive orders against the defendant bank.

5. The application. Is opposed by the defendant bank. The affidavit in opposition is sworn by **Peter Karima** the bank's credit-manager in the defendant Banks's Community branch. The deponent referred to an application that was previously filed by the plaintiff in this matter to which this court Ruled on 14th March 2018, that the statutory notices of the defendant bank had not been properly served on the plaintiffs. It was a finding of this court, in that Ruling, that the defendant bank had failed to serve those statutory notices on the plaintiffs at their current postal address. By that Ruling this court also found that the plaintiffs had failed to discharge their financial obligation of repaying the loan granted to the 3rd plaintiff.

6. The defendant bank through its credit-manager deposed that it served all the requisite statutory notices on the 1st and the 2nd plaintiff culminating with the redemption notice and the notification of sale sent on **20th June 2019**. Following those notices the plaintiffs by their letter dated 7th November 2019 made repayment proposal to the defendant bank. The 1st plaintiff followed that proposal letter by another letter dated 8th April 2019 whereby the 1st plaintiff sought to defer the remittance of the payment of the amount in the previous proposal.

7. The deponent further deposed:

i. That the plaintiffs applicant having voluntarily and willingly executed letters of offers (sic) and charge instruments, they are bound by the contractual terms therein and this court cannot rewrite the contract between the parties.

ii. That all the notices under the relevant law were properly issued and served upon the plaintiffs.

iii. That the plaintiffs in their entire pleadings and the Motion have not disputed the distance of a debt in favour of the 1st defendant as such no prima facie case has been made out against the 1st defendant to warrant the grant of the orders sought.

ANALYSIS

8. As stated before there is no dispute that the 3rd plaintiff obtained a financial facility from the defendant bank which facility was secured, by amongst others, the property owned by the 2nd and 3rd plaintiffs. The plaintiffs' contention that the defendant bank failed to issued the statutory notices was disproved by the notices attached to the defendant's affidavit. Further those notices prompted the plaintiffs to write and make proposal for the repayment of the debt. The defendant's contention that the plaintiffs failed to regularise their repayments of the facility was not denied by the plaintiffs. It is trite that dispute of the debt is not a basis of obtaining restraining orders. The court in the case **Polypipes Limited & 4 others v Bank of Baroda (Kenya) Ltd & another [2018] eKLR** made the same finding as follows:

"I entirely concur with the legal principles stated in the above authorities. That is the law, The Applicant has basically not disputed arrears, has been several proposals even in this proceeding to liquidate the same and failed to do so. The issue of inapplicable and/or varying interest rate, the accounts to be taken, failure to serve the requisite statutory or other notices and lack of a valuation of the suit properties do not stop the Applicants from paying the arrears.

I find the power of sale arises in favour of a chargee when the charge money has become due and the Court of law will not restrain a chargee from exercising its statutory power of or because the chargor has begun a redemption action or because he objects to the manner in which the sale is being arranged as rightfully observed in the case of; Joseph Okoth Waudi Vs National Bank of Kenya [2006] eKLR."

9. I am of the same opinion as the learned judges finding above. That finding is pertinent to this case. The plaintiffs in this case do not dispute the arrears owed or the bank. Indeed the plaintiffs more than once wrote to the defendant bank making proposal for the repayment of the amount owed to the defendant bank.

10. The issue also raised by the plaintiffs, that the charged property is of sentimental value to them, cannot be a basis for granting the prayers sought. The plaintiffs offered their property as security for the loan granted to the 3rd plaintiff. Having done so that property became a commodity for sale. That is what was held in the case, **Robert Mugo Wa Karanja v Ecobank (Kenya) Limited & another [2019] eKLR**

"Kitur vs Standard Chartered Bank & 2 others (2002) 1KLR where the court opined as follows:-

"It must be noted that when a Chargor lets loose its property to a Chargee as security for a loan or any other commercial facility on the basis that in the event of default it be sold by a Chargee, the damages are foreseeable. The security is thenceforth a commodity for sale or possible sale, with the prior concurrence and consent of the Chargor. How then can he, having defaulted to repay loan arrears prompting a chargee to exercise its statutory power of sale, claim that he is likely to suffer loss or injury incapable of compensation by an award of damages? Such an argument is definitely misplaced and has no merits."

11. It is obvious from the above discussion that the plaintiff has failed to satisfy the principle of granting an injunction enunciated in the case, **GIELLA VS. CASSMAN BROWN AND COMPANY LIMITED (1973) E.A. 358.**

CONCLUSION

12. The plaintiffs' application, for the reasons set out above, has no merit, and it is misconceived. The Notice of Motion dated 27th August 2019 is dismissed with costs.

Orders accordingly.

DATED, SIGNED and DELIVERED at NAIROBI this 1st day of October, 2019.

MARY KASANGO

JUDGE

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

Sophie..... COURT ASSISTANT

..... FOR THE PLAINTIFFS

..... FOR THE DEFENDANTS