



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. 81 OF 2019

AMOS GICHUKI NGONJO.....1ST PLAINTIFF/APPLICANT

PROTRADE COMPANY LIMITED.....2ND PLAINTIFF/APPLICANT

VERSUS

CREDIT BANK LIMITED.....1ST DEFENDANT/RESPONDENT

PERTER M. GACHIE T/A

REGENT AUCTIONEERS (N) LTD.....2ND DEFENDANT/RESPONDENT

RULING

By **Notice of Motion** Application dated 20th February 2019, brought under the provisions of **Sections 1A & 1B and 3 & 3A of the Civil Procedure Act and order 40 Rules 1 & 2, of the Civil Procedure Rules** and all other Enabling provisions of the law, the Applicant sought orders:-

- a) *That pending the hearing and determination of this Application inter-partes, the Respondent, their employees, agents, assignees, servants and/or any other persons howsoever acting under their directions be restrained from selling, offering for sale, transferring, charging, leasing and/or dealing in any manner whatsoever with the property known as Land Reference number 209/1418/33 (IR No.92877) situated in Ngara within Nairobi;*
- b) *That pending the hearing and determination of this suit, the Respondent, their employees, agents, assigns, servants and/or any other persons howsoever acting under their directions be restrained from selling, offering for sale, transferring, charging, leasing and/or dealing in any manner whatsoever with the property known as Land Reference number 209/1418/33 (IR No.92877) situated in Ngara within Nairobi;*
- c) *That the time for compliance and/or for rectifying any default to redeem Land Reference number 209/1418/33 (I.R No. 92877) be extended for such other period as the court may determine pursuant to powers conferred on the court the express provisions of the Land Act, 2012;*
- d) *That the 1st Respondent's statutory powers of sale be suspended and/or postponed for such other period as the court may determine to enable the Applicants redeem Land Reference number 209/1418/33 (IR No. 92877).*
- e) *That the costs of this application be provided for.*

PLAINTIFFS/APPLICANTS SUBMISSIONS

The Applicant submitted that the lack of valuation on behalf of the 1st Respondent does not satisfy the provisions of **Section 97 of the Land Act** as no proper valuation of the suit land was carried out. J.B Havelock, J in ***David Gitome Kuhiguka v Equity Bank Ltd [2013] eKLR*** stated at paragraph 11;

“...however, in reference to ground No. 12 of the Application, I find that the Defendant had a valuation of the suit property carried out by Zenith (management) Valuers Ltd dated 25th February 2012. The Defendant sought to sell the suit property at auction over a year later on 12th April 2013. Section 97 (2) of the Land Act 2012 reads:

“(2) A charge shall, before exercising the right of sale, ensure that a forced sale valuation is undertaken by a valuer”

The Applicant stated that the Respondents have not provided any evidence to demonstrate that they had obtained a Valuation Report that is not more than twelve (12) months prior to the purported sale of the subject suit property. Moreover, the Applicants stand to lose a property worth more than **(Kshs 200,000,000.00)** Two Hundred million Kenya shillings should the intended sale be allowed to proceed in violation of the Applicant’s statutory underpinned equity of redemption right on the strength of an illegal procedure.

Secondly, that the 2nd Applicant had on several instances met with the 1st Respondent’s representatives to discuss and restructure the repayments of the remaining balance of the serviced loan.

That the Applicants have a *prima facie* case with a probability of success as the statutory notice was issued, despite the Applicant continuing and presently, engaging with the bank on how to restructure the loan in order to enable them service the loan. This is due to the result of the ongoing **Civil Case Number 130/2018** between the **Earth Movers International** and the current lessor of the Land and **Mr. George Karanja at Naivasha Law Courts** since this was the prime location for the business operations and thus making the intended sale a nullity, illegal and unlawful.

That the Plaintiffs stand to suffer irreparable loss and damage not compensatable in damages should the Defendants who are eager to illegally, unlawful and unprocedurally sell the suit property be allowed to proceed since it is a life-long investment. This is based on the location and value of the property.

That the balance of convenience tilts in preservation of *status quo* until both parties are heard on the merits of the instant application as the 2nd Defendant will still be in a position to recover their money. This is in consideration of the fact that the property is worth **Ksh.200,000,000/-**(Two hundred million shillings) while the loan advanced in 2016 is only **Kshs 96,000,000** (Ninety –six million shillings). The 1st Defendant stands no chance of losing any money as opposed to the Plaintiffs who may lose their life-long investment.

In determining on whether to grant interlocutory orders, the main issue for the court’s determination is whether the Applicant has met the requisite conditions to warrant the granting of a temporary injunction, whereby the Plaintiffs stated that they had done so in line with ***Giella vs Cassman Brown***.

DEFENDANTS/RESPONDENTS SUBMISSIONS

The Respondents submitted that the Plaintiffs approached the 1st Respondent and on its own violation and insistence, requested various banking facilities in the year 2015. There is no letter of offer for the year 2014, and no facility was granted during that year.

That the facility was secured by *inter alia* a First Legal Charge over the 1st Plaintiff’s property known as **Title L.R. No. 209/1418/33** for **Ksh 96,000,000/-** plus interest.

That by the letter of Offer dated 7th December 2016, the Bank granted the 2nd Applicant, a term loan of **Ksh 93,000,000/-** and an overdraft facility of **Ksh 3,000,000/-**. The term loan was for *inter alia*, clearing existing facilities, purchase of items and making related payments. The facilities were secured by *inter alia* the already held First legal Chare over the 1st Plaintiff’s property known as **Title L.R. No. 209/1428/33**.

That due to failure to service the loan facility on the part of the 2nd Applicant, the 1st Respondent made multiple demands for the 2nd Applicant to regularise the accounts, which went unheeded.

That the 1st Respondent then sent out the Three Months Statutory Notice in accordance to **Section 90 (3)** of the **Land Act (No. 6 of 2012)** dated 7th June 2018, via registered post on 11th June 2018 to the 1st and 2nd Applicants and received in person by a director of the 2nd Applicant on 19th June 2018. On or about 22nd October 2018, the 1st Defendant issued the 40 days’ Notice to the Plaintiffs via registered post, to sell in accordance with **Section 96 (2)** of the **Land Act (No. 6 of 2012)**. The Applicants have intentionally failed to include the above Statutory Notices in their Application, in a bid to mislead this court.

Further that, the Auctioneers 2nd Respondent herein, issued a 45 days redemption Notice and a notification of sale on 20th December 2018 to the Applicants via registered post, and by hand delivery stipulating that the charge property would be auctioned on 28th February, 2019.

That the bank statement for the 2nd Applicant’s current Account Number **013100700023**, from which the overdraft facility was accessed, had an outstanding balance of **Ksh 11,435,245.18** as at 6th March 2019. The statement for the loan account number **0133202000018**, which the Applicants have conveniently left out, had an outstanding balance of **Ksh 103,810,573.58** as at 20th February 2019.

That the Auctioneers 2nd Respondent herein, issued a 45 days Redemption Notice and a Notification of sale on 20th December 2018 to the Applicants *via* registered post, and by hand delivery stipulating that the charged property would be auctioned on 28th February 2019.

In the celebrated case of ***Giella –vs- Cassman Brown and Co. Ltd [1973] [EA 358]*** the court set out the principles for Interlocutory Injunctions; these principles are:-

i) The plaintiff must establish that he has a prima facie case with high chances of success;

ii) *That the Plaintiff would suffer irreparable loss that cannot be compensated by an award of damages;*

iii) *If the court is in doubt, it will decide on a balance of convenience.*

In the case of *Mrao Limited –vs- Fist American Bank of Kenya Limited [2003] KLR 125*, the court stated as follows;

“A prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of the applicant’s case upon trial. That is clearly a standard which is higher than that of an arguable case.”

The 1st Respondent deponed that even to date, the 2nd Applicant is not making any payments towards the Redemption of the loan. This issue was dealt with in the Ruling by Judge J. B Havelock in *Patrick Waweru Mwangi & Another –vs- Housing Finance Company of Kenya Limited [2013]eKLR* in refusing to award injunctive orders he said;

“There is nothing before me to show that further payments have been made since that date, over a year ago. In this regard, I am cognizant of the finding of Njagi J. in Kyangaro –vs- Kenya Commercial Bank Ltd & Another [2004] 1 KLR 126. At page 145 the learned Judge had this to say:

An injunction is an equitable remedy. He that comes to equity must come with clean hands and must also do equity. The conduct of the Plaintiff in this case betrays him. He admitted in this court, quite frankly, that since leaving employment of the bank four years ago, he has never paid a cent towards redemption of the loan. He admits that he is in default, and yet he is also in possession. He can’t have it both ways. Either he pays the loan, or allows the bank to realize its security. He who comes to equity must fulfil all or substantially all his outstanding obligations before insisting his rights. The Plaintiff has not done that. Consequently, he has not done equity. In the hands of the Plaintiff, a permanent injunction would wreak havoc to the first Defendant, and that would be inequitable. While chargees are enjoined by law to follow the laid down procedures for the realization of their security, the courts must not at the same time be converted into a haven of refuge by defaulters. Even lenders and chargees have their own rights.”

Moreover, the 1st Applicant’s argument that he will suffer irreparable loss if the suit property is sold does not warrant the issuance of orders sought. A property once pledged as security becomes a potential commodity of sale. The sentimental attachment placed upon is diminished once the property is pledged as security. There is many a case law on the point.

In *Julius Mainye Anyenga –vs- Ecobank Kenya Limited [2014] eKLR*, Honourable Gikonyo J. stated as follows; and many courts have expressed themselves as clearly on the subject.

“I am content to cite the case of HCCC No. 82 of 2006 Maltex Commercial Supplies Limited & Another –vs- Euro Bank Limited (in liquidation) that; “...Any property whether it is a matrimonial or spiritual house, which is offered as security for loan/overdraft is made on the understanding that the same stands the risk of being sold by the lender if default is made on the payment of the debt secured.”

Also in the case of *Maithya –vs- Housing Finance Company of Kenya & Another [2003] 1 EA 133 at 139* where Honourable Nyamu, J. stated as follows:

“Charged properties are intended to acquire or are supposed to have a commercial value otherwise lenders would not accept them as securities. The sentiment of ownership which has been greatly treasured in this country over the years has in many situations given way to commercial considerations. Before lending, many lenders banks and mortgage houses are increasingly insisting on valuations being done so as to establish forced sale values and market values of the properties to constitute the securities for the borrowings or credit facilities... loss of the properties by sale is clearly contemplated by the parties even before the security is formalized.”

That it is extremely inequitable, unjust and unfair for the Applicants to actively engage in misleading the Court with a view of attempting to extract an outcome that is based on untruths. The Applicants have intentionally failed to include the statutory Notices in their application, in a bid to mislead this court. The Applicants have also, perjured themselves by claiming to be ***“diligently making regular payments to the loan”*** despite annexing bank statements that are a clear testament of non payment of the loan.

In *Mumias Sugar Company Limited –vs- Option two Limited & Another [2014] eKLR*, the High Court stated as follows;

“However, I reckon that, although the question whether the plaintiff should give an undertaking as to damages is a matter for the discretion of the court, except where there are exceptional circumstances, the undertaking should always be required where an interlocutory injunction has been granted. That is a principle of law upon which the discretion should be exercised by the court on this subject. I, therefore, do not accede to the Plaintiff’s argument that the Defendants have not shown that the Plaintiff will be unable to pay any damages that may be suffered by the Defendants or any damages will occur at all. Neither the Plaintiff’s ability nor inability to pay an amount of damages will prevent or compel the call for an undertaking as to damages from the Plaintiff, respectively.

The 1st Respondent deponed that the Applicants’ application and Plaint have not at any point brought up the issue of valuation. It is therefore irregular and completely insincere the Applicants to now attempt to base their entire submission on valuation, in a failed attempt to blindsides the Defendants. Had the Applicant asked for a copy of the Valuation from the Respondents, the same would have been availed by the 1st

Respondent. This only goes further to show that the Applicants and their representatives have chosen to completely mislead the Court with a view of defeating all forms of decency and honest litigation. The Respondents pray that this is condemned by the Court in the strongest terms possible.

That the allegations that the property has not been properly valued are false. A valuation Report dated 9th January 2019 by Claytown Valuers limited has been availed in the Further Affidavit of Francis Ngaruiya dated 21st June 2019. The Chargee is required under **Section 97** of the **Land Act 2012**, before exercising the right of sale, to ensure that a forced sale valuation is undertaken by a valuer. They could not understand why the Applicants were alleging that the Respondents were in breach of **Section 97** of the **Land Act**. That was clearly a ploy to mislead the court.

DETERMINATION

The Court considered the pleadings and submissions filed by the parties.

ISSUES

Whether the Plaintiffs are entitled to the grant of temporary injunction

i) The plaintiff must establish that he has a prima facie case with high chances of success;

LOAN/ FACILITY

The Plaintiff /Applicant confirms that he is the owner of the suit property **LR Number 209/1418/35** situated in Ngara. He is also guarantor of the 2nd Applicant's loan facility advanced by the Defendant to the 2nd Applicant of **Ksh 96,000,000/=** The Applicant stated that the 2nd Applicant made diligent and regular payments repaying the loan advanced as shown in the annexed statement of account to Applicant's application.

The Respondent vide Replying Affidavit filed on 2nd April 2019 confirmed another Letter of Offer of 7th December 2016 ,the Bank granted the 2nd Plaintiff/Applicant a term loan of **Ksh 93,000,000/-** and an overdraft facility of **Ksh 3,000,000/-** These facilities were secured by the 1st Legal charge of 1st Plaintiff's suit property **LR No 209/1418/33** held to continue.

DEFAULT/DEMAND/NOTICES

The Respondent contends that the 2nd plaintiff failed to service the loan facility and the Respondent wrote and served the Plaintiffs/Applicants with the following demand letters and statutory Notices;

a) Letter dated 7th June 2018 under **Section 90 of the Land Act**

b) Letter dated 22nd October 2018 **under Section 96(2) Land Act** and copies of payment receipts of Registered postage to the 1st & 2nd Plaintiffs on 11th June 2018 and 22nd October 2018 respectively.

c) Regent Auctioneers by letter of 20th December 2018 wrote to the Plaintiffs and gave 45 days notice of sale by auction. The auction was scheduled on 11th February 2019 for recovery of loan balance of Ksh 112,51 213.4 as at 11th December 2018.

The Plaintiff/Applicant stated that the annexed letters to the application dated 27th February 2018 and 29th November 2017 did not comply with provisions of **Section 90 of Land Act**. This Court notes that the Statutory notices annexed to the Replying Affidavit of 2nd April 2019 by Mr. Wanaina Francis Nganga of the 1st Respondent were served to the Applicants in compliance with the law. These notices were not disclosed to Court at the time the Plaintiffs/Applicants filed instant application.

VALUATION

The Plaintiff/Applicant raised for the 1st time the issue of valuation of the property before the statutory power of sale is contested in their Written Submissions filed on 30th April 2019.

The Respondent vide Further Affidavit filed on 24th June 2019, disclosed that the valuation was conducted over suit property LR 209/1418/33 Chambers Road Ngara Nairobi City County by Clayton Valuers Limited. They compiled report on 9th January 2019 before the scheduled auction on 28th February 2019. The report was/is annexed as **WFN1** to the Further Affidavit. The Plaintiffs did not request for the Valuation Report .This Court is satisfied that the Respondent complied with **Section 97 of Land Act**.

PAYMENTS/SERVICING FACILITIES

The Plaintiff/Applicants deponed that they were not granted by the Respondent any opportunity to rectify and/or restore the default to normalcy. By demands and Notices, the Respondent took away the Plaintiff's statutory rights bestowed under **Section 90(2) Land Act**.

The 1st Respondent opposed the Applicants' claims on the following grounds;

- a) The statement of account current account 0131007000023 with the overdraft facility had outstanding balance of Ksh 11,435,245.16 as at 6th March 2019.
- b) The Statement of Account Loan Account number 0133202000018 had outstanding balance of Ksh 103,810,573.58 as at 20th February 2019 copies of the statements are annexed as **WFN 7** to the Replying affidavit.

The Plaintiff/Applicants made various proposals to regularise the facilities' accounts but the proposals were not fulfilled. Reference was made to Plaintiff/Applicant's letter of 12th March 2018. The Plaintiff/Applicant stated that the business suffered setbacks due to the pending litigation between Earth Movers Int'L and one Mr George Nganga which halted quarry operations in Naivasha.

The Plaintiffs/Applicants promised to settle the arrears in the Accounts.

This Court perused the Statements of Accounts filed by both the Applicants/1st Respondent and they confirm the loans/overdraft were regularly serviced between 2016-2017; from 2018 to date the repayments were hardly made. The Correspondence between the parties demonstrate that the Respondent availed the Plaintiffs/ Applicants an opportunity to regularize the facilities' accounts. The Plaintiffs/Applicants wrote the letter of 12th March to the 1st Respondent seeking request for extension of overdraft facility. The Plaintiff informed the Respondent that in the coming month they could obtain receivables from EAPCC worth **Ksh 9,439,674.63/-** and would settle the default loan/overdraft. The payment was not made. The Respondent fully disclosed service of statutory notices and valuation of the suit property was conducted. The Respondent complied with **Section 90, 96 & 97 of Land Act**.

The Plaintiff/Applicants admits obtaining loan facilities from the Respondent, there is security of the charged property in lieu of the facilities. In the absence of the Plaintiff/Applicants exercise of right of redemption, this Court finds that the *prima facie* case is not established.

ii) That the Plaintiff would suffer irreparable loss that cannot be compensated by an award of damages;

That the Plaintiffs submitted that they stand to suffer irreparable loss and damage not compensatable in damages should the Defendants who are eager to illegally, unlawful and unprocedurally sell the suit property which is a life-long investment and it is a prime property by virtue of the location and value of the property.

The plaintiffs/Applicants obtained letters of offers from the Respondent for loan and overdraft facilities. They accepted the offers and funds were advanced. They services the loan/overdraft facilities but from 2018 defaulted The Charge provided as security to the Respondent is duly executed and registered and is annexed to the Respondent's Replying Affidavit. The parties are bound the terms specifically **Paragraphs 9, 10 & 11** of the Charge.

The Plaintiffs/Applicants have not contested validity of the charge that gives rise to right of the Respondent to exercise statutory power of sale.

In David Mburu Githere vs Jamii Bora Bank Limited [2017] eKLR it was held;

“The Plaintiffs herein, as submitted by the Defendant wilfully gave the suit property as security and as such it became a commodity for sale and it is therefore subject of sale in case of default. Further, even if the Court was to find in favour of the Plaintiffs at the final determination of the suit, damages would be an adequate remedy. The Plaintiffs thus can find recourse in Section 99(4) of the Land Act which provides that;

A person prejudiced by an unauthorised improper exercise of the power of sale shall have a remedy in damages against the person exercising the power.

iii) If the court is in doubt, it will decide on a balance of convenience.

The Plaintiffs/Applicants stated that the balance of convenience tilts in preservation of *status quo* until both parties are heard on the merits of the instant application as the 2nd Defendant will still be in a position to recover their money. This is in consideration of the fact that the property is worth **Ksh.200,000,000/-**(Two hundred million shillings) while the loan advanced in 2016 is only **Kshs 96,000,000** (Ninety –six million shillings).

This Court finds from the pleadings filed and submissions ably made by parties; respective Counsel, there is no dispute as to the contract between the Applicants and Respondent. There is no challenge to the Charge document properly executed and registered. This Court finds that statutory notices were properly served by Respondent to the Applicants. Valuation of the suit property was conducted and valid for 12 months before sale. At this stage there is no evidence presented to this Court of a dispute for hearing and determination of the application.

Secondly the Amount claimed from Applicants by Respondent is over Ksh 100,000,000/- arising from default in the Loan and overdraft facilities.

DISPOSITION

- 1. The application of 21st February 2019 seeking grant of Interlocutory injunction is dismissed with costs.**

2. The Plaintiffs/Applicants have not established prima facie case to warrant grant of Interlocutory Injunction.

3. The prayers sought (c) and (d) for extension of time to pay are not granted. The parties are at liberty to negotiate.

DELIVERED SIGNED & DATED IN OPEN COURT ON 6TH DECEMBER 2019.

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF:

MR. KAHARA H/B MRS REBO FOR APPLICANTS

MS WAIGWA H/B MR. ORARO FOR RESPONDENTS

COURT ASSISTANT- JASMINE