



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 51 OF 2017

STELLAR KAVUTHA MUTHOKA1ST PLAINTIFF

KENNY MUTHOKA MALUKI2ND PLAINTIFF

VERSUS

KENYA WOMEN MICROFINANCE BANK LTD.....DEFENDANT

RULING

1. In the Application dated 16th February, 2017, the Plaintiffs are seeking for the following orders:

a. That this Honourable Court be pleased to grant a temporary injunction restraining the Respondent whether by itself, its servants and/or agents or whomsoever else is acting on its instructions, behalf and/or authority from selling by public auction and/or private treaty titles numbers Kitui Municipality/Block III/290 and Kitui Municipality/Block 1/90 or dealing with the same in any other manner whatsoever pending the final determination of the suit herein.

b. That the Respondent be condemned to pay costs of this Application.

2. The 1st Plaintiff swore an Affidavit in support of the Application in which she deponed that her, together with the 2nd Plaintiff, borrowed Kshs. 70,000,000 from the Defendant; that the loan facility was secured using two parcels of land being Kitui Municipality/Block 111/290 and 90 and that although the charge was for Kshs. 70,000,000, the Defendant only released to them Kshs. 57,034,494.12 before releasing a further sum of Kshs. 8,098,968.15 to them.

3. According to the Plaintiffs, they have been making timely and frequent deposits towards the repayment of the said loan; that they have so far made a payment of Kshs. 19,098,348; that without any prior notice, the Defendant, through Garam Investment Auctioneers, advertised for sell the suit properties by way of public auction and that they were never served with a notification for sale or the statutory notice as required by law.

4. The Plaintiffs finally deponed that after reading the advertisement in the newspaper, they deposited on the loan account Kshs. 4,000,000 and intend to pay off the balance within 91 days from February, 2017; that the advertisement to sell the suit property was done in bad faith and was illegal and that the Defendant has never adjusted the interest rates in accordance with the prevailing law.

5. In its Grounds of Opposition, the Defendant averred that the Application is an afterthought and an outright abuse of the court process; that the Plaintiffs have admitted not having paid the loan and that the Defendant's statutory power of sale has crystallized.

6. In the Replying Affidavit, the Defendant's legal officer deponed that after the Plaintiffs' fell into arrears, the Defendant issued to the Plaintiffs the first statutory notice on 28th April, 2016 vide a registered mail; that a second statutory notice was issued to the Plaintiffs on 19th September, 2016 in which the Plaintiffs were given three (3) months to redeem the loan and that they were thereafter served with a notification of sale by Garam Investments by registered mail on 17th December, 2016. According to the Defendant, the same notification of sale was personally served on the Plaintiffs on 19th December, 2016.

7. The Defendant's Director deponed that before the exercise of statutory power of sale by the Defendant, proper valuations were done in respect to the two suit properties and that the Plaintiffs have admitted for being in arrears.

8. In their Further Affidavit, the Plaintiffs denied that they received the letters dated 19th September, 2016 and 28th April, 2016 purportedly sent by registered post; that Phoebe Muthoka who purportedly received the notification of sale on 19th December, 2016 is not their agent, attorney or a party to the loan contract and that in the letters dated 28th April, 2016 and 19th September, 2016, the bank did not demand for the full settlement of the entire loan amounting to Kshs.64,101,344.

9. The Plaintiffs' advocate submitted that the Plaintiffs never received the notices dated 25th April, 2016 and 19th September, 2016 demanding for the payment of Kshs. 2,658,829.52 and 3,820,412 respectively; that the notice purportedly issued by Garam Investments purposed to crystallize the chargee's power of sale and that if that were so, then the chargee should have demanded for the payment of the entire amount.
10. According to the Plaintiffs' advocate, the initial report before charging the suit properties indicated the value of parcel of land number 290 as Kshs. 65,700,000 but the second valuation valued the same land at Kshs. 5,000,000 and that this is a violation of Section 97(1) of the Land Act.
11. The Defendant's advocate submitted that the Plaintiffs have failed to show that they never received the statutory notices; that the valuation reports dated 16th February, 2017 gave open valued forced sale value of the suit land and that the valuation was done in accordance with Section 97 of the Land Act.
12. The Defendant's advocate submitted that the Plaintiffs had received more than 60,000,000 from the Defendant as at 20th February, 2017; that the plaintiffs have an outstanding balance of Kshs. 60,655,338 and that the Application should be dismissed with costs.
13. It is not in dispute that the Defendant had a charge registered against parcels of land known as Kitui Municipality Block 111/29 and 90. According to the charge document dated 20th March, 2015, the 2nd Plaintiff was indicated as the chargor while the 1st and 2nd Plaintiffs were the borrowers. The amount secured by the two suit properties was Kshs. 70,000,000.
14. The Plaintiffs have alleged that although they borrowed Kshs. 70,000,000 from the Defendant, the Defendant only released to them Kshs. 57,034,494.12 and a further sum of Kshs. 4,866,538.73. This assertion was not disputed by the Defendant.
15. The Plaintiffs have alleged that they were never served with the statutory notices and the notification of sale. The Defendant's legal officer deponed that the Plaintiffs were served with the first statutory notice dated 28th April, 2016 vide a registered mail. Although the said notice has been exhibited, the Certificate of posting showing when the letter dated 28th April, 2016 was received by Postal Corporation of Kenya has not been produced.
16. The Defendant has alleged that it issued to the Plaintiffs a second statutory notice dated 19th September, 2016. The Defendant has annexed on his Affidavit the said statutory notice together with a certificate of posting dated 23rd September, 2016. Indeed, the said certificate shows that a letter was sent to the two Plaintiffs on the said date. Having not denied that the postal address indicated in the letter dated 19th September, 2016 is theirs, I am satisfied that the Plaintiffs were served with the notice of 19th September, 2016.
17. However, there is no evidence before me to show that the Plaintiffs were served with the notice of 28th April, 2016 and the notification of sale by Garam Investments dated 17th December, 2016 by registered mail as alleged.
18. The notification of sale dated 17th December, 2016 and allegedly issued by Garam Investments Auctioneers demanded for the payment of Kshs. 64,101,344 which was due as at 14th November, 2016. On the other hand, the Defendant's statutory notices of sale dated 28th April, 2016 and 19th September, 2016 demanded for Kshs. 2,658,829.52 and 3,820,412 respectively. The said letters did not indicate the total amount that was due and owing under the charge.
19. The statutory notices of sale that were issued ought to have informed the Plaintiffs the full amount that was due from them. Indeed, the information of the total payable amount was paramount in this instance considering that the Plaintiffs did not receive the amount of Kshs. 70,000,000 that was indicated in the charge document. The Defendant cannot leave the issue of informing the Plaintiffs the outstanding amount to the auctioneers. To that extent, I find that the statutory notices that were issued by the Defendant did not inform the Plaintiffs' the money that was due under the charge in contravention of Section 90(2) (b) of the Land Act.
20. As I have already stated in this Ruling, there is no evidence that the Plaintiffs were served with the notice of 28th April, 2016. There is also no evidence that the Plaintiffs were served with the notice of sale pursuant to the provision of Section 96(2) of the Land Act.
21. Having not complied with the law as stated above, I find that the Plaintiffs have a prima facie case with chances of success. I therefore allow the Application dated 16th February, 2017 as prayed.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 11TH DAY OF MAY, 2018.

O.A. ANGOTE

JUDGE