



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)**

**COMMERCIAL AND TAX DIVISION**

**CIVIL SUIT NO.236 OF 2018**

**TONUI KIPYEGON FREDRICK.....1<sup>ST</sup> PLAINTIFF/APPLICANT**

**KENNETH KIPRONOH KOECH.....2<sup>ND</sup> PLAINTIFF/APPLICANT**

**VERSUS**

**FAULU MICRO-FINANCE BANK LIMITED.....DEFENDANT**

**R U L I N G**

1. The Plaintiff/Applicant filed a suit on 11<sup>th</sup> June 2018 simultaneously with an application dated 7<sup>th</sup> June 2018. In the Notice of Motion the Applicant seeks the following orders:-

1. **THAT** this application be certified as urgent and service of this application be dispensed with in the first instance.
2. **THAT** a temporary injunction do issue restraining the Defendant whether by itself, its servants and/or agents or whomsoever is acting on his behalf from, selling, alienating, transferring or in any other manner whatsoever interfering with the property known as TITLE CIS-MARA/OLELESHWA/9654 and TITLE CIS-MARA/OLELESHWA/13594 pending the hearing and determination of this application.
3. **THAT** a temporary injunction do issue restraining the Defendant whether by itself, its servants and/or agents or whomsoever is acting on his behalf from, selling, alienating, transferring or in any other manner whatsoever interfering with the property known as TITLE CIS-MARA/OLELESHWA/9654 and TITLE CIS-MARA/OLELESHWA/13594 pending the hearing and determination of the suit.
4. **THAT** a temporary injunction do issue pending hearing and determination of the application compelling the Defendant whether by itself, its servants and/or agents or whomsoever is acting on his behalf to comply with section 97(2) of the Land Act No. 6 of 2012 and ensure that a Second forced sale valuation is undertaken by a valuer to be agreed upon by both parties in regard to the property known as TITLE CIS-MARA/OLELESHWA/9654 and TITLE CIS-MARA/OLELESHWA/13594 prior to the sale of the property on 12<sup>th</sup> June 2018.
5. **THAT** a temporary injunction do issue pending hearing and determination of the suit compelling the Defendant whether by itself, its servants and/or agents or whomsoever is acting on his behalf to comply with section 97(2) of the Land Act No.6 of 2012 and ensure that a Second forced sale valuation is undertaken by a valuer to be agreed upon by both parties in regard to the property known as TITLE CIS-MARA/OLELESHWA/9654 and TITLE CIS-MARA/OLELESHWA/13594 prior to the sale of the property on 12<sup>th</sup> June 2018.
6. **THAT** preservatory orders do issue against the suit premises known as TITLE CIS-MARA/OLELESHWA /9654 and TITLE CIS-MARA/OLELESHWA/13594 pending the Respondent's compliance with Section 90, 96(2) and 97(1)(2) of the Land Act No.6 of 2012 and pending the hearing and determination of this application.
7. **THAT** the OCS, Kajiado police station, does enforce compliance of the orders above.
8. **THAT** Honourable Court be pleased to issue such further orders or directions as it deems fit in the circumstances.
9. **THAT** the cost of this application be provided for.

2. On 12<sup>th</sup> June 2018 when the matter came for hearing under certificate of urgency M/s Githogori, learned Advocate appeared for the Plaintiff/Applicant while Mr. Njega, learned Advocate, appeared for the Defendant/Respondent. That after brief submissions by both counsel I granted prayer 2 of the Notice of Motion dated 7<sup>th</sup> June 2018 on interim basis subject to the Applicants paying the auctioneers charges to be agreed or taxed. I further directed the defendant to file the Replying affidavit within 2 days and granted the Plaintiff/Applicant corresponding leave then to file supplementary affidavit within 2 days from the date of service. The parties were directed to put in written submissions and appear before court for highlighting on 18<sup>th</sup> June 2018.

3. On 18<sup>th</sup> June 2018 Mr. Kamau Muturi, learned Advocate, held brief for M/s Githogori and relied on the written submissions and opted not to highlight on the same; whereas Mr. Njega, learned Advocate, appearing for the Defendant/Respondent in his highlighting, submitted that this court's orders granting the applicant interim orders has not been complied with.

4. The Plaintiffs/Applicants, Notice of Motion dated 7<sup>th</sup> June 2018, is premised on the grounds on the face of the application. There is admission that the properties **CIS/MARA/OLELESHWA 9654** and **13594** belong to the 1<sup>st</sup> and the 2<sup>nd</sup> plaintiff respectively; that a legal charge was created over **CID/MARA/OLELESHWA/9654** in favour of the defendant, for the 1<sup>st</sup> plaintiff to secure a sum of Kshs. 581,240/- (*1<sup>st</sup> charged property*); that the 2<sup>nd</sup> plaintiff as a guarantor of the 1<sup>st</sup> plaintiff allowed a charge to be created over **CIS-MARA/OLELESHWA/13594** for the 1<sup>st</sup> plaintiff to secure a sum of Kshs. 581, 240/-, that the plaintiff was cumulatively granted Kshs.1,162,500/- payable at a monthly instalment of Kshs. 51,667 (*comprising of both the principal and interest*) over a period of 36 months; however since last election in 2017 the 1<sup>st</sup> plaintiff is in arrears of Kshs. 386,000/-.

5. It is alleged by the Plaintiffs/Applicants that though aware that the Defendant/Respondent has a right to exercise its statutory power of sale, the same must be exercised in full observation to some mandatory provisions envisaged in law before the right to exercise his power of sale can be conferred to the defendant. It is alleged the defendant has failed, ignored and/or neglected to adhere to the provisions of section 90 of the Land Act, by failing to serve the plaintiff with the statutory notice; section 96 (2) of the Land Act by failing to serve the plaintiffs with notice to sell; section 97(2) of the Land Act by failing to ensure that a proper forced sale valuation is undertaken before the exercise of the statutory power of sale and by the failure of the defendant's agent; M/s Spectrum Auctioneer; serving the plaintiffs with 45 days redemption notice or any notification of sale as envisaged in the Auctioneers Act.

6. The plaintiffs further contend upon receipt of the Valuation Report from the Auctioneers they noted the properties charged were grossly and maliciously undervalued by the defendant; comparing the valuation of the properties as of 2016 and the auctioneers valuation as of 24<sup>th</sup> March 2018; in which both properties open market value is given as less than 50% of market value as of 2016 and forced value at around 30 per cent of forced value as of 2016.

7. The defendant filed a Replying Affidavit dated 13<sup>th</sup> June 2018 opposing the Plaintiffs/Applicants application. The defendant through an affidavit by one, Steve Biko Nyagah, a legal officer of the Defendant/Respondent company avers *inter alia*:-; that there is no dispute the defendant advanced to the plaintiff the sum of Kshs. 1,162,500/- payable by way of a monthly instalment of Kshs. 51,667 over a period of 36 months; that the plaintiffs, are in default and presently in arrears of the sum of Kshs. 386,000/-, that the debt was secured by a legal charge over the suit properties **CIS/MARA/OLELESHWA/9654** and **CIS/MARA/OLELESHWA/13594** and that it was an express term of the charge that in the event of default, the defendant would be at liberty to exercise its statutory power of sale.

8. It is contended by the defendant that the plaintiffs upon default, the bank issued statutory notice as provided by law together with notice to sell under section 96 of the Land Act and the auctioneers instructed by bank issued to the plaintiff, a redemption notice as required by the Auctioneers Rules (**annexed and marked "SNB 1" are relevant notices**) using postal address supplied by the plaintiffs in the loan application forms, (**annexed marked "SBN 2" a copy of loan application form**);

9. On issue of valuation the Defendant/Respondent contends that the issue raised is speculative as no independent valuation has been availed by the Plaintiffs/Applicants to disapprove the findings and opinions in value provided by the respondent's valuers, urging the plaintiffs opinion of the value of the property cannot be basis for the grant of injunction.

10. The parties filed their opposing written submission in support of their rival positions. The Applicants/Plaintiffs counsel M/s Githogori & Harrison Associates, filed their submissions dated 16<sup>th</sup> June 2018 on 18<sup>th</sup> June 2018 whereas M/s Muchoki Kangala Njenga & Company Advocates filed theirs dated 18<sup>th</sup> June 2016 on the same day. Both counsel opted not to highlight on their submissions. I have considered the Notice of Motion; Replying Affidavit and counsel rival submissions. The issue for consideration can therefore be summed as up follows:-

- a) **Whether the Defendant/Respondent complied with the provisions of the law prior to the intended sale of the suit property?**
- b) **Whether the agent of the defendant, M/s Spectrum Auctioneers, issued the plaintiff with a notification for sale?**
- c) **Whether the Plaintiffs/Applicants have established a prima facie case with probability of success.**

**A. Whether the Defendant/Respondent complied with the provisions of the law prior to the intended sale of the suit property?**

11. In the instant application; there is no dispute that the Plaintiffs/Applicants are the respective registered proprietors of the suit property, thus **CIS/MARA/OLELESHWA/9654** and **13594**, to which first legal charge was created over the respective properties in favour of the defendant; following which the defendant cumulatively advanced to the plaintiff the total sum of Kshs. 1,162,500/- payable in a monthly instalment of Kshs. 51,667 comprising of both the principal and interest over a period of 36 months. That there is no dispute the Plaintiffs/Applicants are in default of repayment of the loan advanced by the defendant since 2017 for the sum of Kshs. 386,000/-. It is

further admitted by the Plaintiffs/Applicants, the defendant is entitled to exercise its statutory power of sale of the charged properties as it now seeks but subject to the laws governing such exercise of such rights.

12. Section 78 of the Land Act relied upon by the Plaintiffs/Applicants provides;

**"(a) The provisions of this Part shall not be construed so as to affect the validity of any entry in the register or any charge, mortgage other security instrument which was valid immediately before the commencement of this Act and the entries in the register and the charges, mortgages or other instruments shall continue to be valid in accordance with their terms not withstanding their inconsistency with the provisions of this Part;**

**(b) The provisions relating to the realization of any charge, mortgage or other instrument created before the commencement of this Act shall apply save for the requirement to serve notice to spouses and other persons who were not required to be served under the repealed Acts of Parliament.**

**(2) References in this Part to "the charged land" shall be taken to mean and include a charged land, a charged lease and sublease and a second or subsequent charge."** [

13. The Plaintiffs/Applicants contend that they were never served with the statutory notices by the defendant; prior to the defendant advertising the charged properties for sale. Section 90 of the Land Act 2012 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.**

**(1) The notice required by subsection (1) shall adequately inform the recipient of the following matters—**

**(a) the nature and extent of the default by the chargor;**

**(b) if the default consists of the non-payment of any money due under the charge, the amount that must be paid to rectify the default and the time, being not less than three months, by the end of which the payment in default must have been completed;**

**(c) if the default consists of the failure to perform or observe any covenant, express or implied, in the charge, the thing the chargor must do or desist from doing so as to rectify the default and the time, being not less than two months, by the end of which the default must have been rectified; [Rev. 2016] Land No. 6 of 2012 L4 - 51 [Issue 3]**

**(d) the consequence that if the default is not rectified within the time specified in the notice, the chargee will proceed to exercise any of the remedies referred to in this section in accordance with the procedures provided for in this sub-part; and**

**(e) The right of the chargor in respect of certain remedies to apply to the court for relief against those remedies."**

The said section mandates the chargee to give the chargor a 3 month notice to rectify any default failure whereof, the chargee can pursue the remedies encapsulated under the said section.

14. I have perused the Plaintiffs/Applicants, supportive affidavit under paragraph 6 and 7 of the affidavit, in which it is clearly admitted the Plaintiffs/Applicants have since 2017 been in arrears of Kshs. 386,000/- and that contrary to the provisions of section 90 of the Land Act, the defendant failed to serve the plaintiffs with statutory notice.

15. In the defendant's Replying Affidavit dated 13<sup>th</sup> June 2018, one, Steve Biko Nyagah, under paragraph 5 deponed thus;

**"THAT upon the said default, the bank issued a statutory notice as provided by law together with a notice to sell under Section 96 of the Land Act. I am also aware that the auctioneers duly instructed by the bank issued to the plaintiff, a redemption notice as required under the Auctioneer's rules."**

The defendant therefore controverted the plaintiff's allegation of non-service of the Statutory Notice upon the Plaintiffs/Applicants. Annexures "SBN 1" demonstrate the postal address applied for dispatch of the statutory notice to be the one provided by the plaintiffs in the loan application forms. That contrary to counsel submission, that the postal code is not 00200, assigned to Nairobi but the postal code in the notices is 020500 and not as submitted for the Plaintiffs/Applicants.

16. Section 96 (2) of the Land Act provides;

**"Before exercising the power to sell the charged land, the chargee shall serve on the chargor a notice to sell in the prescribed form and shall not proceed to complete any contract for the sale of the charged land until at least forty days have elapsed from the date of the service of that notice to sell."**

17. The plaintiffs/Applicants urge the defendant purports to have sent to the plaintiff, the notice to sell under section 96 of the Land Act

through letters dated 24<sup>th</sup> November 2017 to the plaintiffs through postal address No.1888 – 20500 Narok and certificate of postage with stamp from postal office which is illegible but handwritten to have been sent on 5<sup>th</sup> June 2017 and is further submitted the postal address did not belong to the plaintiffs.

18. With regard to service of statutory notice and notice to sell as well as redemption notices, there is a Replying affidavit by the defendant on record and annexed statutory notices duly served together with evidence of postal service on address provided by the Plaintiffs/Applicants. There is demand notice dated 25<sup>th</sup> May 2017; there is register of postages indicating postal dispatch of the alleged notices to the Plaintiffs/Applicants. The affidavit filed by the defendant has not been controverted by filing a supplementary affidavit by the Plaintiffs/Applicants. The matters deponed upon in that affidavit having not been controverted are taken as true and correct. I therefore have no other way to find other than the statutory notice and the notice of intention to sale were duly served upon the Plaintiffs/Applicants who were aware of the indebtedness and who did not challenge the contents of the defendant's affidavit dated 13<sup>th</sup> June 2018.

19. In the case of **Nyangilo Ochieng & Another Vs. Kenya Commercial Bank, Court of Appeal at Kisumu Civil Appel No. 148 of 1995 (1996) eKLR**, the court addressed itself thus:-

**"It is for the chargee to make sure that there is compliance with the requirements of Section 74 (1) of the Registered Land Act. That burden is not in any manner on the chargor. Once the chargor alleges non-receipt of the statutory notice it is for the chargee to prove that such notice was in fact sent."**

20. From the foregoing I find sufficient evidence that the defendant sent the mandatory notice under section 90 and 96 to the Plaintiffs/Applicants through the address they had availed to the Defendant/Respondent. I further find the plaintiffs failed to controvert the contents of the defendant's replying affidavit and cannot be allowed to rely on submissions, which are not supported by an affidavit controverting the defendant's affidavit. Accordingly I find and hold the defendant complied with the provision of section 90 and 96 of the Land Act No. 6 of 2012 prior the intended sale of the suit property.

**B. Whether the agent of the defendant, M/s Spectrum Auctioneers, issued the plaintiff with notification of sale?**

21. Rule 15 of the Auctioneers Rules provides:-

**"Upon receipt of a court warrant or letter of instruction the auctioneer shall in the case of immovable property—**

- (a) Record the court warrant or letter of instruction in the register;**
- (b) Prepare a notification of sale in the form prescribed in Sale Form 4 set out in the Second Schedule indicating the value of each property to be sold; [Rev. 2017] Auctioneers No. 5 of 1996 [Subsidiary] A26 - 31 [Issue 3]**
- (c) Locate the property and serve the notification of sale of the property on the registered owner or an adult member of his family residing or working with him or where a person refuses to sign such notification, the auctioneer shall sign a certificate to that effect;**
- (d) Give in writing to the owner of the property a notice of not less than forty five days within which the owner may redeem the property by payment of the amount set forth in the court warrant or letter of instruction;**
- (e) On expiry of the period of notice without payment arrange sale of the property not earlier than fourteen days after the first newspaper advertisement."**

The notification under the above-mentioned Rules is required to be served prior to a sale of immovable property giving the chargor 45 days upon which to redeem the property and the same is required to be served on the registered owner of the property or an adult member of family residing and working with him, and where the person declines to sign the notification, the auctioneer needs to sign the certificate to that effect.

22. In the instant case, the Plaintiffs/Applicants have under paragraph 6 of their supportive affidavit deponed that the auctioneers failed to serve them with 45 days redemption notice or any notification of the sale as envisaged in the Auctioneers Act. I have very carefully perused the court record and have found no affidavit of service nor certificate from the auctioneer placed on record to demonstrate service of the notification of sale. The Plaintiffs/Applicants averment on non-service remains unchallenged. The proof of service squarely lies on the auctioneers, who has decided not to file an affidavit of service. The absence of evidence of service, in my view, demonstrates the defendant has failed to discharge the burden of proof on service. The failure to serve the Plaintiffs with a notification of sale is a clog on the equity of redemption. I also find and hold the redemption clause under the Auctioneers Act is mandatory, and should be issued separately from and after the one under section 96 (2) of the Land Act and cannot be wished away nor taken as inferior and of no consequences.

23. In **Malindi ELC Court Land Case No. 1 "B" of 2014 Josiah Kamanja Njenga Vs. Housing Finance Corporation of Kenya & another**, Angote J, stated as follows;

**"Having analysed the chronology of events, I take the view that the auctioneer's fees is only payable once the bank gives to the auctioneer lawful instructions. Section 96(2) of the Land Act stipulates that the Bank cannot exercise its power to sell the charged property until at least 40 days have lapsed. The Plaintiff was served with the 40 days' notice on 18<sup>th</sup> October 2013, which was the fourth day after the posting of the letter dated 10<sup>th</sup> October, 2013. The letter, according to the documents annexed on the Replying Affidavit, was received by the post master general on 14<sup>th</sup> October, 2013. It is only after 27<sup>th</sup>**

November, 2013, which was the 40<sup>th</sup> day after 18<sup>th</sup> October, 2013, when the Plaintiff is supposed to have been served with the letter, that the 1<sup>st</sup> Defendant would have instructed the 2<sup>nd</sup> Defendant to proceed to issue to the Plaintiff with a notification of sale pursuant to the provisions of Rule 15 of the Auctioneers Rules, 1997 and not earlier than that. Consequently, the letter of instructions dated 14<sup>th</sup> November, 2013 by the 1<sup>st</sup> Defendant addressed to the 2<sup>nd</sup> Defendant instructing it to sell the suit property was prematurely issued and is contra statute. The said instructions and the subsequent notification of sale by the 2<sup>nd</sup> Defendant are therefore, prima facie, a nullity and cannot be the basis for the auction which had been scheduled for 26<sup>th</sup> January, 2014 or the loading of the auctioneer's fees on the Plaintiff's loan account."

24. Reading from **section 96 of the Land Act** and under rule **15 (d) of the Auctioneers Rules**, one finds a clear distinction between the two which bears an innuendo of a clog on the equity of redemption of the chargor. **Section 96 (2) of Land Act** is couched in a manner that implies;

*"Before exercising its powers to sell the charged land, the chargee shall serve on the chargor a notice to sell in a prescribed form ... meaning the charge is required under the section to use a prescribed form and non-adherence with the section would vitiate the notification for sale or any sale based on a flawed process. In absence of demonstration of issuance a service of the notification of sale to the Plaintiffs/Applicants, it would be unjust and unconscionable to condemn the plaintiffs to bear cost of the instructions, to the auctioneers emanate from an illegality. I find it would be proper to nullify any intended sale of the charged properties by the defendant until and when there is full compliance with the provision, of the law by the defendant."*

25. From the foregoing I am satisfied the defendants agent M/s Spectrum Auctioneers failed to issue and serve the Plaintiffs/Applicants with notification of sale and any purported interest to sell the suit property would be nullity until full compliance with the provisions of the law by the defendant.

#### **B. Whether the Plaintiffs/Applicant have established a prima facie case with probability of success?**

26. The elements of granting of a temporary injunction are well spelled in the case of **Gielva Vs. Cassman Brown & Company Ltd (1973) E.A 358**. For court to grant an injunction, the applicants has to show that he/she has a prima facie case with a likelihood of success and he/she stands to suffer irreparable loss unless the orders sought are granted and lastly if the court is in doubt about the first two, it will decide the matter on balance of convenience.

27. In the instant case, the court was called upon to consider whether the defendant complied with section 97 (1) and (2) of the Land Act No. 6 of 2012 which provides;

**(1) A chargee who exercises a power to sell the charged land, including the exercise of the power to sell in pursuance of an order of a court, owes a duty of care to the chargor, any guarantor of the whole or any part of the sums advanced to the chargor, any chargee under a subsequent charge or under a lien to obtain the best price reasonably obtainable at the time of sale.**

**(2) A chargee shall, before exercising the right of sale, ensure that a forced sale valuation is undertaken by a valuer.**

28. I have perused the applicant's affidavit dated 7<sup>th</sup> June 2018 under paragraph 7 and 8 as well as the defendant's affidavit dated 13<sup>th</sup> June 2018 paragraph 9; in respect of the market value, mortgage Lending value and Forced value as of 2016 and as of 24<sup>th</sup> March 2018. The forced value as of 2016 is more than double compared with that of 24<sup>th</sup> March 2018.

29. The defendant submits the valuation was taken by **Zenith Management valuers Ltd**, to which the Plaintiffs/Applicants are complaining about the correctness of the valuation as being too low as to indicate fraud, notwithstanding Plaintiffs/Applicants did not avail an independent valuation. The defendant urges the court should take judicial notice that land like any other marketable commodity is subject to market dynamics that cause its value to rise or fall depending on material factors prevailing at any particular time. In **Simon Njoroge Mburu Vs. Consolidated Bank Limited (2014) eKLR**, under paragraph 14 in a similar application, it was stated;

**"The plaintiff in this matter has claimed, rightly, that the statutory notice issued by the defendant was invalid. He also complains that the defendant did not have a valuation of the suit property carried out before the sale. That is as may be but I do not consider the plaintiff has made out a prima facie case entitling him to an injunction and I am of the view that he would well be compensated by damages. Despite his argument that the suit property has been sold at an under valuation, the plaintiff has not put in evidence before this court of an alternative valuation to prove his point in that regard."**

30. I have considered the valuation under the Plaintiffs/Applicants affidavit as of 3<sup>rd</sup> November 2016 at the time of granting loan and the valuation as of 24<sup>th</sup> March 2018, two (2) years down the line and also the provisions under **section 97 (1) and (2) of the Lands Act**, and notwithstanding that a statutory notice was issued by the Defendant on the forced sale value as of 24<sup>th</sup> March 2018, and in view of the value associated with Lands and there being no reason given for the forced sale value to have drastically fallen to less than 50 percent of the value at time of granting the loan, and in absence of Plaintiffs/Applicants valuers report or joint report, I consider that the Plaintiffs/Applicants have made a prima facie case. In matters involving land, which is a scarce commodity, and whose value has been going up from time to time, I am satisfied as such; the applicant is entitled to injunction as I am not of the view, that he would be compensated by way of damages if the injunction is not granted.

31. The upshot is that the Plaintiffs/Applicants have met the threshold warranting the granting an injunction. I accordingly enter the following orders:-

**i) The Defendant complied with the provisions of the law as regards issuing and serving Statutory Notice and Notice to sell but the auctioneer's failed to issue and serve notification of sale under Rule 15 of the Auctioneers Act.**

**ii) An order restraining the defendant and/or its authorized agents from proceeding with the sale of the charged properties and the defendants Auctioneers be and are hereby compelled to issue a proper notification of sale under Rule 15 of the Auctioneers Rules.**

**iii) The defendant's valuation report be and is hereby expunged from the record and order for fresh joint Valuation Report to be conducted by the valuers to be agreed by the parties within 21 days from today in default the matter to be mentioned before the court for further orders.**

**iv) Cost of the Application to the Plaintiffs/Applicants.**

**v) The Defendant bear auctioneer's costs.**

Dated, signed and delivered at Nairobi this **12<sup>th</sup>** day of **July, 2018**.

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**J .A. MAKAU**

**JUDGE.**