



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO. 430 OF 2016

IMMACULATE OYATSI.....1ST PLAINTIFF/APPLICANT

PANCRAS SIRO OYATSI.....2ND PLAINTIFF/APPLICANT

VERSUS

KENYA COMMERCIAL BANK LTD...DEFENDANT/RESPONDENT

RULING

1. This ruling relates to two Notice of Motion Applications. The first application is dated 24th October 2016, brought under the provisions of; Article 159 of the Constitution of Kenya, Sections 1A, 1B and 3A of the Civil Procedure Act, Order 40 Rules 2, 3 and 4 and Order 51 Rule 1 of the Civil Procedure Rules, 2010, Section 84, 90 and 96 of the Land Act, 2012 and all other enabling provisions of the law.

2. The second Notice of Motion Application is dated 14th December 2016, brought under the provisions of Article 2, 10 and 159 of the Constitution of Kenya 2010, Section 5 Judicature Act Cap 8 Laws of Kenya, Order 52 Supreme Court Practice Rules of England, Section 3A and 63 of the Civil Procedure Act, Chapter 21 Laws of Kenya and all enabling provisions and powers of the law.

3. The Applicants are seeking for the following orders in the first application;

a) That pending the hearing and determination of the suit, an order of temporary injunction be and is hereby issued restraining the Defendant/Respondent whether by himself, employees, servants and/or agents or otherwise assigns and/or any person whatsoever acting on his behalf and/or under his mandate and/or instructions from alienating, advertising for sale, offering for sale, selling, taking possession of, leasing, transferring, charging or otherwise in any manner whatsoever interfering with Land Reference Number 1160/1064 (original number 1160/166/8,

b) That an interlocutory mandatory injunction be and is hereby issued compelling the Defendant/Respondent to issue updated statements of accounts particularizing inter-alia the chronology of the interest charged and the applied rate and loan repayments made by the Plaintiffs as well as full details of thereof;

c) That after issuance of a corrected statement of account, the 1st and 2nd Plaintiffs/Applicants be given reasonable time to pay the arrears that are outstanding and/or the entire indebtedness;

d) That this Honourable Court be pleased to issue any such other or further orders as it may deem fit and necessary to grant in the interests of justice and fairness;

e) That the costs of this Application be provided for by the Defendant/ Respondent

4. The Applicants are seeking for the following orders in the second application;

(a) That a notice to show cause to issue to the Managing Director/Chief Executive Officer of the Respondent to personally attend Court on a date set by the Court to state why he should not be committed to civil jail for disobedience of the Orders of the Honourable Court issued on 31st October 2016;

(b) That the property of Kenya Commercial Bank Limited, the Respondent herein, to be attached and sold for being in contempt of

Court orders;

(c) That the Managing Director/Chief Executive Officer of Kenya Commercial Bank Limited, the Respondent herein, be committed to Civil jail and detained in prison for a term of six (6) months or such period as this Honourable Court will deem fit or both be fined and imprisoned for contempt of the Honourable Court Orders made on 31st October 2016;

(d) That such further or other consequential orders as may seem fair and just to this Honourable Court

(e) Costs of and occasioned by these proceedings to be borne by the Respondent.

5. I shall first deal with the first application. That application is supported by grounds on the face of it and an Affidavit sworn by Immaculate Oyatsi dated 24th October 2016, where she deposes that the Plaintiffs (herein “the Applicants”) requested for a loan facility from the Defendant’s Company (herein “the Respondent”) to purchase a property known as L.R. No. 1160/1064, original number 1160/166/8, Karen Splendor (herein “the suit property”).

6. The Respondent offered the Applicant(s) a mortgage facility letter which they accepted on 17th June 2014, the terms of which were;

a. The mortgage facility was for the sum of Kshs. 70,000,000;

b. The purpose of the facility was to complete the purchase of a residential property House No. 4 situated in L.R. No. 1160/1064 (original number 1160/166/8) Karen Splendor, Nairobi.

c. The term is five years and the repayment being Kshs. 1,636,490;

d. The interest payable on all monies, liabilities and obligations in relation to the facility will be Kshs. 12.9% per annum;

e. Mayira Limited will guarantee the mortgage facility.

7. Subsequently, Mayira Limited the Applicants shareholders and directors issued to the Respondent with a guarantee and/or indemnity dated 15th November 2014. On 27th March 2017, the Applicants became the registered proprietors of the suit property and all improvements thereon, being House No. 4 and on 30th March 2015, a charge dated 23rd March 2015, was registered over the property in favour of the Respondents to secure the loan facility, and the loan facility advanced to the Applicants accordingly.

8. On 2nd December 2015, the Applicants made a payment of Kshs. 2,150,000 to the loan account. That the loan repayments were to be accessed from proceeds of Mayira Limited, for services rendered to the Government of South Sudan in the sum of USD 873,860 and the sale of L.R. Number 93/562 Nairobi. However due to unforeseen political upheavals in South Sudan in late 2015 and 2016, the payments due to Mayira Limited and to the Applicants were delayed. But there were positive indicators of stabilization of the situation and therefore the payment coming through and the clearance of the indebtedness to the Respondent. Similarly, the sale of L.R. No. 93/562 Nairobi, did not proceed as the prospective buyer could not raise the money within the sale period.

9. As a result, the Applicants fell into arrears on the monthly repayments but met and have been engaging the Respondent on the circumstance occasioning the default on repayment and the measures under process to remedy the default and/or drastically reduce the loan or clear it. But the Respondent nevertheless issued statutory notices under section 90 and 96 of the Land Act.

10. On 29th August 2016, the Purple Royal Auctioneers served the 2nd Applicant with a notification of sale, for the outstanding amount of Kshs. 82,872,283.20 as at 31st July 2016. That the notice referred to “Title No. 1160/1060-Karen Splendor House No. 4 Hardy Estate Karen-Nairobi County I.N.O Pancras Siro Oyatsi” and stated that, the suit property would be sold by public auction on Thursday 3rd November 2016 at 11.00am at the Auctioneers offices, and on 17th October 2016, the property was advertised in the Daily Nation newspaper for sale.

11. However, the Applicants are aggrieved on the ground that the 1st Applicant has not been served with any notice stipulated in law within which to redeem the property and failing which the Respondent may on expiry of the period of notice, sell the Applicants property as prescribed in the charge issued on 20th March 2015. Further, the Applicants have not been served with any notification of sale prescribed in the Auctioneers Act, pursuant to said charge over the suit property. That the Respondent and its agents, the Auctioneers have through misrepresentations given notice and notification of sale purporting to sell the suit property, which notices given to the 2nd Applicant dated 29th August 2016, are invalid, and in breach of the charge issued on 20th March 2015 and the Land Act, 2012.

12. The Applicants further argue that the Respondent unilaterally increased the rate of interest from 12.9% as contained in the charge and mortgage facility letter to 18.5%, without adhering to the provisions of Section 84 of the Land Act, 2012 and the provisions of the Banking Act as amended in 2016. The Applicants termed the realization process by the Respondent as a nullity in law hence void ab initio.

13. Therefore if the sale proceeds, the Applicants losses shall suffer irreparable damage and not capable of compensation by way of award of damages, as the suit property constitutes their matrimonial home. Be that as it were, the Applicants prayed that, they be given time to pay the outstanding amount as it is clear that the money from South Sudan due to Mayira Limited which is over and above the principal amount will be released and they shall apply the same towards the payment.

14. The 2nd Applicant also swore an Affidavit in support of the application which reiterated the contents of the Affidavit sworn by the 1st

Applicant in its entirety, and therefore adopts and associates himself fully with the contents thereof.

15. However, the Application was opposed vide a Replying affidavit sworn on 14th November 2016 by Fredrick Mung'athia- the Recovery Manager, Credit support, of the Bank. He deposed that, on 14th April 2014, the Applicants jointly voluntarily applied for a loan from the Respondent by submitting a loan application form on 6th June 2014. On 9th June 2014 the Respondent offered the Applicants a mortgage facility of Kshs. 70,000,000 ("the facility") for the purchase of the suit property. The loan was for a term of five (5) year from the date of draw down, and repayable by monthly installments in the sum of Kshs. 1,636,490.00.

16. The facility was to be secured by a first legal charge over the suit property and a corporate guarantee and indemnity of Kshs. 70,000,000 by Mayira Limited and a Board Resolution authorizing the issuance of Guarantee. That pursuant to clause 5.1 of the letter of offer, the Applicants were enjoined to pay interest on all monies, liabilities and obligations advanced or incurred by them in relation to the Facility at the rate of 12.9% per annum under the bundle mortgage rate being the base rate minus 4.1% for the time being.

17. Further, as per clause 5.4 of the letter of offer, the Bank had the sole discretion to revise the applicable rate or rates of interest within the limits permitted by law upon giving the Applicants at least thirty (30) days' notice prior to any such change.

18. It was further averred that, on 17th June 2014, the Applicants signed the letter of offer accepting the facility and the terms and conditions thereof. On 30th March 2015, a charge was created in favour of the Respondent in the sum Kshs 70,000,000 and the said sum disbursed to the Applicants. However, the Applicants allegedly defaulted on their obligations to repay the loan and continued in the default whereupon on 14th December 2015, the Respondent served them with a statutory notice seeking for repayment of a sum of Kshs 6,472,770,11 being the arrears as at 8th December 2015, with an interest at the rate of 17%. The notice gave the Applicants 90 days within which to pay the money. It was not paid.

19. On 19th April 2016, the Applicants were issued with a forty (40) days' notice of sale of the property and the amount in arrears as at 15th April 2015, was Kshs 14,422,560.90, while the outstanding debt was Kshs 77,212,219.75. On 10th June 2016, the 2nd Applicant allegedly admitted the existence of the outstanding mortgage arrears and explained in the said letter that funds were being awaited from South Sudan on or before 30th June 2016. The Respondent was requested to withhold any action until 30th June 2016.

20. On 17th June 2016, the Respondent wrote to the Applicants a letter conceding to the request on a "without prejudice basis". However the Applicants once again failed to honour their repayments obligations and wrote to the Respondent on 1st July 2016, indicating that they were expecting to receive funds from the sale of a house No. LR 93/562 on or before 15th July 2016. That did not materialize.

21. As a result, the Respondents instructed Purple Royal Auctioneers with instructions to sell the suit property and upon which the Auctioneer served the Applicants with a notification notice together with a Redemption Notice on 29th August 2016. The notice was served on the 2nd Applicant who duly signed the same. The Respondent conceded that the Notification and Redemption notices by error wrongly described the suit property as title No. 1160/1060 instead of 1160/1064, but all the other details of the suit property were correct being: Karen Splendor, House No. 4, Hardy Estate Karen.

22. Be that as it were, on 31st August 2016, the 2nd Applicant wrote to the Respondent acknowledging receipt of the sale notice from the Auctioneers and expressing their difficulties in repaying the mortgage due to the aforesaid political situation in South Sudan and requested that the sale that was due to take place be put on hold. Therefore, the misdescription of the property did not prejudice the Applicants. It was argued that the improper description of the property is a procedural error which the Court has the discretion to disregard and authorize the sale.

23. That the Auctioneer conducted a valuation on the property and indicated the open market value to Kshs 135,000,000 and the forced value to be Kshs 90,000,000. The Respondent in response to the Affidavit sworn by the Applicants argued that, a dispute as to the amount owed is not a ground for restraining the Bank from the selling the property. That the property was charged for a specific amount of money and the Applicants can be adequately compensated by way of damages. It is immaterial that the said property is a matrimonial property.

24. The parties disposed of the application by filing submissions which were subsequently highlighted in Court. I have considered the same alongside the arguments advanced and I find that, the main issue to consider at this stage is whether the Applicants have met the threshold of the grant of injunctive orders sought. It suffices to note that, the following prayers in the application herein are a subject of the final prayers in the Plaint under paragraph 27(e) and (d). These prayers are that:

a) That an interlocutory mandatory injunction be and is hereby issued compelling the Defendant/Respondent to issue updated statements of accounts particularizing inter-alia the chronology of the interest charged and the applied rate and loan repayments made by the Plaintiffs as well as full details of thereof;

b) That after issuance of a corrected statement of account, the 1st and 2nd Plaintiffs/Applicants be given reasonable time to pay the arrears that are outstanding and/or the entire indebtedness;

25. Therefore, the determination thereof at this stage will extinguish the suit at an interlocutory stage.

26. Be that as it were, the principles that govern the grant of an injunction are well settled in the case of; *Giella vs Cassman Brown & Co. Ltd (1973) EA 358*. In a nutshell, the Applicants have to show that they have a prima facie case with probability of success. That damages will not be adequate remedy in the given circumstances and the balance of convenience tilts in their favour.

27. In the instant case, there is no dispute that the Applicants were granted the mortgage facility and it was secured by the suit property and a charge registered over the property in favour of the Respondent to secure the repayment of the principal sum of Kshs 70,000,000. The Applicants have admitted that they experienced difficulties in repayment of the loan facility and went into arrears. The sale proceeds expected from LR No. 93562 did not materialize. It does also appear that they have engaged with the Respondent on several occasions to indulge them.

28. The main issues raised by the Applicants to stall the intended sale are that; the 1st Applicant as a co-owner and co-chargor was not served with notification of sale as well as 45 days' notice within which he may redeem the property as required under Rule 15(c) and (d) of the Auctioneers Rules 1997. Further that the notification of sale served on the 2nd Applicant refers to a different property, in that suit property is LR No. 1160/1064 (original no. 1160/166/8); and the notification of sale is in relation to LR No. 1160/1060; and again referred to the 2nd Applicant alone, yet the property belongs to both Applicants as joint proprietors. That the misdescription of the property goes to the root of the statutory power of sale. And again the same error is reflected in the advertisement of the sale. Finally that the interest rate was varied from 12.9% to 18.5% unilaterally.

29. In response, the Respondent argued that under Rule 15(c) stated above, an Auctioneer is required to serve the registered owner or an adult member of his family residing or working with him with the statutory notice of sale. That the law provides for a notice to be served on a registered owner and not registered owners. That the service upon the 2nd Applicant was sufficient knowledge to the 1st Applicant as the 2nd Applicant is an adult member of the family residing in the suit property, and she has acknowledged the same under paragraphs 14 and 15 of her supporting affidavit. That the notification of sale was signed for by the 2nd Applicant as deposed at the said paragraphs by the 1st Applicant' affidavit and the service upon the 2nd Applicant is supported by one Maina Mwangi the process server who effected the service. The 2nd Applicant then wrote to the Respondent on 10th June 2016, to state that, it was regrettable to receive a sale notice from the Auctioneer, and in response thereof the Respondent wrote to both Applicants on 17th June 2016, bringing the notice to the knowledge of the 1st Applicant.

30. The Respondent maintained that the improper description of the property was a procedural error and the same cannot render the subsequent sale by the mortgagee invalid as stated in the case of; *Louis Roger Ouandji vs Bank of India & Another (2008) eKLR*.

31. Finally, the Respondent submitted that the interest rate in the Redemption notice indicated as 18.5% is a mere typographical error and the correct rate is 17% per annum as indicated in the statutory notice of sale issued under Section 90 of the Act.

32. Having considered the above varying arguments, I find that, a prima facie case is established based on the material placed before the Court and which material must show that the rights of the Applicant have been infringed by the Respondent. Evidence must be placed before the Court to show an infringement of a right and without delving into the merits of the case, the questions that must be asked and answered are:

(a) *Has the Applicants admitted that they were granted a mortgage facility;*

(b) *have they fully repaid the same and/or are they in arrears of repayments;*

(c) *Whether, with the admission of arrears as herein, the Applicants can be entitled to raise the issues raised herein to defeat the Respondent's statutory power of sale;*

33. This Court has had an occasion to make an observation to the effect that, the money that the Bank deals with is not of its own. a Bank simply trades with the depositors funds. It is against this background that the Courts must guard against a possibility of injuncting a chargee from recovery of the funds advanced to a debtor which may have far reaching effect on depositors.

34. Having the considered the issues raised by the Applicants, I find that as much as the 1st Applicant was not served with the notification of sale, and whatever explanation the Respondent may have which will be considered in the main hearing, it is a fact the 2nd Applicant is also liable as a co-owner and registered proprietor of the suit property to be so served, however cannot lack of service cannot estop the chargee from exercising statutory power of sale, when one charger was properly served.

35. Similarly, although the property was improperly described and it has been admitted, it is a fact that the Applicants knew the particular property they had charged to the Respondent and the description of the suit property as LR No. 1160/1060 instead of LR. No. 1160/1064 can not be a ground perse to stop the sale. Courts have held again and again that misdescription of a property is not a ground to stop a sale. It is not indicated that there was another property of the same description as LR No. 1160/1064 that would have caused confusion. Be that as it were, the issues of misdescription of the property and/or failure to serve the notice upon the 1st Applicant can be remedied by an order that the same be properly served. Finally, the Respondents have admitted and are ready to correct the interest rate indicated in the Redemption notice from 18.5% to 17%, therefore that should not cause an issue.

36. The principles of equity are clear, that he who goes to equity must go with clean hands and that equity looks at that done that ought to have been done. The Applicants herein cannot be in default and seek for an equitable remedy of injunction while in such default. It is in this regard that the Court makes the following orders;

(a) *That a temporary injunction shall issue herein only on condition that the Applicants pay all the outstanding arrears within a period of thirty (30) days from the date of this order and resume repayment of monthly installments on or before the first day of the month following the month of this order;*

(b) *In the meantime, the Respondent shall issue proper notices with proper description of the property;*

(c) In default of payment of arrears as aforesaid, the Respondent will be at liberty to exercise its power of statutory power of sale in accordance with the provisions of the law;

(d) The parties shall forthwith commence on the compliance with pre-trial directions with a view of preparing the matter for the hearing of the main suit;

(e) The costs in relation to this application shall abide the outcome of the main suit.

37. I shall now come to the second application. In a nutshell, the Plaintiffs/Applicants aver that, despite the order given by the Court on 31st October 2016, restraining the Respondent from advertising the suit property for sale on 1st November 2016, the Respondent caused an advert in the Daily Nation Newspaper for the sale of the suit property. It is averred that, that particular act by the Respondent is in blatant disobedience and contempt of the said Court order, therefore to protect the dignity, the sanctity of the Court processes and restore public confidence in the rule of law, the orders sought for in the application should be granted.

38. The application was opposed vide grounds of opposition which states as follows;

(i) *The application is misconceived, incompetent, an abuse of the Court process, bad in law and is only meant to delay the determination of the pending application for injunction;*

(ii) *The application is in breach of the clear provisions of Rule 81.9 of the Civil Procedure (Amendment No. 2) Rules 2012 as no penal notice was prominently displayed or at all on the front copy of the Order served on the Defendant;*

(iii) *The application as filed and the prayers sought thereof are unmeritorious and ought to be dismissed with costs to the Defendant.*

39. The application was disposed of by filing of submissions and basically the Applicants relied on the Section 63(c) of the Civil Procedure Act citing that the Court can commit a person guilty of disobedience of its order to prison and order that his property be attached and sold. Reliance was placed on the case of; Shimmers Plaza Limited vs National Bank of Kenya Limited (2015) eKLR .

40. In response it was argued that, the order issued by the Court in this matter and served on the Defendant and the Auctioneers did not contain a warning to the Defendant or the Auctioneers that its disobedience would be contempt of Court punishable by imprisonment, a fine or sequestration of assets. Further, there was no undertaking by the Defendant not to do the act which it was restrained from doing. That the display of a warning or penal notice in the Court order is a mandatory requirement in contempt of Court proceedings.

41. However, the Respondent admitted though on without prejudice basis, that the Auctioneers accidentally, unintentionally, inadvertently and/or by error failed to notify the Nation Group Limited not to advertise the property for sale on 1st November 2016 and so the advertisement was not in defiance of the Court order.

42. From the arguments herein, it is a fact that the Court stopped the sale on 31st October 2016, and therefore the advertisement on 1st November 2016 was in total disregard of that order. The saving grace is that the sale did not take place on 1st November 2016 and the Respondent have readily admitted that the advertisement was carried out in error. Granting the orders sought for in the subject application will not progress this matter, though it must be clearly stated that the Court will not condone intentional or unintentional disobedience of its orders.

43. The only appropriate remedy to the Applicants is to pay costs of the Applications. In that regard, I make the following orders in relation to the subject Applications herein: the costs in relation to the second application dated 14th December 2016, are awarded in favour of the Applicants.

44. Those are the orders of the Court.

Dated, delivered and signed in an open Court this 8th day of October 2018.

G.L. NZIOKA

JUDGE

In the presence of:

Mr. Wesonga for Mr. Wekesa for the 1st and 2nd Applicants

Ms. Okabasi for Ohaga for the Respondent

Langat.....Court Assistant