



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 76 OF 2016

MUSONERA HILLARY WILSONPLAINITFF

VERSUS

1. KENYA WOMEN FINANCE TRUST

2. GARAM INVESTMENTS AUCTIONEERS.....DEFENDANTS

RULING

1. The amended Notice of Motion dated 5th July, 2016 has been brought under the provisions of Order 40 rule 1, 2, 3(1) and 4, Order 50 rule 1 and Order 8 rule 1 of the Civil Procedure Rules, Sections 1A, 1B, 3, 3A, 63(c) of the Civil Procedure Act and Article 159 (2) (d) of the Constitution of Kenya and all other enabling provisions of law. It seeks the following orders:-

(i) Spent;

(ii) Spent;

(iii) That pending the hearing of the main suit, the defendant, their servants and/or agents or otherwise be restrained from alienating, disposing, selling and/or in any manner dealing with the suit and developments on LR. No. MN/1/6794 CR 23114 in Nyali area, Mombasa;

(iv) That the OCS Mtwapa Police Station do give security in effecting this order; and

(v) That costs of the application be provided for.

The application is supported by the amended supporting affidavit of the applicant Musonera Hillary Wilson dated 5th July, 2016 and the grounds on the face of the application.

2. The respondents filed their grounds of opposition on 28th July, 2016 and a replying affidavit on 24th August, 2016.

3. On 28th July, 2016, this court gave the timelines within which written submissions were to be filed. Although Mr. Mutubia, Learned Counsel for the respondent on 19th December, 2016 informed the court that both parties had filed their written submissions, this court has not traced the applicant's written

submissions in the court file.

4. On the date of the hearing of the application, neither the applicant nor his Advocate attended court. The Court proceeded to hear the Counsel for the respondents after establishing that an affidavit of service was filed on 24th January, 2017 to show that the law firm of Angelo Owino & Co. Advocates was served with a hearing notice.

5. Mr. Mutubia informed the court that the 1st respondent decided to exercise its statutory power of sale against the applicant who has defaulted in payment of an outstanding loan. The applicant then moved the court so that the 1st respondent could be stopped from selling his property by public auction.

6. Counsel submitted that the applicant admits having been advanced Kshs. 18 Million by the 1st respondent and that he is servicing the loan. He referred the court to the loan agreement forms attached as annexures AC1 and AC2 to the 1st respondent's affidavit. The charge document was attached thereto as annexure AC3. It was argued that the said documents give the 1st respondent the right to sell the property of the applicant on defaulting in payment of the loan.

7. Mr. Mutubia referred to annexure AC4 which is a loan statement attached to the replying affidavit of the 1st respondent. He stated that the applicant has been inconsistent in repaying the loan and that as at July 2016, the outstanding balance was Kshs. 21,400,000/=. The said amount continues to attract penalties and interest.

8. The court was informed that the applicant alleges that he was not served with the requisite notices. Counsel for the 1st respondent referred the court to the annexure marked as AC5 attached to its replying affidavit which is a notice that was issued to the applicant and the 2nd borrower. A certificate of posting was attached to the said affidavit and marked as annexure AC6, the 2nd statutory notice was attached as annexure AC7 a certificate of posting was attached as annexure AC8 to the said replying affidavit. Two affidavits of service in respect to the 1st and 2nd notices were also attached to the said affidavit. Counsel therefore argued that the allegation that the applicant was not served does not therefore arise and that the applicant had failed to establish a prima facie case for grant of an injunction. The court was invited to refer to the respondents' list of authorities that point to the fact that courts do not protect a debtor who has defaulted in payment of a loan. He prayed for the application herein to be dismissed with costs to the respondents.

ANALYSIS AND DETERMINATION

The issue for determination is if the applicant has met the threshold required for grant of an order for an injunction.

9. A perusal of the applicant's amended supporting affidavit in paragraphs 3 and 4 contains an admission by the applicant to having applied for a loan facility of Kshs. 18 Million in the year 2014 with which he purchased a property namely, LR No. MN/1/6794 CR 23114 in Nyalali area, Mombasa. In paragraphs 5 and 6 thereof, he states that he has been servicing the loan but his business has not been doing well and he still has a loan balance to pay. In paragraphs 7, 8 and 9 he deposes that the respondents by public auction threatened to sell the property and have advertised the same, yet he has not been issued with a statutory notice. It is for the said reason that he prays for the orders sought.

10. I have perused the annexures attached to the applicant's affidavit and those attached to the 1st respondent's replying affidavit. There is no doubt that the applicant was advanced a loan of Kshs. 18 Million by the 1st respondent as per the facility letter dated 11th June, 2014 that was duly executed by the parties hereto. A charge was duly registered over certificate of Title No. CR. 23114 in the name of the applicant herein as the chargor and the 1st respondent as the chargee. The statement of account marked as annexure AC4 reveals that the applicant has been making payments intermittently but has in most instances fallen short of making the Kshs. 347,860.21 monthly payment proffered in the letter of offer

marked as annexure AC1. As at 30th June, 2016, the outstanding loan stood at Kshs. 21,419,245.23.

11. Clause 9.1 of the charge document attached as annexure AC3 to the 1st respondent's replying affidavit provides that if the chargee shall wish to exercise its power to sell the premises, the chargee shall prior to exercising such right serve on the chargor and/or borrowers (with a copy to such persons as are prescribed by section 96(3) of the Land Act) a written notice to sell the premises and shall not proceed to complete any contract for the sale of the premises until at least forty (40) days have elapsed from the date of service of such notice.

12. Acting on the strength of clause 9.1 of the charge document, the first statutory notice dated 6th October, 2015 was issued to the applicant and his co-borrower as per the certificate of posting dated 28th October, 2015. The said statutory notice was also personally served on the applicant on 17th October, 2015 as per the affidavit of service marked as AC6 attached to the 1st respondent's replying affidavit. The applicant received the said notice on behalf of his co-borrower. The second statutory notice dated 10th February, 2016 was issued under the provisions of section 90(3)(e) of the Land Act. A certificate of posting dated 8th March, 2016 was attached to the 1st respondent's affidavit as annexure AC8. An affidavit of service was also attached to the replying affidavit to show that the second statutory notice was on 14th March, 2016 served on the 2nd borrower, who is the applicant's wife. She accepted service of the said documents on her behalf and that of the applicant herein. It thus follows that the 1st respondent resorted to exercising its statutory power to sell the charged property due to non-compliance on the part of the applicant.

13. The provisions of Section 90 of the Land Act provides as follows:-

(1) 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.

(2) 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 (3) months, by the end of which the payment in default must have been completed. (emphasis mine).

c.

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."

Section 90(3) thereof provides that:-

"If the chargor does not comply within two (2) months after the date of service of the notices under subsection (1), the chargee may:-

a. sue the chargor for any money due under the charge,

- b. appoint a receiver of the income of the charged land,**
- c. lease the charged land, or if the charge is of a lease, sublease the land,**
- d. enter into possession of the charged land; or**
- e. Sell the charged land.”**

14. In the case of **Nyangilo Ochieng & Another vs Kenya Commercial Bank [1996] eKLR**, the Court of Appeal stated as follows :-

“It is for the chargee to make sure that there is compliance with the requirements of s.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.”

15. In this case, the 1st respondent covered its ground well to ascertain that the statutory notices were not only served through registered post but through personal service as well. It is thus my finding that the 1st respondent has discharged its burden of proof with regard to service of the statutory notices of sale.

16. I have considered the contents of the applicant’s supporting affidavit and the admission that he owes the outstanding loan because business has been bad. I have also taken into account that the 1st respondent is in business. It requires borrowers to pay money advanced to them for smooth flow of business and for it to stay afloat. The applicant failed to prosecute his application and I am in agreement with Counsel for the respondents that the applicant has failed to satisfy the principles set out in the cases of **Giella vs Cassman Brown Company Limited [1973] EA 358, Mrao Ltd. vs First American Bank Kenya Ltd. & 2 Others [2003] eKLR** and **Francis Ngarama Kiratu vs Equity Bank Limited & Another [2016] eKLR**.

17. The upshot of the foregoing is that the application dated 5th July, 2016 is hereby dismissed with costs to the respondents.

DELIVERED, DATED and SIGNED in open court at MOMBASA on this 14th day of March, 2017.

NJOKI MWANGI

JUDGE

In the presence of:-

No appearance for the Applicant

Ms. Kariuki holding brief for Mr. Mutubia for the Respondent

Mr. Oliver Musundi – Court Assistant