



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURT
ENVIRONMENT AND LAND COURT
ELC.NO.220 OF 2017

IRENE KEMUNTO ONGORI.....PLAINTIFF/APPLICANT

= VERSUS =

HOUSING FINANCE COMPANY OF KENYA.....DEFENDANT/RESPONDENT

R U L I N G

The matter for determination herein is the **Notice of Motion** application dated **24th June 2015**, brought by the Plaintiff/Applicant herein **Irene Kemunto Ongori** and which is brought under Order 40 Rules 1, 2 & 3 of the Civil Procedure Rules, Sections 1, 1A, 1B, 3 & 3A of the Civil Procedure Act together with all the other enabling provisions of the law. The applicant has sought for various orders against the Defendant herein, **Housing Finance Company of Kenya** hereinafter referred to as **HFCK**. The orders sought are:

1. *Spent*
2. *Spent*
3. ***THAT the Honourable Court be pleased to issue a temporary injunction against the Respondent, its agents, servants, employees and or any other person acting under its instructions from dealing, transferring, alienating, inhibiting, recharging and or in any other manner whatsoever interfering with the Applicant's parcel of land LR No.13869/5 pending the hearing and determination of this suit.***
4. ***THAT costs of this application be borne by the Respondent.***
5. ***Any other relief that the Honourable Court may deem just and fit to grant.***

This application is premised on the grounds stated on the face of the application and on the Supporting Affidavit of the Applicant herein. The grounds in support of the application are:-

1. ***The Applicant charged her property with the Respondent and has been repaying the loan.***
2. ***The Respondent has purported to auction the property without affording the Applicant the statutory and mandatory procedures as by law required.***

3. *No auction has in fact taken place and any purported auction is an illegality.*
4. *There is an apparent risk of the Respondent proceeding to unilaterally change the ownership of the property on account of an auction that never was.*
5. *Unless stopped by orders of this Court, the Respondent may deal to the disadvantage of the Applicant.*
6. *No prejudice shall be suffered if the orders sought are granted.*
7. *The Applicant shall suffer irreparable loss and damage if orders are not granted.*
8. *The loan account of the property are not reconciled by parties herein.*

In her Supporting Affidavit, **Irene Kemunto Ongori** averred that on or about the **7th January 2011**, she charged her property known as **LR No.13869/5** to the Respondent for **Kshs.7,350,000/=** as is evident from annexure **IKO-1** which is a copy of the Charge document. Further that it was the term of the said Charge that she was to repay the loan vide **monthly installments** of **kshs.174,856/=** and the said sum was subject to negotiations. She also averred that she embarked on repayment of the said loan and during such repayment, she re-negotiated the repayment sum to a lower sum and the Respondent readily agreed. It was her contention that during the repayment, there was a reconciliation problem as the figures were not adding up in their respective accounts. It was her further contention that she has consistently made repayments to the Respondent and as at **16th June 2015**, the **arrears** on account were **kshs.169,424/30** as is evident from annexure **IKO-2**. Further that she made a request for the Statement of Account but the Respondent has failed and/or refused to provide her with the same. The Applicant alleged that the auction that was earmarked for **22nd May 2015**, did not take place and therefore there was no public auction conducted. She also alleged that she was never served with the **Mandatory Notices** which are cardinal requirements for the Respondent before it could exercise its statutory Power of Sale. She urged the Court to allow her application.

The application is opposed and **Martin Machira**, the **Legal Manager** of the Defendant Bank swore a **Replying Affidavit** and averred that the Plaintiff obtained a loan facility from the Defendant for a sum of **Kshs.7,350,000/=** and she executed a Charge dated **7th January 2011**, over **LR No.13869/5** in favour of the Defendant as security for the loan facility. He averred that it was the terms of the said Charge that the Plaintiff would pay the debt as provided by the said Charge document. However, the Plaintiff has been a constant defaulter and the Defendant has at all times kept the Plaintiff aware of the status of her account including sending monthly Statements of Account to the Plaintiff. It was his contention that it is misleading, dishonest and an instance of material non-disclosure for the Plaintiff to aver in Paragraph 9 of the Supporting affidavit that the Defendant has failed to provide the Plaintiff with Statements of Account. He also averred that following the continued defaults, the Defendant issued the Plaintiff with various statutory Notices. Further that following failure by the Plaintiff to settle the outstanding loan even after service of statutory Notices, the suit property was **advertised** on **7th May 2015** on **Daily Nation Newspaper** for **sale** by **Public Auction**. It was his contention that on **22nd May 2015**, the suit property was **sold** by **Public Auction** as advertised to One **Isaack Njiru Mwige** who was the successful bidder. However, the Plaintiff has not enjoined the said Purchaser, **Isaack Njiru Mwige** in these proceedings.

He also averred that the Defendant complied with all the requisite provisions of law regarding Chargees statutory power of sale. In any case, the Plaintiff has admitted being in default prior to the sale of the suit property by the Defendant.

The Applicant filed a **Supplementary Affidavit** and reiterated that no auction took place and if at all there was any public auction, it went against the laid down covenant in the charge document executed by the parties herein. It was her contention that she did not receive the correspondences as alleged by the Defendant. She denied that she has any caretaker at the premises known as **Samuel Benson Manthi**, who was allegedly served with the **45 days** redemption Notices.

The Respondent also filed a further **Replying Affidavit** on **20th July 2015**, and averred that the Defendant **executed transfer** of the suit property in favour of the Purchaser **Isaack Njiru Mwigie** on **19th June 2015**, and the transfer was lodged on **22nd June 2015** and **registered** on **25th June 2015**. It was his contention that **Isaack Njiru Mwigie** is the registered proprietor of the suit property and further that the said **Isaack Njiru Mwigie** is not a party to this suit. Further that no orders of injunction can issue against an event that is already past. He urged the Court to dismiss the instant application.

The application was canvassed by way of Written Submissions. The **Law Firm of Odera Obar & Co, Advocates** for the Plaintiff filed their Written Submissions on **12th August 2016**, and urged the Court to allow the Plaintiff's application as the Defendant breached the provisions of various Sections of the **Land Act 2012**, particularly **Sections 90(1) and (2), Section 96 (2) (b) and Section 97(2)** of the said Act which provides that:-

"A charge shall, before exercising the right of sale, ensure that a forced sale valuation is undertaken by a valuer"

The Plaintiff relied on various decided cases among them the case of **David Gitome Kuhiguka ..vs..Equity Bank, Nairobi HCCC No.94 of 2013**, where the Court held that the duty of the chargee exercising power of sale to value the property before sale is obligatory.

The Plaintiff further relied on the case of **Maina Wanjigi & Another ..vs.. Bank of Africa & Another, Nairobi HCCC No.237 of 2014**, where the Court held that, an auction process must retain its integrity and the conduct must not leave room for speculation. The Law Firm of **Walker Kontos & Co. Advocates** for the Defendant/Respondent filed their submissions on **11th September 2015**, and argued the Court to dismiss the Plaintiff's application. They submitted that the Plaintiff was a constant defaulter and the Defendant duly exercised its Power of Sale as provided for in the charge document. The Defendant relied on various decided cases among them the case of **Maithya ..vs.. Housing Finance Company of Kenya & Another (2003) 1 EA 133** where the Court held that:-

"Those who come to equity must do equity. Failure to service the loan or to pay the lender or to pay into court what had been admitted took the Applicant outside the realm of exercise of the courts discretion"

Further the Defendant relied on the case of **Morris & Co. Ltd ..vs..Kenya Commercial Bank Ltd (2003) 2 EA 605**, where the Court held that:-

"It is well settled law that a dispute as to amount due cannot be a ground for an injunction to restrain a lender from appointing a receiver on grounds of default of in payment obligations"

The Defendant further relied on the case **of Munidi Okemba Lore..vs.. Lucy Wambui Gachara (2014) eKLR** where the Court relied on the provisions of **Section 99(4)** of the **Land Act** and held that:-

"Any person, according to Section 99(4) of the Land Act, prejudiced by an authorized improper and irregular exercise of the Power of Sale shall have a remedy in damages against the person exercising that power, in this case, the bank"

The Defendant also relied on the case of **Mrao Ltd ..vs..First American Bank (CA) 2003 eKLR 125**, where the Court held that:-

".....It is the duty of any person entering into commercial transaction, particularly one in which large amount is involved, to obtain the best possible advice so that he can better understand his obligations under the documents to which he appends his signature or seal. If courts are going to allow debtors to avoid paying their debts by taking some of the defences I have seen in recent times, for instance challenging contractual interest rates, banks will be crippled if not driven out of business altogether and no serious investor will bring their capital in a country whose

courts are a haven for defaulters”.

The Defendant urged the Court to dismiss the Plaintiff’s application with costs.

This Court has now carefully considered the instant ***Notice of Motion*** and the ***annexures*** thereto. The Court has also considered the pleadings in general, the written submissions, cited authorities and the relevant provisions and the Court makes the following findings;

The Application herein is anchored under Order 40 Rules 1 & 2 which order provides for situations when temporary injunction may be granted. The said Order 40 Rule 1 provides that:

“Where in any suit it is proved by affidavit or otherwise—

(a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or

(b) That the Defendant threatens or intends to remove or dispose of his Property in circumstances affording reasonable probability that the Plaintiff will or may be obstructed or delayed in the execution of any Decree that may be passed against the Defendant in the suit. the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders”.

Further the application is anchored under Sections 1A & 1B of the Civil Procedure Act which deals with the overriding objective of the Act which is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes. The said Sections also provides that the Court has a duty to further the overriding objective. This application is also premised upon Section 3A of the Civil Procedure Act which donates to court the inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of the court process.

Taking into account the above provisions of law, the Court is also alive to the fact that the injunctive orders sought are equitable reliefs which are granted at the discretion of the Court. However the said discretion must be exercised judicially. See the case of ***Giella..vs..Cassman Brown & Co. Ltd 1973 EA 358***, where the Court held that;

“The granting of an interim injunction is an exercise of judicial discretion and an appellate Court will not interfere unless it is shown that the discretion has not been exercised judicially.”

Further in deciding whether to grant or not to grant the sought orders the Court will be guided by the well settled principles for grant of injunction orders as stated in the ***Giella..vs..Cassman Brown case (supra)*** where the Court held that”-

“The conditions for grant of an interlocutory injunction are well settled in East Africa. First an Applicant must show a prima facie case with probability of success. Secondly, an interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience. See East Africa Industries..vs..Trufood (1972)EA 420.”

As the Court embark on the analysis of available evidence to determine whether the orders sought are deserving or not, this Court will caution itself that at this interlocutory stage, it will not deal conclusively with the disputed facts or issues based on the affidavit evidence. Such issues can only be effectively dealt with after calling of evidence and testing the same through cross-examination. See the case of ***Agip (K) Ltd..vs..Mahesh Chardra Himatlal Vora & Others, Civil Appeal NO.213 of 1999***, where the Court held that;

“In an application for injunction, the Court should not delve in substantive issues and make final concluded views of the dispute before hearing oral evidence.”

There is no doubt that the Plaintiff herein entered into a contract with the Defendant to take a loan facility from the Defendant Bank on **7th January 2011**. There is no doubt that the said loan was for **Kshs.7,350,000/=** and the Plaintiff offered her property **No.LR 13869/5 I.R No.117027/1** as security. There is no doubt that the Plaintiff/Applicant was supposed to have paid **Kshs.174,856/=** per month as the monthly installments. However, it is evident that the Plaintiff/Applicant was in default and several correspondences are available showing that the Plaintiff was in default and she even sought for re-adjustment of the monthly installments. It is also evident that the charge document contains several clauses which stipulated duties and obligations of each of the parties to the charge. Of special interest is **clause no.8** which is titled **“events of default”**. It is stated that:

“The chargor and the chargee hereby agree that the chargee shall cease to be under any further commitment to the chargor and the charge debt and interest and other moneys secured by this charge shall immediately become due and payable upon the happening of any of the following events.

a) If the chargor fails to pay when demanded any sum due and owing to the chargee under this charge and fails to comply with any term or condition of any facility from the charge or fails to perform or discharge any term agreement obligation or liability of the charger or the chargee under this charge or in any other security created by the charge in favour of the charge contained or implied or under any loan agreement facility letter or other agreement or

The Defendant/Respondent has alleged that the Plaintiff/Applicant was in default of payment of her monthly installments and that she was in arrears and therefore the Defendant utilized the above provisions of **clause 8**. The Plaintiff has on her part faulted the manner in which the alleged sale of her charged property was carried out. The Applicant has alleged that she was not served with the relevant statutory Notices and that the Defendant breached the provisions of Section 97(4) of the Land Act by failing to carry a valuation of the charged property before selling the same.

Further that there was no public auction carried out and if at all the charged property was sold through any public auction. Then the same was null and void for failure to meet the mandatory requirements for a charger who is exercising its statutory power of sale. On its part, the Defendant has alleged and submitted that it met all the statutory obligations before exercising its statutory power of sale. Further that the suit property has been sold and the said Purchaser is not enjoined as a party on these proceedings. Indeed, if at all the suit property has already been sold to a 3rd party, then the Plaintiff needed to enjoin the said 3rd party as a party to these proceedings since the orders issued by this Court over the suit property would affect the said third party.

The Plaintiff has alleged that the Defendant breached various provisions of law while exercising its statutory power of sale. The Defendant has vehemently denied the said allegations. The said allegations are disputed facts which cannot be determined through affidavit evidence. The said disputed facts can only be determined after calling of oral evidence and interrogating the same. At this juncture, this Court cannot hold and finds that the Defendant failed to comply with the obligatory requirements while exercising its statutory power of sale. As I had pointed out, this Court will be cautious not to delve into disputed facts which can only be properly determined after calling witness in an oral hearing.

The Defendant has alleged that the suit property has already been sold to one **Isaack Njiru Mwige**. Indeed, this Court has seen a transfer by chargee dated **19th June 2015**. This suit was filed on **26th June 2015** when the Transfer by chargee had already taken place. Injunctions are granted to prevent a future event but not an event that has already occurred. The logic herein is that the purpose of injunction is to preserve the *status quo* and it is issued when there is an immediate danger to property by sale or other disposition. See the case of **Noormohammed Janmohammed..vs..Kassman Ali Virji Madhani (1953) 20 LRK8** where it was held that:

“The purpose of temporary injunction is to preserve the status quo.”

It is alleged that the suit property has already been sold to a 3rd party. The Plaintiff has alleged that the said sale was null and void, breach of statutory and obligatory requirements. However, without tangible evidence, this Court cannot at this juncture hold that the said sale was improper, null and void. If the sale has already taken place, then it would be an exercise in futility to injunct the Defendant Bank from selling the same. See the case of **Mavoloni Company Ltd..vs..Standard Chartered Estate Management Ltd, Civil Application no.266 of 1997**, where the Court of Appeal held that:

“An injunction cannot be granted once the event intended to be injuncted has been overtaken by events.”

Equally in this matter, the Plaintiff/Applicant has sought to restrain the Defendant from selling the suit property. The said property has allegedly been sold to a 3rd party **Isaack Njiru Mwige** who is not a party to this suit. The intended event has been overtaken by events. Even if this Court was to invoke the provisions of Section 1A, 1B and 3a of the Civil Procedure Act and issue any necessary orders such that would prevent further dealing with the suit land, then the said orders would be against **Isaack Njiru Mwige** who is the Purchaser of the suit property and who is not a party to this suit. Issuing such orders would amount to condemning the said Purchaser unheard and that would be against the rule of natural justice.

Having now carefully analysed the available evidence and the pleadings in totality, the Court finds that the issues raised by the Plaintiff/Applicant would only be adequately determined with finality by calling evidence in the main trial. For now the Court finds that the Applicant has failed to establish any of the threshold principle for grant of injunctive orders.

For the above reasons, the Court consequently dismisses the Plaintiff/Applicant’s **Notice of Motion** dated **25th June 2015** entirely with costs being in the cause.

It is so ordered.

Dated, signed and delivered at NAIROBI this 14th day of July 2017.

L. GACHERU

JUDGE

14/7/2017

In the presence of

Mr. Odera for Plaintiff/Applicant

Mr. Kimani for Defendant/Respondent

Hilda Court clerk

COURT: Ruling read in open court in the presence of the above states advocates.

L. GACHERU

JUDGE

14/7/2017