



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

HCCC CASE NO. 520 OF 2015

BENSON WAKABA MWANGI

T/A ST. TITO HIGH SCHOOL.....PLAINTIFF

VERSUS

BANK OF AFRICA KENYA LIMITED.....DEFENDANT

R U L I N G

1. The **Notice of Motion** application before the court is dated 2nd October 2015 and is filed by the Plaintiff/Applicant seeking the following orders;
1. **That this matter be certified as urgent to be heard ex-parte in the first instance.**
2. **That pending the hearing of this application the intended sale of the plaintiff's land Title No. RUIRU/KIU BLOCK 2/GITH/4162 scheduled on 28th October, 2015 be suspended and postponed.**
3. **That a Temporary injunction do issue restraining the Defendant, its agents and or servants from selling by public auction the plaintiff's land title No. RUIRU/KIU BLOCK 2/GITH/4162 pending the hearing of the suit.**
4. **That this Honourable Court to be pleased to extend the period of time to repay the loan balance by Twelve (12) months from today.**
5. **That Costs be provided for.**
2. The application is premised on the grounds set out therein and is supported by the affidavit of the Plaintiff sworn on 2nd October 2015.
3. The Plaintiff/Applicant's case is that he was given a financial facility by the Defendant Bank in December 2012, and that he gave the suit property, which is alleged to be his matrimonial home, as security for the loan. Soon, the applicant fell into arrears interms of the loan repayment causing the defendant to take steps to realise the security being Title No. **RUIRU/KIU BLOCK 2/GITH/4162.**
4. The Applicants case is that he is repaying the loan, and pleads with this court to extend the period of time to repay the loan balance by twelve (12) months.
5. The Defendant/Respondent opposes the application and it has filed a Replying Affidavit sworn on 14th October 2015 by Samuel Irungu.
6. The brief background of the suit and application is as follows;

The Suit Property is charged by the Plaintiff to the Defendant to secure banking facilities

amounting to Kshs.8,200,000/=, which the Defendant granted to the Plaintiff. The terms and conditions of the banking facilities granted by the Defendant to the Plaintiff are contained in the following documents:

- i. ***A letter dated 10th March 2011 by which the Defendant offered the banking facilities to the Plaintiff (“the Letter of Offer”). The Plaintiff expressly accepted the terms set out in the letter. A copy of this letter is contained in Exhibit S1 1 to the Replying Affidavit (see page 1 to 6 of the Exhibits);***
- ii. ***The Defendant’s Standard Terms and Conditions were Applicable to all Banking Facilities. The Plaintiff expressly accepted the said terms and conditions. A copy of the Defendant’s Standard Terms and Conditions Applicable to all Banking Facilities is contained in Exhibit S1 1 to the Replying Affidavit (see page 7 to 22 of the Exhibits).***
- iii. ***A charge dated 30th September 2011 was made between the Plaintiff and the Defendant. The charge is contained in Exhibit S1 2 to the Replying Affidavit (see page 23 to 48 of the Exhibits).***

Under the Charge, the Plaintiff covenanted that he would pay all the monies, obligations and liabilities secured by the Charge on the 7th day after the date of the Charge or as per the Letter of Offer. Further, it was agreed in terms of Clause 8(a) of the Charge that in the event of the Plaintiff’s default in paying when demanded any sum due and owing to the Defendant under the Charge, the monies secured by the Charge would immediately become due and payable. The plaintiff failed to perform his obligations under the Charge as he failed to repay the banking facilities granted by the Defendant and secured by the Charge. The fact that the Plaintiff failed to make repayments is not denied.

7. The Defendant issued three separate demand letters to the Plaintiff:

- i. ***A first demand dated 16th June 2014 – see Exhibit SI 3 to the Replying Affidavit (page 49 of the Exhibits);***
- ii. ***A second demand letter dated 17th July 2014 – see Exhibit SI 3 to the Replying Affidavit (page 50 of the Exhibits).***
- iii. ***A third and final demand letter dated 8th September 2014–see Exhibit SI 3 to the Replying Affidavit (page 51 of the Exhibits). All the above demands were ignored by the Plaintiff.***

8. In view of the Plaintiff’s default in making payments, the Defendant made the decision to exercise its rights as a charge and caused a Statutory Notice dated 19 February 2015 to be issued to the Plaintiff – see Exhibit SI 4 to the Replying Affidavit (page 52 of the Exhibits). Also see Exhibit BMW 1 to the Supporting Affidavit (page 3 to 4 of the Exhibits). This notice was ignored by the Plaintiff.

Following the expiry of Statutory Notice, the Plaintiff caused a 40 – day Notice to sell dated 5th June 2015 to be issued to the Plaintiff – see Exhibit SI 4 to the Replying Affidavit (page 54 of the Exhibits). Also see Exhibit BMW 1 to the Supporting Affidavit (page 1 to 2 of the Exhibits). This notice was ignored by the Plaintiff.

9. The Defendant has caused the Suit Property to be valued by Real Appraisal Limited and they have prepared and issued a Valuation Report dated 27th July 2015 – see Exhibit SI 4 to the Replying Affidavit (page 56 to 76 of the Exhibits).

10. The Defendant then Instructed Keysian Auctioneers to issue the requisite statutory notices and advertisements to sell the Suit Property by public auction. Copies of a 45 – day Redemption Notice and a Notification of Sale issued by Keysian Auctioneers to the Plaintiff and an advertisement published in the Daily Nation of Monday, 5th October 2015 are contained in Exhibit BMW 3 to the Supporting Affidavit (see pages 17 to 20 of the Exhibits).

11. As at 10th August 2015, the debt owed by the Plaintiff to the Defendant stood at Kshs.10,670,004.66. The Plaintiff does not deny that he owes a debt to the Defendant and he does

not dispute the above amount. In prayer 4 of the Application, the Plaintiff curiously requests the court to grant him a 1 year extension to repay the debt owed to the Defendant.

12. Parties filed submissions which I have considered. I raise the following one issue for determination;

i. ***Whether the Defendant/Respondent can exercise its statutory power of sale of the security.***

13. I have considered the submissions by the defendant who has given the chronology of events establishing that indeed a loan facility was granted to the Plaintiff and the Plaintiff has defaulted in repayment thereof. The letter of offer above said was given by the defendant and was accepted by the plaintiff who also accepted the applicable terms which were reduced into writing. Further a change dated 30th September 2011 was drawn under which the Plaintiff consented to pay the loan in the manner agreed. The Plaintiff defaulted and the defendant sent three demand notices, and a statutory notice on 19th February 2015. The plaintiff still failed to comply causing the defendant to take steps to exercise its statutory powers of sale of the security.

14. The Applicant's main plea is that it be given more time to repay the loan. In fact the applicant admits the debt and is only pleading for more time. It is clear from the court record that all the statutory Notices required to be given by the defendant were given to the plaintiff. In view of the applicant's admission of the loan, I do not think that the applicant has established a case for an injunction as laid down under the ***Giella -Vs - Cassman Brown (1973) EA 753***. In that case, the court established three principles for grant of temporary injunction as follows:

- a. ***The applicant must demonstrate that it has a prima facie case with a probability of success;***
- b. ***An injunction will not issue unless the applicant will suffer irreparable harm or damage which cannot be adequately compensated by an award of damages; and***
- c. ***If the court is in doubt, it will decide the application on a balance of convenience.***

15. In my view the applicant has not satisfied the first two principles: it has not established a prima facie case capable of succeeding; and it has not proved that if injunction is not granted it will suffer irreparable harm which cannot be compensated by damages.

16. In the case of ***Giro Commercial Bank Ltd - Vs – Mutegi (2002) eKLR***, the court had this to say, which is relevant to this application:

“In view of the admitted facts, and in view of the fact that the debt was admitted as due and further that the loan was not being serviced, the superior court should not have granted the injunction ... the respondent had not made out a prima facie case with a probability of success”.

17. From the foregoing, it is the view of this court that this application must fail.

18. I dismiss the application with costs to the Respondent.

READ, DELIVERED AND DATED, AT NAIROBI THIS 5th DAY OF FEBRUARY 2016.

E. K. O. OGOLA

JUDGE

Ruling Read in open court in the presence of:

M/s Maital for Plaintiff

M/s Omondi for Defendant

Teresia – Court Clerk