



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISUMU**  
**ENVIRONMENT & LAND COURT**  
**LAND CASE NO.55 OF 2013**

**DORICE ACHOLA ODERO.....APPLICANT**

**VERSUS**

**STEPHEN KARANJA T/A DALALI TRADERS..... 1<sup>ST</sup> RESPONDENT**

**FIRST COMMUNITY BANK LTD.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. **Dorice Achola Odero**, the Applicant, filed the notice of Motion dated 12th March 2013 under Order 40 Rules 1(a) & (b) , 2, 3 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act Chapter 21 of Laws of Kenya. The Applicant prays for **Stephen Karanja T/A Dalali Traders** and **First Community Bank Limited**, hereinafter referred to as 1st and 2nd Respondents, to be restrained from alienating, disposing of, selling **Kisumu/Kasule/4315** and **4316** pending the hearing and determination of this suit. The application is based on the four grounds on the notice of Motion and the affidavit of **Dorice Achola Odero** sworn on the 12th March 2013.
2. The application is opposed by Respondents through the replying affidavit of Paul Magoto, the 2nd Respondent's recoveries manager, sworn on 17th April 2013.
3. The interim stay orders of sale were granted ex parte by the Deputy Registrar on 12th February 2015. The Respondents filed the notice of motion dated 12th June 2015 for the setting aside of the interim Orders of 12th February 2015 but there is no evidence of service on the Applicant. The court will therefore treat the application dated 12th June 2015 as abandoned as it has been overtaken by events by the inter partes hearing of the application dated 12th March 2013 and this ruling.
4. The parties counsel appeared in court on the 15th June 2015 and agreed to have the application dated 12th March 2013 dealt with through written submissions. The Applicant's counsel filed their written submissions dated 13th October 2015 on the same date while the Respondents counsel filed theirs dated 12th February 2015 on the 8th October 2015.
5. The issues for determination are as follows:
  - a) Whether the Applicant has established a case for issuance of injunction orders restraining the 2nd Respondent from exercising their statutory power of sale at this interlocutory stage.

- b) Who pays the costs of the application.
6. The court has carefully considered the grounds on the application, the supporting and replying affidavits and the rival written submissions and come to the following findings;

a) That the applicant obtained two loan facilities from the 2nd Respondents of Ksh.1,200,000/= and 300,000/=. Both parties have annexed two letters of offer dated 5th September 2009 and 9th November 2009 from the 2nd Respondent to the Applicant in respect of the loan of Ksh,1,200,000 and 3000,000/= respectively to their affidavits. The parties have also annexed the acceptance notes by the Applicant of the two letters of offer.

b) That the letters of offer dated 5th September 2009 and 9th November 2009 for the Ksh.1,200,000/= indicated at clause 2 that the loans would be secured by a joint and chattels mortgage registration over motor vehicle **KAV 368 S**, first legal Charge over **Kisumu/Kasule/4315** and **4316** among others. The 2nd Respondent has annexed to their replying affidavit the Charge documents over the two parcels of land dated 29th January 2010 and registered on 2nd February 2010 in respect of the loan for Ksh.300,000/= and the chattel mortgage for Ksh.1,200,000/= loan. These two documents have not been disputed by the Applicant.

c) That the recovery of motor vehicle KAV 368 S by the Respondents has been a subject matter of a case filed by the Applicant herein against the 2nd Respondent in Winam PMCC NO.342 of 2010. The motor vehicle is reportedly to have been sold but none of the parties herein have provided details of how much was realised after the sale and how the amount realised was employed or credited. The contention of the Applicant is that the 2nd Respondent should be restrained from exercising their power of sale over the two parcels of land as the motor vehicle has been sold and the loan therefore fully paid. The applicant has however not provided the court with details to confirm her contention that the loan was fully paid. The one who alleges the existence of a fact has the duty to prove and in this case the Applicant has not discharged that duty.

d) That the 2nd respondent position is that the loan facility accorded to the Applicant is still in arrears and they should be left at liberty to sell the properties. The 2nd Respondent had served the Applicant with the demand notice dated 28th September 2010 demanding payment of Ksh.1547461.59 before commencing the realization process. This has not been disputed by the Applicant. **The provisions of Section 90 of the Land Act** No.6 of 2012 states as follows:

***" 90.(i) if a Charger is in default of any obligation, fails to pay interest or any other periodic payments 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 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".***

The 1st Respondent, acting on instructions received from 2nd Respondent sent the notice dated 2nd January 2013 to the Applicant giving her 45 days to redeem the two parcels of land by paying Ksh. 1394661.59 which was owing as at 17th December 2012. The notice is annexed to the Applicant's affidavit. The provision of **Section 96 of the Land Act** states as follows:

***" 96(i) Where a Chargor is in default of the obligations under a charge and remains in default at the expiry of the time provided for the rectification of that default in the notice served on the Chargor under Section 90(1), a Chargee may exercise the power to sell the charged property."*** There is nothing availed so far to suggest that the 2nd Respondent has failed to follow the due process in their endeavour to exercise their power of sale.

e) That for the Applicant to succeed in her application, she has to come within the

principles set out in **Giella -V- Cassman Brown & Company Limited** [1973] E.A 358 by establishing a prima facie case with a probability of success. The Applicant believe that the amount of the loan arrears that she owed the 2nd Respondent was satisfied after the sale of the motor vehicle KAV 368 S is not enough without actual proof for the court to exercise its discretion in her favour. The following decided cases cited by the Respondents counsel in their submissions captures the superior courts position on the matter.

(i) **Moris & Company Limited – V- Kenya Commercial Bank Limited & Another 2 EA 605** where Ringera J, (as he then was) held,

*"...And what is one to make of the fact that the exact amount is in dispute and the interest component thereof is said to be usurious or unconscionable. It is just a tiny ripple in the pond. The law is well settled that a dispute as to the amount due cannot be a ground for an injunction to restrain a mortgagee from exercising its statutory power of sale."*(ii) **Maltext commercial Supplies Limited & Another -V- Euro Bank Limited (in liquidation)** (2007) eKLR where Warsame J (as he then was) observed as follows:

*" I think the duty of the court is to enforce or legitimize what the parties agreed between themselves. It is no power of the court to enforce what it thinks ought to have been fairly agreed between the parties. That is the essence of contractual relations. Parties bargain for their interest and benefits, therefore the court cannot alienate or allocate a person a right it did not bargain for because may be he/she bargained not bargain for because may be he/she bargained poorly....."*

*I have to reckon again that the bank has no money to lend. The money it lends belongs to the public and in particular, depositors. The bank through its liquidating agent has a responsibility to recover all monies outstanding. It is in the interest of the public that the agent recovers all monies due and owing to the debtors."*

(iii) **Mrao limited -V- First American Bank of Kenya Limited & 2 Others** [2003] eKLR where Kwach J.A, stated;

*" ... I have always understood that it is the duty of any person, entering into a Commercial transaction particularly one in which a large amount of money is involved to obtain the best possible legal 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 just debts by taking some of the defences I have seen in recent times for instances challenging contractual interest rates, banks will be crippled if not driven out of business altogether and no serious investors will bring their capital into a country whose courts are a haven for defaulters."*

(iv) **Hyundai Motors Kenya Limited -V- East African Development Bank Limited** [2007] eKLR Warsame J (as he then was) stated the following about an application before him;

*" The application in my view epitomizes the resolute nature of the plaintiff and its utter contravention of the requirement of good conscience and Commercial ethics. It has borrowed sums of money on the charge document. It admits or acknowledges a debt of Ksh.100 million. There is persistent default but wants to use every trick on earth to restrain the defendant from selling the suit property. It appears nowadays there is no end to litigation and it has become a customary for defaulter to the slightest excuse in order to postpone the day of reckoning; They must have in mind that the money of the lenders is not for free. The loan advanced was not meant to be candy sweets to be enjoyed freely by the plaintiff. The monies of the lenders are a carrot accompanied by a stick and the stick can only be used when there is a default. Where there is an absolute default, the party in default cannot avoid the stick simply because it has taken the carrot'".*

(v) Elijah Kipngeno Arap Bii -V- Kenya Commercial Bank Limited {2001} KLR 458 where Ringera J (as he then was) stated as follows:

***"The applicant has known all along that the securities he offered for his charge debt would be realized if default was made in the repayment. As I have said severally, once property is offered as security it by that very fact becomes a commodity for sale. And there is no commodity for sale whose loss cannot be compensated adequately in damages."***

The superior courts have in the cases above, among many others, taken the position that a chargee or mortgagee will not be restrained from exercising his power of sale merely because the amount due is in dispute, or because the Chargor, or mortgagor has begun a redemption action, or because the Chargor or Mortgagor objects to the manner in which the sale is being arranged. The restraining orders may however be issued if the Chargor or mortgagor pays the amount claimed by the Chargee or mortgagee or where the claim is shown to be excessive.

7. That the Applicant herein has not shown that she has paid the amount of the arrears claimed by the 2nd Respondent. The Applicant has also not shown that the amount claimed by the 2nd Respondent as arrears is not in accordance with the chattel mortgage and Charge executed between herself and the 2nd Respondent. The Applicant has therefore not established a prima facie case for issuance of the injunction orders at this stage.
8. That having found as above the court finds the application dated 12th March 2013 is without merit and is dismissed with costs to the Respondents. The interim orders of stay issued on 12th February 2015 are hereby vacated.

**SM. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

Dated and delivered this **10TH day of February 2016**

In presence of;

APPLICANT    Absent

RESPONDENTS    Absent

COUNSEL    Mr Anyul for the Applicant

**SM. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**LAND 55 OF 2013**

10/2/2016

S.M. Kibunja J

Oyugi Court Assistant

Parties absent

Mr Anyul for the Applicant

Court: Ruling delivered in open court in presence of Mr Anyul for the Applicant.

**SM. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**10/2/2016**