



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 245 OF 2014

MATI MUGENDI LOYFORD.....PLAINTIFF

VERSUS

EQUITY BANK LIMITED.....DEFENDANT

RULING

1. The Notice of Motion dated **9th June, 2014** and filed pursuant to Order 40 Rule 1 (a) and (b) and Order 51 Rule 1 of the Civil Procedure Rules as well as Sections 3A and 63 (c) and (e) of the Civil Procedure Act, Chapter 21, Laws of Kenya, sought temporary injunction to restrain the Defendant/Respondent from selling the Plaintiff's property, comprising of **LR No. 209/9071/62** situated in **Nairobi West Miller Estate** (hereinafter referred to as the suit property) pending the hearing of the application and the suit. Although the application was filed under certificate or urgency, the record shows that the Court was far from impressed by the fact that the applicant waited until the eve of the sale to seek injunctive relief. Thus it declined to grant the *ex parte* orders sought for. Nevertheless, on **11th June, 2014** the Plaintiff was given a *status quo* order pending hearing of the application, the status quo then prevailing being that the sale had not taken place.
2. The brief background of the matter is that the Directors of **Glenrock Company Limited** (hereinafter referred to as the Borrower) approached the Defendant Bank and were granted a loan facility in the sum of Kshs. 9,500,000/= sometime in July, 2012. The said facility was secured by a legal charge over the suit property whereupon the Plaintiff, as the legal owner, duly executed a personal guarantee dated 28th March, 2012, not only to secure the sums advanced by the Defendant to the Borrower, but also binding himself to pay up the loan in the event of default by the borrower.
3. It so happened that the Borrower defaulted in servicing the facility. A formal demand notice was issued by the Defendant to the Plaintiff dated 23rd January, 2013 which was followed by the requisite Statutory Notices to both the Plaintiff and the Borrower dated 17th June, 2013. For the reason that no action was taken by either of them towards the redemption of the charged property, the Defendant instructed the firm of **Antique Auctioneers** to proceed with the process of realization of the securities by way of sale of the charged property. To that end, the said firm of Auctioneers issued the Plaintiff with a 45 day Redemption Notice as well as a Notification of Sale both dated 25th November, 2013 after which the property was advertised for sale, initially on 19th May, 2014 and thereafter on 9th June, 2014. It was thus the advert of 9th June, 2014 that provoked the instant application.

4. The application is predicated on the following grounds:
 - a. **That justice dictates that the orders sought be granted pending the hearing of the main suit;**
 - b. **That the Plaintiff has a strong case against the Defendant with overwhelming chances of success, and that the balance of convenience tilts in the Plaintiff's favour;**
 - c. **That the Plaintiff was never served with either the statements of account or with a Statutory Notice of Sale;**
 - d. **That the property in question is the only matrimonial home in which the Plaintiff resides with his family and if sold he will suffer irreparable damage as the property may be sold for a lesser sum than its actual value;**
 - e. **That if the sale proceeds, it will violate both the Lands Act, 2012 and the Constitution of Kenya;**
5. In support of the application the Plaintiff relied on his supporting and further affidavits sworn on 9th June, 2014 and 25th September, 2014 respectively.
6. The Defendant/Respondent opposed the Plaintiff/Applicant's application, to which end it filed an affidavit sworn by its Credit Manager **CHARLES WAWERU** on 9th July, 2014. It is the Defendant's contention that as at 22nd April, 2014 the borrower, having defaulted in servicing the subject loan facility, was indebted to it in the sum of Kshs. 13,389,001. To demonstrate this, the Defendant annexed documentation to its Replying Affidavit showing that:
 1. **The Borrower is truly and justly indebted to it (see certified copy of loan account statements marked "CW-4")**
 2. **A formal Demand Notice was sent to the Borrower and copied to the Plaintiff (Copy thereof marked "CW-5")**
 3. **Statutory Notices were issued both to the Borrower and the Plaintiff (Copy thereof marked "CW-6")**
 4. **Notification of Sale dated 25th November, 2013 was duly served (See "CW-7")**
 5. **That prior to the advertisement of 9th June, 2014 the property had earlier on 21st January, 2014 been advertised for sale by public auction on 7th February, 2014 (See a "CW-8") and on 19th May, 2014. (See "CW9").**
7. It was thus the contention of the Defence that for the Plaintiff to move to Court on the eve of the auction is not only malicious, but is also inequitable and in bad faith and is a move intended only to frustrate the Defendants right to recover the monies owed to it by the Borrower. The Defendant further pointed out that the Plaintiff admitted that he never took much interest in the servicing of the loan account by the Borrower. The Defendant thus urged for the dismissal of the application with costs.
8. The Court has given due consideration to the application, the grounds upon it has been brought as evinced in the Supporting and further Affidavits and the annexures thereto, as well as the Defendant's response thereto. The application was canvassed by way of written submissions which I have also carefully perused, including the authorities cited.
9. There is no dispute that on or about 9th July, 2012 the Defendant advanced a sum of Kshs. 9,500,000/= to the Borrower herein, and that the said loan facility was secured by a legal charge over the suit property belonging to the Plaintiff, on the basis of a Guarantee dated 28th March, 2012 (**See CW1, CW2 and CW3**). It is equally not in dispute that the Borrower defaulted in servicing the loan, hence the move by the Defendant to realize the securities. In the circumstances, for the Court to restrain the Defendant from realizing its statutory power of sale pending the hearing and determination of this suit as sought by the application dated 9th July, 2014, it must be satisfied that the principles laid down for the grant of such orders in the case of **GIELLA VS CASSMAN BROWN & CO LIMITED [1973] EA 358** have been satisfied herein by the Plaintiff/Applicant, namely:
 1. **That a prima facie case has been made out by the Plaintiff/Applicant.**
 2. **That the Plaintiff/Applicant stands to suffer irreparable harm which would not adequately**

- be compensated by an award of damages;
3. That the balance of convenience favours the grant of injunction.

10. As to what amounts to a prima facie case, the Court in MRAO LIMITED Vs FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS [2003] eKLR had this to say;

“...in civil cases it is a case in which on the material presented to the Court a Tribunal Property directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter...a prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the applicant’s case upon trial. That is clearly a standard which is higher than an arguable case.”

11. With the foregoing principles in mind, the Court has analyzed and considered the grounds raised in support of the application. The applicant’s first ground was that he was never served with statements of account. The Defendant/Respondent countered this argument by demonstrating that such statements were regularly supplied to the Borrower and annexed certified copies of some of them to the Replying Affidavit as “CW-4.”

12. As rightly pointed out by the Defendant, there is nothing to show that the Plaintiff/Applicant asked for such statements and was denied or that he otherwise sought to find out how the loan account was performing. To the contrary, he expressly conceded, at paragraph 6 of his Supporting Affidavit that:

“...after I guaranteed the loan I never took much responsibility but on 19th May, 2014 I was advised by a friend that he had seen a Newspaper advert of the same even date listing my house for sale...”

13. He further conceded at paragraph 5 of his supporting affidavit that he *“... ignorantly guaranteed”* the Borrower, a posturing that was deprecated by the court in the MRAO case (Supra) thus:

“...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...”

14. In the premises I find that the Plaintiff’s contention that he was not served with statements is untenable. Besides failure to serve the Plaintiff/Applicant with account statements of the Borrower cannot be a valid ground for restraining the Defendant/Respondent from exercising its statutory power of sale, in the face of the evidence herein that the Borrower was supplied with the same at regular intervals.

15. The Plaintiff/Applicant’s second ground of complaint was that he was never served with a Statutory Notice of Sale. This is a ground that is clearly misplaced in the face of the documents marked CW5, CW6 and CW7 and annexed to the Defendant’s Replying Affidavit, which show that all relevant notices were duly served as per the addresses provided in the security documents. No evidence of any changes were brought to the attention of the court. It is now trite that service is deemed to have been effected if notice is sent by registered post to the last known address of the chargor. (See IBRAHIM MUSA & SONS LIMITED & ANOTHER VS FIRST NATIONAL FINANCE BANK & ANOTHER [2002]eKLR). I therefore find no merit in this argument.

16. The Plaintiff/Applicant’s third ground was that the property in question is their only matrimonial home in which he resides with his family. In his Further Affidavit sworn on 25th September, 2014 he averred that he had not consulted his wife when he charged the property to the Defendant. He annexed to that Affidavit a copy of an Affidavit as evidence of his Meru Customary Marriage to one NELLY WAKIURU MWANGI and as proof that they live together as husband and wife on the suit property.

17. The Plaintiff’s averments aforementioned being uncontroverted, the Court is satisfied on a prima

facie basis that the suit property could very well be a matrimonial home for purposes of Section 2 of the Land Act, 2012. The question that then arises is whether on that account the protection afforded by Section 79 (3) of the Land Act would be available to the Plaintiff/Applicant herein:

Section 79 (3) of the Land Act provides that:

“A charge of a matrimonial home shall be valid only if any document or form used in applying for such a charge or used to grant the charge is executed by the chargor and any spouse of the chargor living in that matrimonial home or there is evidence from the document that it has been assented to by all such persons.”

18. It is noteworthy however that this provision came into force on 2nd May, 2012 while the charge herein was executed on 28th March, 2012. Although Section 78 (1) of the Land Act presupposes retrospective application of Section 79 as well as the other provisions under part VII of the Land Act, that provision has to be construed in conjunction with the other provisions of the Land Act, notably the transitional provisions in Section 162 thereof. Accordingly, I would share the view expressed by Mutungi J in **Barclays Bank of Kenya Vs Attorney General & Another [2015]eKLR** thus;

“Having regard to the provisions of Section 78 (1) as read together with Section 162 (1) of the Land Act, my view is that where a right had accrued and a charge had become enforceable through realization pursuant to the chargee’s power of sale a spouse who was not a party to such a charge does not by reason of Part VII of the Act acquire any additional rights that he/she did not possess under the operative law under which the charge was governed prior to the coming into force of the Land Act. Such a spouse cannot challenge the prior charge on the basis that his/her consent was not given to the creation of the charge.”

19. Accordingly, I hold the view that the protection afforded by Section 79 (3) of the Land Act is not available to the Plaintiff/Applicant herein for the reason that spousal consent was not a requirement at the time the subject charge was executed. Thus, at the time of issuing the requisite notices, the Defendant/Respondent had no way of knowing whether or not the charged property was the Plaintiff/Applicant's matrimonial home, granted that the Plaintiff is the sole registered proprietor. Besides, Section 79(3) of the Land Act is a provision intended for the protection of the spouse whose consent was not procured; and not the party who knowingly charges a matrimonial home without spousal consent, as the Plaintiff/Applicant now purports. Thus, the provision ought to have been invoked not by the Plaintiff/Applicant as has been done but by his spouse whose consent was allegedly not obtained (See Section 103 (1) of the Land Act). The Plaintiff, having knowingly charged the suit property without informing his spouse, is estopped from invoking the provisions of Section 79(3) of the Land Act in an attempt to fetter the Defendant’s right of Sale, for that would be inequitable. It is a cardinal principle that he who comes to equity must do so with clean hands.

20. Moreover, and as has been pointed out herein above, the Plaintiff/Applicant is presumed to have known the weighty obligation he was assuming as a Guarantor. The Charge and Guarantee documents indicate that the contents and ramifications thereof were explained to him before he appended his signature thereon. It is of little help therefore that the charged property is their matrimonial home. It is now trite that once matrimonial property has been charged, it becomes a commercial chattel in the market with a value, and is therefore available for sale as any other chattel, its sentimental value notwithstanding. This point was poignantly made by Ringera J in the case of **ISAAC LITALI vs. AMBROSE W. SUBAI & 2 OTHERS NBI HCCC 2092 OF 2000 (UR)** thus:

“...the Plaintiff has in his pleading and affidavit made a mountain out of the fact that he has developed the land in question into a home and its sale would therefore occasion pain and loss which cannot adequately be compensated in damages... I am of the opinion that once land has been given as security for a loan, it becomes a commodity for sale by that very fact, and any romanticism over it is unhelpful...For nothing is more clear in a contract of charge than that

default in the payment of the debt will result in the sale of the security. In that respect, land is no different from a chattel such as a motor vehicle or any other form of security. "

In the premises, I find no merit in the Plaintiff's contention that the suit property is a matrimonial home.

21. Lastly, the Plaintiff's expressed the apprehension that the charged property would be sold at an under value unless the Court intervened. This ground however cannot amount to much in the face of the evidence adduced by the Defendant, which shows that it complied with Section 97 (1) of the Land Act by having the property valued with view of ascertaining its fair market value (**See annexure CW-10 to the Replying Affidavit**) and that on the basis thereof the auction was twice called off because the bids were too low. This evidence was not controverted by the Plaintiff/Applicant. What is more, the Plaintiff/Applicant did not endeavour to provide an alternative valuation to contradict the Defendant's annexure CW-10 herein or show that the Defendant had attempted to sell the suit property at an undervalue.
22. It is therefore plain from the foregoing that the Plaintiff/Applicant has failed to demonstrate that he has a prima facie case with the probability of success as is required. That being the case, it would be pointless for the Court to proceed to consider the two other **GIELLA** Case Principles, namely **irreparable harm** and **balance of convenience**. This is because the 3 conditions are sequential to be applied as separate distinct and logical hurdles, a point well elucidated in the Case of **NGURUMAN LIMITED VS JAN BONDE NIELSEN & OTHERS [2014]eKLR** thus:

"It is established that all the above three conditions and stages are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially...if prima facie case is not established, then irreparable injury and balance of convenience need no consideration..."

23. In the result, it is my finding that the Plaintiff/Applicant's Notice of Motion dated 9th June, 2014 is devoid of merit and the same is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 1ST DAY OF APRIL, 2016.

OLGA SEWE

JUDGE