



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL & ADMIRALTY DIVISION**  
**CIVIL SUIT MISC. NO.658 OF 2012**

**JIMMY WAFULA SIMIYU .....PLAINTIFF**

**VERSUS**

**FIDELITY COMMERCIAL BANK LIMITED.....DEFENDANT**

**RULING**

1. Many of the issues raised in the Application of 17<sup>th</sup> February 2016 may have been dealt with by the Court in previous Rulings herein. The Notice of Motion seeks the following two substantive prayers:-

- THAT this Honorable Court be pleased to issue a temporary Order of injunction restraining the Defendants by themselves, their servants, agents namely Nairobi Connection Services Auctioneers or any other auctioneering firm from advertising for sale, selling, disposing off, taking possession, leasing, concluding private treaty agreements for sale or in any other manner alienating or interfering with the Plaintiffs possession and Title to the parcel of land known as Title No. Ngong/Ngong/47047 by public auction and or private treaty sale pending hearing and determination of this suit.
- This Honourable Court be pleased to grant the Plaintiff leave to amend his Plaintiff in terms of the attached Draft Amended Plaintiff.

2. The Plaintiff, who is an Advocate of the High Court of Kenya applied and was granted a term loan of Kshs. 4 million by the Defendant Bank. The loan was granted pursuant to the terms of a Letter of Offer of 18<sup>th</sup> May 2011. As security for the facility a charge over Ngong/Ngong/47047 was created in favour of the Bank. There was default in payment and the Defendants commenced the exercise of its statutory power of sale. To stop the exercise of that power, this action was brought and on 8<sup>th</sup> March 2013 the Court issued an order of Injunction.

3. Due to inaction on the part of the Plaintiff, the Defendant moved Court to dismiss the suit for want of Prosecution. Upon hearing the Application the Court, on 29<sup>th</sup> October 2014, ordered that the Plaintiff's set the suit down for hearing within (30) days failing which the suit stood dismissed.

4. On 22<sup>nd</sup> October 2015, Gikonyo J, moved by the Plaintiffs Motion of 23<sup>rd</sup> September 2015, held as follows:-

“Therefore, I do not agree resuscitation was in vain unless the Plaintiff is saying we should set

aside the order reviving the suit in which case the suit shall stand dismissed. From his submissions, he is not saying that as he is convinced the resuscitation of the suit was not necessary. Accordingly, the circumstances of this case are that extending any further clemency to the Plaintiff will be extravagant exercise of discretion in favour of a party who has but shown deliberate dilatory behaviour whose aim is to prolong the suit for as long as he wants. Such temporizing of a case is loathed in law. Therefore, I will leave things as they are; the suit is still alive and may be progressed by parties, but the injunction remains discharged. There is absolutely no imminent danger of sale of the suit property. Even if it was there, the matter shall be decided on its merits. I dismiss the Plaintiff's Motion dated 23<sup>rd</sup> September, 2015 with orders to costs. It is so ordered".

5. That Ruling set in motion the chain of events leading to the present Application. In the Affidavit sworn on 17<sup>th</sup> February 2016 in support of the Application before Court, the Plaintiff deposes that on 29<sup>th</sup> January 2016 at about 15.45 hours he was served with a Notification of Sale by one Timothy Owour trading as Nairobi Connection Services Auctioneers demanding payment of Kshs.9,168,910/=.

6. The Plaintiff avers that the Notification of Sale and demand letter of 5<sup>th</sup> January 2016 are illegal for the following reasons:-

- a) Contravening Section 90(2) (b) of the Land Act 2012.
- b) Contravening Section 90(2) (e) of the Land Act 2012.
- c) Failing to serve the Statutory Notice required under Section 90 (1) of the Land Act 2012.
- d) Failing to serve the Statutory Notice by hand delivery despite knowledge of the Plaintiff physical address
- e) Demanding an amount in contravention of Section 44 of the Banking Act popularly known as the indiplum rule.
- f) Demanding conflicting amounts in the demand letter of 5<sup>th</sup> January 2016 at 10,108,604 and Kshs.9,168,910 in the Auctioneers Notification for sale.
- g) Serving the Notification of sale prior to a complaint Statutory Notice under Section 90 (1) of the land Act 2012.
- h) Failing to serve the Statutory Notice on the Plaintiffs spouse in disregard of the fact that the suit property is a matrimonial house where the Plaintiff resides with his family.
- i) Failing to value the suit property in the last 12 months prior to the exercise of the Statutory power of sale.
- j) Attempting to exercise the power of sale to frustrate the substantive hearing and determination of the suit scheduled for 13<sup>th</sup> April 2016 in an attempt to extinguish the Plaintiffs equity of redemption.
- k) Clogging the Plaintiffs equity of redemption.

7. Juda Delli swore a Replying Affidavit on 24<sup>th</sup> February 2016 on behalf of the Defendant Bank. He avers that on 6<sup>th</sup> November 2015 the Defendant issued the Plaintiff with the Notice contemplated by Section 96 of the Land Act 2012. This Notice followed the Statutory Notice of 3<sup>rd</sup> August 2015 issued under the provisions of Sections 90(1) and 90(2) of the Land Act 2012.

8. In respect to these Notices, the Plaintiff produced a letter from the Acting Director Legal Services of Postal Corporation of Kenya that the two letters were returned back to the sender Philip Muoka & co.

advocates, unclaimed.

9. The first limb of the Application before Court is for an order of Temporary Injunction and the Principles in **Giella –vs- Cassman Brown & Co. Ltd** [1973]EA 358 are well and truly applicable. These principles which need to be stated are that:-

“First an applicant must show a prima facie case with a 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”.

10. Has the Applicant demonstrated a prima facie case with probability of success? The Court sees the

(1) Does the suit property constitute matrimonial property?

(2) Were Statutory Notices served on the Plaintiff?

(3) If so, are those Notices valid in law?

(4) Does the amount of Ksh.9,168,910/= demanded by the Bank contravene Sections 44 and/or 44A of The Banking Act?

(5) Has the Bank valued the suit property in the last 12 months prior to the exercise of The Statutory Power of Sale and if not, is the Bank to be barred from exercising its Statutory Power of Sale?

11. The Plaintiff had previously asserted that the charged property was Matrimonial property to which Judge Mabeya held,

“I propose to start with the 3<sup>rd</sup> issue of whether the suit property is a matrimonial home to warrant special protection from this Court. The definition of a matrimonial home is contained in Section 2 of the Land Act as “any property that is owned or leased by one or both spouses and occupied by the spouses as their family home”. The Plaintiff submitted that it was his intent to build a matrimonial home in the suit property where he and his family could reside. As such, he claims that this intent entitles him to protection from the anticipated actions of the Defendant. I find fault with the argument. As the Defendants puts it, the Plaintiff merely indicated the purpose of his loan facility to be completion of a residential house. The Sections of the law relied on by the Plaintiff require actual occupation of the house to constitute a matrimonial home. In the absence of such occupation, the same will be construed as any other property. The Plaintiff himself averred that it was his intention to occupy the same from December, 2012. I therefore find that as at the time of coming to Court and hearing of the application, the suit property was not a matrimonial home as it was yet to be occupied and therefore does not warrant the special protection of this under the relevant law”.

12. The Plaintiff now argues that there is a change of circumstances as his family has since taken occupation of a house constructed thereon. In my view, this change of circumstance cannot turn the property into Matrimonial property for purposes of the matter at hand. For purposes hereof regard is had to the status of the property at the time it was offered as security and a charge created over it. Judge Mabeya was of the view, and correctly so, that at that time the said property was not a matrimonial home. A chargor should not be permitted to change the character of a property it has offered as security in a manner that defeats the charge created thereover.

13. This is not the first time that the Plaintiff is stating that Notices sent to his Postal Address have been returned uncollected. The Statutory Notices of 3<sup>rd</sup> August 2015 and 6<sup>th</sup> November 2015 were sent by way of Registered post to Postal address 25056-00100 Nairobi. It is admitted that the address belongs to the Plaintiff.

14. When raised as an issue to challenge the Bank's earlier attempt at realization, Mabeya J. held;

“That statement commends itself to this Court. The Plaintiff has obtained that the said notice was returned to the Defendant after it went uncollected. This is understandable given the various issues that the Plaintiff had to contend with including the fire that razed his office, the loss of the Post Office Box key among others. However, the Defendant has contended that it communicated the notice via the last know address of the Plaintiff thereby effectively discharging its responsibility of service of the notice. The question that arises is who is to blame for the non-delivery of the notice. To my mind, the Defendant may have done all it was required under the Charge. It was for the Plaintiff to collect the Notice from his post office box. It is however, true that when the said Notice was returned to sender, the Defendant should have at least taken further steps to try and effect service of the same on the Plaintiff. It seems that between 10<sup>th</sup> August 2012 and 7<sup>th</sup> September 2012 the Defendant did nothing. It sat and waited. To my mind therefore, it is arguable whether the Statutory right of sale could accrue before the Plaintiff was served with a copy of the notice on 7<sup>th</sup> September, 2012 by the Defendant's legal manager. It may also be doubtful if the auction sale scheduled for 16<sup>th</sup> November 2012 or on any other date by the Defendant could be regular or lawful”.

15. The Plaintiff again sought to prove that the mail was returned unclaimed. The proof is in the following letter of the Director Legal Services of Postal Corporation of Kenya;

March 6<sup>th</sup>, 2016

Wafula Simiyu & Co Advocates

Peresia Centre

Apartment No.2

Ground Floor

Along Ngong Rd Opp Uchumi Hyper

P.O. Box 25056-00100

NAIROBI

ATT: J.W SIMIYU

Dear Sir,

RE: CONFIRMATION OF DELIVERY OF REGISTERED ITEMS NO.RD 10956275KE AND RD107100638KE

The above captioned matter and further your letter dated February 2<sup>nd</sup>, 2016 refers.

Registered item No. 109562757KE, was returned back to the sender Philip Muoka & Co, and delivered on November 6<sup>th</sup>, 2015 via the following address, P.O Box 52434-00100.

Registered item No. 107100638KE was also redirected back to the sender, however he is yet to come for collection of the item.

Yours faithfully,

JANE MASARA (MRS)

For: AG. DIRECTOR LEGAL SERVICES

For: POSTMASTER GENERAL

*jmasara@posta.co.ke*

16. What am I to make of this argument? I have to agree with Counsel for the Bank that Judge Mabeya accepted the Plaintiffs first explanation because the Plaintiff had suffered a fire to his office and lost the key to the Post Office Box. It was therefore believable that the Plaintiff may not have accessed his mail Box then. On this occasion however, the Plaintiff has not said that he did not open his postal box during the period when the Notices reached his Box. In the absence of proof that, for one reason or other, he could not access his mail Box, the confirmation from Postal Corporation of Kenya is of little assistance to the Plaintiff. A mischievous Box Holder can selectively leave mail that he does not want to pick in the hope that it is resent to the sender. To accept the evidence of resend without cogent evidence that the addressee did not access his mail box would be to allow such mischief to succeed.

17. On the evidence presented so far, this Court does not find that it is sufficient to establish that the Statutory Notices did not reach the Plaintiff.

18. This Court is then asked to find that the Notice of 3<sup>rd</sup> August 2015 failed to comply with Section 90(2)(e) of The Land Act and is therefore null and void. Section 90 of the Land Act provides:-

(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 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 months, by the end of which the payment in default must have been completed;

(c) if the default consists of the failure to perform or observe any covenant, express or implied, in the charge, the thing the charger must do or desist from doing so as to rectify the default and the time, being not less than two months, by the end of which the default must have been rectified;

(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.

19. The impugned Notice is produced below:-

3<sup>rd</sup> August, 2015

Jimmy Wafula Simiyu

P.O. Box 25056-00100

NAIROBI

Dear Sir,

STATUTORY NOTICE UNDER SECTION 90(1) AND (2) OF THE LAND ACT 2012, (CAP 6 LAWS OF KENYA) RELATING TO TITLE NO. NGONG/NGONG/47047

We act for Fidelity Commercial Bank Ltd and hereby demand from you the IMMEDIATE PAYMENT of the sum of Kenya Shillings nine million one hundred and six eight thousand, nine hundred and ten and forty two cents Kshs 9,168,910.42 hereinafter referred to as the ('outstanding amount') being amount due and owing to our client as at 3<sup>rd</sup> August 2015. The outstanding amount continues to attract interest until payment in full at the contractually agreed default rate of 33% per annum.

The outstanding amount arises from loan facilities granted to you and which were secured by, among others, a legal charge dated 18<sup>th</sup> May 2011 over TITLE NO. NGONG/NGONG/47047 full particulars and details whereof are well within your knowledge.

TAKE NOTICE THAT unless our client receives the outstanding amount, further interest that will accrue as aforesaid within THREE (3) MONTHS from the date of service upon you of this notice, we shall at the end of that period proceed with the sale of the property without further reference to you at your risk as to attendance costs and other consequences incidental thereto. For purposes of this paragraph, the date of service shall be ten (10) days from the date of posting as evidenced by the certificate of posting a Registered Postal Article issued to us at the time of posting.

TAKE FURTHER NOTICE no further reminders will be sent to you and that any proposals made, if accepted, and any part-payment or installments paid and accepted shall not constitute a waiver of this notice and any proposals made and installments paid will be without prejudice to our client's right pursuant to this notice and under the Land Act 2012.

Yours faithfully

Signed

Philip Muoka & Co Advocates

CC

Mrs. Jimmy Wafula (spouse to Jimmy Wafula Simiyu)

P.O. Box 25056-00100

NAIROBI

True, the Notice does not inform the chargor of his rights in respect to certain remedies. Does that invalidate the Notice in the present circumstances?

20. It must not be forgotten that the Statutory Notice of 3<sup>rd</sup> August 2015 was issued after this suit had been presented and the Plaintiff had successfully stopped the realization process on one occasion (see ruling of Justice Mabeya of 8<sup>th</sup> March 2013). Can it therefore be fairly said that the chargor, an Advocate of the High Court of Kenya, would not be aware of the rights available to him as a chargor when he had already commenced proceedings to protect himself against realization? This Court does not see how, in the circumstances of this case, how compliance with the provisions of Section 90(2) (e) prejudices the Plaintiff or fetters his equity of redemption. This Court is not persuaded that, prima facie, the Notice can

be invalidated by this non-compliance.

21. Is the amount demanded a contravention of the *in-duplum* rule?

The loan granted to the Plaintiff was Kshs.4,000,000/=. The amount demanded in the Notice is Kshs. 9,168,910.42.

22. Section 44A of the Banking Act reads:-

“(1) An institution shall be limited in what it may recover from a debtor with respect to a non-performing loan to the maximum amount under subsection (2).

(2) The maximum amount referred to in subsection (1) is the sum of the following-

(a) the principal owing when the loan becomes non-performing;

(b) interest, in accordance with the contract between the debtor and the institution, not exceeding the principal owing when the loan becomes non-performing; and

(c) expenses incurred in the recovery of any amounts owed by the debtor.

(3) If a loan becomes non-performing and then the debtor resumes payments on the loan and then the loan becomes non-performing again, the limitation under paragraphs (a) and (b) of subsection (1) shall be determined with respect to the time the loan last became non-performing.

(4) This section shall not apply to limit any interest under a court order accruing after the order is made”.

23. For this purpose, Section 44A (3) is critical. It is not in dispute that on 28<sup>th</sup> September 2012, the Plaintiff resumed payment of the loan by making payment of Kshs.259,000/-. Thereafter the Account closed at a debit balance of Kshs.4,794,235/-. That was the amount that was due when the loan last became non-performing. That is the amount that is relevant for purposes of Section 44A(3) of The Banking Act. Double this amount is Kshs.9,834.756/-. Clearly the amount demanded of Kshs.9,168,910/- is within that maximum. The Bank may not be in violation of Section 44A of The Banking Act.

24. Also in respect to the Banking Act is an allegation that the Bank acted in contravention with section 44 of The Banking Act in respect to the interest charged. Section 44 reads:-

“No institution shall increase its rate of banking or other charges except with the prior approval of the Minister”

25. First, a party who asserts must prove (Section 107 of The Evidence Act). There is no iota of evidence tendered by the Plaintiff that the Bank was in contravention of Section 44. At any rate the applicability of the provisions of Section 44 on interest is doubtful.. See the judgment of Kasango J. in **Sammy Japheth Kavuku Vs. Equity Bank Ltd & another** [2014] eKLR, where she held,

“The key words in this Section are ‘rate of banking or other charges’ with no specific mention of ‘interest’. As has rightly been pointed out by the Defendant’s Counsel, Section 52 of the said Act is clear that no contravention of the provisions of the Act shall affect or invalidate in any way any contractual obligation between an institution and any other person. In this regard, I find that there was no contravention of the Banking Act when the Defendant varied the interest rates without approval from the Minister. The Minister could not interfere with the contractual obligations between the Plaintiff and the Defendant when Clause (2) of the Mortgage Instrument had clearly spelt out the effects of variation of interest by providing that:-

‘...the decision of the Mortgage is this regard shall not be questioned on any account whatsoever’.

26. The door is quickly closing on the Plaintiff who has so far not demonstrated a prima facie case without probability of success. Nevertheless, the Plaintiff's complaint that the Bank has not carried out a valuation in the last 12 months prior to the exercise of its statutory power of sale is a fair one. This complaint was set out in the supporting affidavit of the Plaintiff. Yet the Bank did not specifically respond to the issue. The silence is loud and the Court believes the Plaintiff on this.

27. Section 97 (2) of The Land Act places the following obligation on a Chargee who intends to exercise its power to sell Charged land:-

“A chargee shall, before exercising the right of sale, ensure that a forced sale valuation is undertaken by a valuer”

This is in tandem with the duty imposed on the chargee under Section 97(1) to obtain the best price reasonably obtainable at the time of sale.

28. The Bank will have to obtain a current valuation of the property before carrying out the intended sale. That said the Court is not inclined to stop the Bank taking steps towards the sales as the date for sale has not been set. The court takes the view that the Bank has opportunity to comply.

29. The Plaintiff has failed to demonstrate a prima facie case with a probability of success and his plea for Injunction is without merit.

30. As to the second limb of the Application for leave to amend, the same was not opposed and I allow it.

31. The Application of 17<sup>th</sup> February 2016 for Injunction is dismissed with costs.

32. Leave is granted to the Plaintiff to file and serve the amended Plaint within 14 days hereof. The Defendant to file a reply thereto, if necessary, within 7 days of service.

**Dated, Signed and Delivered in Court at Nairobi this 3<sup>rd</sup> day of November, 2016.**

**F. TUIYOTT**

**JUDGE**

**PRESENT:**

Simiyu for Plaintiff

Wetangula for Maoka for 1<sup>st</sup> Defendant

Alex - Court clerk