



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 45 OF 2020

SAMUEL GIKURU

NELLIE WAMBUI WAWERU

KISIWA GUEST HOUSE LIMITED.....PLAINTIFFS

VERSUS

HFC LIMITED.....DEFENDANT

RULING

1. The Application for determination is the notice of motion dated 13th March, 2020 by the plaintiffs brought under Order 40 rules 1,2,4 and 10 of the Civil Procedure Rules, Sections 1A, B, 3A & 63(e) of the Civil Procedure Act, Sections 96 (2), 97 & 99 of the Land Act, No. 6 of 2012, and Articles 10 (2) (a), (b) & (c), 19 (1), 23, 27 (1), 47 (1), 48, 50 (1) & 258 of the Constitution of Kenya, 2010 and all enabling provisions of law. The plaintiffs/applicants seek the following orders:

1. Spent

2. Spent

3. Spent

4. The Honourable court be pleased to grant an order of temporary injunction restraining the defendant/respondent either by herself, Nominated agents, servants and/or anyone claiming and/or acting under the said defendant/respondent, from exercising the statutory power of sale over and in respect of LR. No. Mombasa Municipality/Block XXI/328, (hereinafter referred to as the suit property) and in particular, advertising for sale, selling vide Public Auction and/or Private Treaty, currently scheduled on 17th Day of April 2020 or any other date, disposing of, transferring, leasing, alienating, clogging and/or in any other manner interfering with the 1st and 2nd plaintiffs'/applicants' title, rights and/or interests therein, whatsoever and/or howsoever, pending the hearing and determination of the instant suit.

5. The Honourable Court be pleased to grant an order for the maintenance of status quo and in particular, preserving and/or conserving LR NO.MOMBASA MUNICIPALITY/BLOCK XXI/328, (hereinafter referred to as the suit property) and barring and/or prohibiting the defendant/respondent and/or nominated agents from advertising for sale, selling vide Public Auction and/or private treaty, currently scheduled on the 17th day of April 2020 or any other date, disposing of, transferring, leasing, alienating, clogging and/or in any other manner interfering with the 1st and 2nd plaintiffs/applicants title, rights, and/or interests therein, whatsoever and/or howsoever, pending the hearing and determination of the instant suit.

6. Costs of this application be borne by the defendant/respondent.

7. Such further and/or other orders be made as the court may deem fit and expedient.

2. The application is based on the grounds set out thereon and supported by the affidavit of Samuel Gikuru Waweru, the 1st plaintiff/applicant sworn on 13th March, 2020 and supplementary affidavit sworn on 1st July, 2020. Briefly, it is the applicants' case that they obtained loan facilities from the defendant. The first was a mortgage facility for Kshs. 27,500,000 while the second was a mortgage facility for Kshs.7,000,000/=. The applicants aver that the loans were secured by charges over LR. NO.209/4844/54-MBOTELA and LR. NO MOMBASA MUNICIPALITY/BLOCK XXI/328. It is the applicant's contention that the said loan facilities were settled and/or paid in total

when the 1st and 2nd plaintiffs approached the defendant with proposal to sell LR NO.209/4844/54-MBOTELA by private treaty and the property was sold for Kshs.46,000,000/- out of which of which the sum of Kshs.37,000,000 was paid to or retained by the defendant to repay the loan.

3. The applicants aver that upon settling the loan facility in full, they requested and/or demanded the release and discharge of charge over and in respect to the suit property, but the defendant refused to heed the request. That instead, the defendant intimated it that was intent and/or desirous to exercise her statutory power of sale and instructed Ms. Legacy Auctioneers Services to issue and serve a Notification of Sale. The applicants accuse the defendant of levying interests beyond the agreed rate. Further, the applicants aver that the defendant has neither issued nor served all the requisite statutory notices and the intended sale is based on the valuation which was carried out in January, 2013 which was long before the issuance of the loan facility, instead of a current valuation. It is therefore the applicants contention that the intended exercise of statutory power of sale, including the scheduled sale on 17th day of April 2020 by and/or on behalf of the defendants is not only premature, but also irregular and fraudulent. According to the applicants, the notification of sale and the intended sale are being carried out in contravention of the provisions of Sections 96 (2) & 97 (2) of the Land Act. The applicants state that unless the orders sought herein are granted, the applicants are bound to suffer irreparable loss and/or damage in so far as the substratum and/or crux of the case would be defeated, destroyed and the suit property sold would stand sold and hence be placed beyond redemption. That the intended sale is bound to alienate the suit property beyond redemption unless the sale is restrained. The applicants maintain that they do not owe the defendant any money and therefore the defendant has no right to exercise its statutory power of sale. The applicants therefore urged the court to grant the orders of temporary injunction and/or maintenance of status quo so as to preserve and/or conserve the suit property.

4. In opposing the application, the defendant filed a replying affidavit sworn by Amos Wachira Mwangi on 28th April, 2020. The defendant contends that the application and the entire suit are bad in law, without merit and are for summary rejection for the reasons that this court lacks jurisdiction to hear and determine the suit; that the plaintiffs have, in writing, admitted to their indebtedness and are merely seeking accommodation from the defendant, something the court cannot force; that disputes on the exact amount due or on the interest charged, even if legitimate, are not grounds for stopping the exercise of the charge's statutory power of sale; and that there is full compliance with Sections 96 (2) and 97 (1) of the Land Act contrary to the plaintiffs' allegations. It is deposed that the plaintiffs' have admitted that they obtained loan facilities from the defendant and the loans were secured by charges over two properties, including the suit property. A copy of the charge has been annexed.

5. It is deposed that in the year 2015, the plaintiff defaulted in repaying the loans, consequently, the defendant issued the requisite statutory notices, copies of which have been annexed. That the said notices prompted the plaintiffs to approach the defendant with a proposal to sell LR. NO 209/4844/54 by private treaty. That the plaintiffs admit the property was sold for Kshs.46,000,000/= but the plaintiffs only channeled a portion of that amount to the defendant. The defendant avers that as at 1st January, 2016, the total outstanding amount on the two accounts was Kshs.39, 661, 462.71 which the plaintiffs did not settle despite being able to do so. That instead, in December 2017, the plaintiffs approached the defendant to negotiate a settlement of the outstanding loan which stood at Kshs.5,805,931.00 as at 23rd January 2018. That the discussions culminated in an agreement dated 23rd January 2018 for the plaintiffs to pay kshs.5,000,000.00 within ninety (90) days in full and final settlement of the loan. The letter dated 23rd January 2018 conveying the said agreement has been annexed. The defendant states that the plaintiffs vide their letter dated 16th March 2018 requested that the ninety (90) days commence on 16th March 2018 which request was accepted by the defendant vide its letter dated 22nd March 2018. Copies of the letters have also been annexed. The defendant avers that the plaintiffs never complied with terms of that settlement and never raised any objection to the calculation of the sums due or the rate of interest charged when they signed the settlement agreement.

6. The defendant states that as a result of non-compliance, the defendant issued three month notice dated 9th April 2019. That there being no compliance with that notice, the defendant issued a forty (40) days' notice to sell dated 19th July, 2019, a copy of which has been annexed. The defendant states that it is preposterous to suggest that the three month notice was received but the forty day notice sent by registered post to the same address, was not.

7. The defendant avers that after service of the aforesaid statutory notices, the plaintiffs vide a letter dated 13th August, 2019, requested for a meeting with the defendant's managing Director to resolve the issue, thus not disputing the indebtedness. A copy of the said letter has been annexed. That the plaintiffs allege that they have paid close to Kshs.60,000,000.00 towards the facility without evidence. The defendant avers that even assuming that the plaintiffs have paid close to Kshs.60,000,00.00 as alleged, that would not offend the in duplum rule in Section 44A of the Banking Act Cap 488. That the total amount lent was Kshs.34,500,000.00, the defendant is therefore entitled to recover at least Kshs.69,000,000.00, excluding recovery costs. The defendant states that it is baseless to suggest that the maximum rate of interest was 18% per annum in all circumstances. That as a matter of fact, the rate of interest was variable, and the contract allowed the defendant to charge default interest in addition to normal interest in cases of default.

8. The defendant avers that the plaintiffs well and truly owe the defendant Kshs.6,025,765.11 as at 16th April, 2020, and the plaintiffs, other than disputing the amount, have not provided any sound basis for challenging it. A copy of the 1st and 2nd plaintiffs' statement of account as at 16th April 2020 has been annexed. The defendant contends that the plaintiffs have no basis for challenging the amount demanded or the interest charged as those are not grounds to stop the exercise of a statutory power of sale. The defendant further states that it is relying on a valuation report dated 27th January 2020, a copy of which has been annexed, and not a valuation report carried out in 2013 as alleged by the plaintiffs. The defendant avers that the plaintiffs have no legal basis to challenge the defendant's exercise of its statutory power of sale and that they have not demonstrated how the sale of a commercial property would constitute irreparable injury incapable of monetary compensation. The defendant therefore urged the court to find that the plaintiffs, having admitted the debt but refused to pay, are not entitled to the equitable remedy of injunction that they seek.

9. The application was canvassed by way of written submission which were duly filed and highlighted by the advocates for both parties. Mr. Nyakeri learned counsel for the plaintiffs submitted that the defendant had no lawful cause and/or basis, to warrant the recovery proceedings vide inter-alia exercise of statutory power of sale or at all. That the defendant violated the terms of the letter of offer and proceeded to vary, increase and then after debit higher default rates, which rates were varied and/or increased in contravention of the provisions of Section 44 of the Banking Act. It is the plaintiffs' submission that the commencement of the recovery proceedings undertaken by the defendant was

premature, illegal and oppressive. The plaintiffs submits that there exists a prima facie case with overwhelming chances of success and relied on the case of **Mrao Limited –v- First American Bank of Kenya Limited & 2 Others (2003)KLR 125**.

10. In respect of irreparable loss, the plaintiffs submit that the exercise of the statutory power of sale, together with alienation and/or disposal of the securities offered by the plaintiffs shall defeat the plaintiffs' interests thereon. The plaintiffs maintain that they are not indebted to the defendant, adding that the notice dated 4th February, 2020 which threatened recovery does not constitute a compliant notice as envisaged in law. Mr. Nyakeri further submitted that the supplementary affidavits filed by the plaintiffs was filed pursuant to leave of the court and ought to be considered. It was his submission that the application meets all the requisite conditions to warrant granting the orders of temporary injunction as sought.

11. Mr. Kongere, learned counsel for the defendant urged the court to ignore all the issues raised in the supplementary affidavit filed by the plaintiffs as it was filed after the defendant had filed its submissions.

12. It is the defendant's submissions that this court lacks jurisdiction to entertain the suit as relates to contracts and compliance of Sections 90, 96 & 97 of the Land Act. The defendant's counsel relied on the case of **Cooperative Bank of Kenya Limited –v- Patrick Kangethe Njuguna & 5 Others (2017) eKLR** and **Phoenix of E.A. Assurance Company Limited –v- S. M. Thiga t/a Newspaper Service (2019)eKLR**.

13. The defendant further submitted that the plaintiffs have not established a prima facie case with a probability of success. The defendant relied on the case of **Jampen Enterprises Limited –v- Nic Bank Kenya PLC & Another (2019) eKLR** where the Court held that the plaintiff did not challenge the valuation report filed, and arrived at a finding that there was no violation of Section 97 (2) of the Land Act. The defendant further submitted that it has discharged its duty to show that notices were issued. The defendant's counsel relied on the case of **Nyangilo Ochieng & Another –v- Fannel B. Ochieng & 2 Others (1996)eKLR** and **Jampen Enterprises (supra)**. It was also the defendant's submission that a dispute on accounts or loan amount and interest cannot be a basis for granting an injunction restraining the exercise of power of statutory power of sale when it arises. The defendant relied on the case of **Francis J. K. Ichata –v- Housing Finance Company of Kenya Ltd (2005)eKLR** and **Air Travel & Related Studies Ltd –v- Equity Bank (Kenya) Ltd (2017)eKLR**. The defendant submitted that the plaintiffs agreed to a settlement warts and all, and cannot be allowed to go back on that agreement.

14. The defendant relied on the case of case of **John Mburu –v- Consolidated Bank of Kenya (2018)eKLR** and **John Mburu (supra)** and submitted that the equitable doctrine of estoppel and waiver will not allow the plaintiffs to revisit the question of interest. The defendant submitted that the plaintiffs have not proved any irreparably injury that they would suffer should the application for injunction not be granted. The defendant relied on the case of **Elizabeth Jerono Yator –v Consolidated Bank of Kenya Limited & Another (2019) eKLR** and urged the court to strike out or dismiss the application.

15. I have considered the application and the submissions made as well as the authorities relied on. The issues falling for determination are whether or not the court has jurisdiction to try the matter, if so, whether the orders sought in the application should be granted or not.

16. The defendant has argued that this court has no jurisdiction for the reasons that the dispute relates to charges or mortgages. The Environment and Land Court is anchored in the constitution. Article 162 of the Constitution of Kenya provides for the establishment of the Environment and Land Court as one of the superior courts in Kenya. It provides as follows:

162 (1) The superior courts are the Supreme Court, the Court of Appeal, the High Court and the Courts referred to in Clause (2)

(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to:-

a. Employment and labour relations; and

b. The environment and the use and occupation of, and title to, land.

17. Article 162 (2) (b) of the Constitution mandated parliament to create a court with the status of the High Court to hear and determine disputes relating to the environment and the use and occupation of, and title to land. Parliament did create the ELC through the Environment and Land Court Act, No.19 of 2011. Section 13 of the ELC Act provides for the jurisdiction of the court and states as follows:

13. (1) The court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162 (2) (b) of the Constitution and with the provisions of this Act or any other written law relating to environment and land.

(2) in exercise of its jurisdiction under Article 162 (2) (b) of the Constitution, the court shall have power to hear and determine disputes relating to Environment and Land, including disputes: -

(a) Relating to environmental planning and protection, trade, climate issues, land use, planning, title, tenure, boundaries, rates, rents, valuation, mining, minerals and other natural resources;

b) Relating to compulsory acquisition of Land;

c) Relating to land administration and management;

d) Relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interest in land; and

e) Any other dispute relating to environment and land.

(3) Nothing in this Act shall preclude the court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Article 42, 69 and 70 of the Constitution.

(4) In addition to the matters referred to in subsections (1) and (2), the court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the court.

(5) Deleted by Act No. 12 of 2012.

(6) Deleted by Act No. 12 of 2012.

(7) The exercise of its jurisdictions under this Act, the court shall have power to make any order and grant any relief as the court deems fit and just, including: -

a) Interim or permanent preservation orders including injunction.

b) Prerogative orders;

c) Award of damages;

d) Specific performance;

e) Restitution;

f) Declaration; or

g) Costs.

18. As can be noted from Section 13 (1) above, the court has both original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162 (b) of the Constitution. Section 13 (2) in very broad terms states that the court has jurisdiction to hear any other dispute relating to environment and land.

19. It will be seen from Section 13 (2) (d) and (e) that the court has jurisdiction to hear a matter relating to public, private and community land, contracts, choses in action or other instruments granting any enforceable interests in land; and any other dispute relating to environment and land. It will therefore be appreciated that the jurisdiction of the court in so far as disputes involving environment or land is very wide and almost limitless. The remedies that the court can grant includes injunctions.

20. The dispute before this court relates to the charge over LAND PARCEL LR NO. MOMBASA MUNICIPALITY/BLOCK XXI/328. The plaintiff seeks an injunction to restrain the defendants from exercising its statutory power of sale and selling the said land. It cannot be argued that the dispute is not over land. It is over land or interest in land. The charge is a disposition relating to land. The current law on charges is in part C of the Land Registration Act and Part VII of the Land Act and Section 101 of the Land Registration Act and Section 150 of the Land Act gives this court jurisdiction to hear and determine disputes, actions and proceedings concerning land under the two Acts. From the foregoing, I find no merit in the arguments that this court has no jurisdiction to hear and determine this suit.

21. I now turn to the second issue whether or not the application herein is merited to warrant the grant of the orders sought. The orders sought by the applicants in this application are of temporary injunction and the courts apply the established principles as laid down in the case of **Giella –v – Cassman Brown & Co. Ltd (1973)EA 358**. At the interlocutory stage, the court is not concerned with the merits or demerits of the case itself as filed in the suit. The principles to be considered are that the applicant must show a prima facie case with a probability of success; the applicant must show that he/she would suffer irreparable injury which would not normally be compensated by an award of damages; and when the court is in doubt, it will decide the application on the balance of convenience.

22. In this case, it is not in contention that the plaintiffs were advanced financial accommodation by the defendant which was secured by the suit property. From the material on record, it is also clear that the plaintiffs defaulted in payment and one of the properties offered as security was sold by private treaty and part of the proceeds paid over to the defendant to settle the loan. The plaintiffs state that they have fully repaid the loan facilities and they demanded for discharge of the remaining security. Instead of discharging, the defendant demanded some Kshs.5,787,645.00. The plaintiffs think that the demand is illegal because it comprises interest charged beyond the fixed contractual rate. The plaintiffs also state that the defendant only served them with three (3) months statutory notice but not the forty day notice to sell under Section 96 of the Land Act. The plaintiffs also accuse the defendant of breaching Section 97 of the Land Act by relying on a valuation report prepared in 2013.

23. The plaintiffs admit receipt of the three month statutory notice but not the forty day notice to sell. However, the defendant has annexed a copy of the notice to sell dated 19th July 2019 and its certificate of posting. That notice was addressed to the plaintiffs using the same address to which the three month notice was addressed. I am therefore persuaded that the forty days' notice was sent and received by the plaintiffs. The plaintiffs claim that they never received that notice is not believable.

24. Regarding the allegation that the defendant relied on a valuation report prepared in 2013, I note that in the replying affidavit, the

defendant has annexed a valuation report dated 27th January, 2020. The plaintiffs did not controvert this allegation and the annexed valuation report has not been challenged. Consequently, it is the finding of this court that the defendant was not in violation of Section 97 (2) of the Land Act.

25. The plaintiffs further contend that the interest charged is beyond the contractual rate of 18% per annum. This in my view, is a dispute on accounts which cannot be a valid ground for restraining the defendant fr

26. om exercising it statutory power of sale. I have also perused the charge documents. Besides the contractual rate of 18% per annum, the parties also agreed default interest at 19.5% per annum in addition to the normal interest.

27. From the material on record it is my finding that the plaintiffs have clearly not made out a prima facie case with a probability of success at trial. I am also not persuaded that the plaintiffs would suffer loss that would not be compensated by way of damages in the event their suit is successful at trial. In my view, having charged the suit property, the plaintiffs converted it to a commercial commodity with a monetary value that can be easily ascertained and its loss can always be made good by an appropriate award of monetary compensation. On the whole, the court finds that the plaintiffs have failed to satisfy the requirements for an injunction.

28. The upshot is that the Notice of Motion dated 13th March, 2020 is not merited and the same is dismissed with costs.

DATED, SIGNED and DELIVERED at MOMBASA virtually due to COVID-19 Pandemic this 29th day of October 2020

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C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

C.K. YANO

JUDGE