



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL CASE NO 494 OF 2013

FLORENCE NJERI KARANJA.....PLAINTIFF

VERSUS

MOLYN CREDIT LIMITED.....DEFENDANT

RULING

INTRODUCTION

1. This ruling is in respect of the Plaintiff's Notice of Motion applications dated 8th November 2013 and 13th March 2013 and filed on 8th November 2013 and 14th March 2014 respectively which the parties agreed could be heard together.
2. The Notice of Motion application dated and filed on 8th November 2013 was brought pursuant to the provisions of Sections 1A and B (sic) and 3A of the Civil Procedure Act, Order 40 Rule 1(a) and Order 51 of the Civil Procedure Rules, Sections 90 and 98 of the Land Act No 6 and all the enabling provisions of the law. Prayer Nos (a) and (b) were spent. It sought the following remaining orders:-
 - a. **Spent.**
 - b. **Spent.**
 - c. **THAT a temporary injunction be and is hereby issued restraining the Defendant, its servants and/or agents from selling, transferring or otherwise dealing with the whole of that parcel of land known as Title No Githunguri/ Nyaga/T.437 pending the hearing and determination of the suit.**
 - d. **THAT costs be provided for.**
3. On 13th November 2013, the court granted the Plaintiff interim injunctive orders pending the hearing and determination of the application herein. However, the interim injunctive orders were discharged on 17th February 2014, a date that had been taken by consent of the parties, as neither the Plaintiff nor her counsel was present in court to have them extended.
4. It was not necessary for this court to consider the merits or otherwise of the Plaintiff's Notice of Motion application dated 13th March 2014 and filed on 14th March 2014 as the same had been overtaken by events. This application had sought prayers that the orders that were made on 17th February 2014 discharging the temporary injunctive orders issued on 13th November 2013 be reviewed and/or set aside and the said interim injunctive orders be reinstated as people had been visiting the subject property with the sole purpose of purchasing the same.

5. On 27th March 2014, the Defendant's counsel informed the court that the subject property was sold by public auction to one Peter Ngotho on 13th March 2014. Upon hearing counsel for both the Plaintiff and the Defendant, the court maintained the *status quo* of the matter herein pending the hearing and determination of the application dated and filed on 8th November 2013. The *status quo* order was issued on condition that the Plaintiff deposited a sum of Kshs 595,954/= in a joint interest earning account in the names of the advocates. Parties confirmed that the account had been opened and the said sum deposited therein.

THE PLAINTIFF'S CASE

6. The Plaintiff's applications were supported by her Affidavit that was sworn on 7th November 2013 and the Affidavit of Thomas Rutto that was sworn on 14th November 2013. A brief summary of the Plaintiff's case was that in February 2013, the Defendant advanced the Plaintiff a sum of Kshs 600,000/= which was to be secured by Title No Githunguri/ Nyaga/T.437(hereinafter referred to as "the subject property"). The said amount was to be repaid over a period of thirty eight (38) months by way of monthly installments of Kshs 33,191/=. She had paid a sum of Kshs 366,383/= as at 8th November 2013.
7. She denied ever having been issued with a Statutory Notice by the Defendant which had advertised the sale of the subject property to recover a sum of Kshs 1,067,237/=. She contended that if the subject property was sold, it would render her application nugatory and cause her to suffer irreparable loss.
8. The Plaintiff reiterated her arguments in her written submissions that were dated 10th June 2014 and filed on 12th June 2014.

THE DEFENDANT'S CASE

9. On 20th November 2013, Moses Anyangu swore a Replying Affidavit on behalf of the Defendant. The same was filed on 21st November 2013. Its case was that from the time the aforesaid monies were advanced to the Plaintiff on 14th February 2013, the Plaintiff never made any payments until around 4th June 2013 when it issued her with a Statutory Notice of Sale through her postal address P.O. Box 253 Ruaraka.
10. The first payment went through on 29th August 2013 but her subsequent cheques were returned unpaid. The non-payment of the monies due and the said cheques attracted charges and penalties between March 2013 and August 2013.
11. Upon the expiry of three (3) months statutory notice as required by the law, the Auctioneers issued a forty five (45) days' Notification of Sale and advertised the subject property for sale on 29th October 2013.
12. It denied that the Plaintiff had made a repayment in the sum of Kshs 366,382/= and pointed out that she only paid a sum of Kshs 300,000/= on 29th August 2013 and Kshs 33,191/= on 11th September 2013 giving a total of Kshs 333,191/= leaving a balance of Kshs 1,067,237/= inclusive of interest charged on the defaulted amounts for the months of February to September 2013 as was provided for in Section (6) of the Loan Application Form that she duly executed.
13. It argued that the Plaintiff's application was an abuse of the court process and that a dispute on the amount payable was not a basis for the grant of a temporary injunction. It also contended that the Plaintiff was in breach of the terms of the Credit Agreement and the Charge Document and as such she had not established a *prima facie* case with a probability of success or shown that she would suffer any irreparable loss that could not be compensated by way of damages. It averred that the balance of convenience tilted in its favour and urged the court to dismiss the Plaintiff's application.
14. The Defendant's written submissions were dated 17th June 2014 and filed on 18th June 2014.

LEGAL ANALYSIS

15. A copy of the advertisement in the Daily Nation for 29th October 2013 annexed in the Plaintiff's Supporting Affidavit and marked "PNK 1" showed that the subject property was to be sold by way of public auction on 14th November 2013. The Plaintiff denied ever having been served with a Notification of Sale as required by the law.
16. The Defendant's bundle of documents was marked "MA 1." Amongst other documents, copies of the Plaintiff's advocates' Statutory Notice dated 4th June 2013, the Notification of Sale by M/S Regent Auctioneers dated 6th September 2013 and Certificates of Postage were annexed to the Replying Affidavit on Moses Anyangu. The dates on the said Certificates of Postage were 4th June 2013 and 9th September 2013.
17. The Defendant did not, however, specify which Certificate of Postage was for which document. This is a poor way of marking exhibits as each exhibit must correspond with the fact that it is intended to prove and/or support. Failure to mark exhibits correctly leaves the court with the burden of ascertaining the facts to be proved from the documents that have been submitted and/or to assume facts thus running the risk of it arriving at erroneous conclusions.
18. Be that as it may, it does appear that the Plaintiff was sent certain documents via her P.O. Box Number 253 Ruaraka. The Certificate of Postage dated 4th June 2013 showed that documents were sent to the Plaintiff by the Defendant's Advocates while the Certificate of Postage dated 9th September 2013 indicated that other documents were sent to her from P.O. Box 22826 00400-Nairobi, which from "PNK 1", the court notes belonged to M/S Regent Auctioneers.
19. An assumption that this court is forced to make and which could be wrong, was that the Statutory Notice and Notification of Sale were sent to the Plaintiff by registered mail by the Defendant's advocates and the said auctioneers respectively. They were sent to the postal address that had been used by the Plaintiff in her pleadings, the Charge Instrument and the Loan Application Form. The court was therefore persuaded by the Defendant's submissions that the documents were sent to the Plaintiff's known postal address and accordingly finds that the statutory notices were duly served upon the Plaintiff.
20. Having said so, it is important to establish whether or not the Defendant's Statutory Notice dated 4th June 2013 had complied with the requirements of Section 90 of the Land Act Cap 280 (laws of Kenya). It stated as follows:-

"We act for Give you notice that you have defaulted in payment of the sum of Kshs 1,152,415.00 together with interest thereon at the agreed rate in charge instrument as at 3rd June 2013

being balance of the amount advanced..."

21. Section 90 of the Land Act Cap 280 (laws of Kenya) provides as follows:-

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;**

22. While the Defendant complied with the durations that were expected to be given in the Statutory Notice and Notification of Sale by the Defendant's advocates, it was required to comply with the provisions of Section 90 of the Land Act in which the Defendant was required to inform the Plaintiff of the following:-

- a. nature and extent of the default by the charger;
- b. the amount that she had to pay 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. That if the default consists of the failure to perform or observe any covenant, express or implied, in the charge, the thing the charger had to 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 was not rectified within the time specified in the notice, the chargee would proceed to exercise any of the remedies referred to in this section in accordance with the procedures provided for in this sub-part;
- e. and the right of the chargor in respect of certain remedies to apply to the court for relief against those remedies.

23. Reading the contents of the said Statutory Notice against the provisions of Section 90 of the Land Act, it is evident that the said notice did not indicate what the outstanding amount of arrears was. The Loan Application Form shows that the loan of Kshs 600,000/= together with 5% of the outstanding loan balance was to be paid in forty eight (48) months.

24. Bearing in mind that the loan was disbursed to the Plaintiff on 14th February 2013 and the Statutory Notice was issued on 4th June 2013, it is not clear from the said notice whether the sum of Kshs 1,067,237/= was for the entire loan or it was for the outstanding arrears. The Plaintiff did therefore appear not to have been given an opportunity to rectify the default before the Defendant exercised its statutory power of sale, a right she was entitled to.

25. The court agreed with the Plaintiff's submissions that the Statutory Notice merely demanded a sum of Kshs 1,152,415/= and did not demand that the Plaintiff rectify the default and adopted the holding in the case of **David Gitome Kuhiguka vs Equity Bank of Kenya Limited (2013) eKLR**. For this reason, the court finds that the Statutory Notice that was issued by the Defendant was not valid as it was not in accordance with the provisions of Section 90 (2) (b) of the Land Act.

26. Turning to Section 96 of the Land Act, the same stipulates as follows:-

"1. 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 land.

2. Before exercising the power to sell the charged land, the chargee shall serve on the chargor a notice to sell in the prescribed form and shall not proceed to complete any contract for the sale of the charged land until at least forty days have elapsed from the date of the service of that notice to sell."

27. Evidently, the Statutory Notice was issued on 4th June 2013. Three (3) months were to expire on 4th September 2014. Bearing in mind the provisions of Section 96 (2) of the Land Act, the Defendant was not expected to proceed to complete any contract for the sale of the charged land until forty (40) days had elapsed from the date of the notice to sell in the prescribed form.

28. A reading of Section 96 (1) of the Land Act shows that these forty (40) days would be in addition to the three(3) months' notice and different from the Notification of Sale to be issued by an auctioneer. No evidence was provided by the Defendant to demonstrate that they had complied with the provisions of Section 96 (2) of the Land Act.

29. Whilst it is true as was submitted by the Defendant, that the court in the case of **Simon Gitau Mugi & Another vs K- Rep Limited & Another [2013] eKLR** correctly found that issuance of statutory notices to debtors whenever they made part payments would result in abuse of the court process, notices must, however, be issued in strict compliance of the law.

30. For all purposes and intent, the said Statutory Notice of 4th June 2013 was invalid and could not be deemed to form the basis of the sale of the Plaintiff's property and the fact that the property had moved to a third party as was evidenced in the Replying Affidavit of Moses Anyangu that was

sworn and filed on 17th March 2014 was immaterial and of no consequence. The invalidity of the said Statutory Notice and failure to issue the mandatory notice under Section 96 of Land Act protected the Plaintiff from losing the legal ownership of the subject property as the auction was unlawful.

31. Whilst the Plaintiff submitted that the Defendant did not undertake a forced sale valuation of the subject property, the court notes that the Defendant furnished the court with a copy of a Valuation Report dated 31st January 2014 by M/S Accurate Valuers Limited in which it put the forced value of the said property at Kshs 1,200,000/= and open market valuation of Kshs 1,600,000/=. The Plaintiff also furnished the court with a copy of a forced valuation report dated 14th May 2014 that showed a fair market value of the property in the sum of Kshs 2,000,000/=.

32. In the absence of any evidence that the said Valuation Report was obtained after the sale to Peter Ngotho, the court can only come to the conclusion that the Defendant obtained a forced sale valuation of the subject property before the auction which took place on 13th March 2014 as it was required to do under Section 97 of the Land Act. The same provides as follows:-

“1. A chargee who exercises a power to sell the charged land, including the exercise of the power to sell in pursuance of an order of a court, owes a duty of care to the chargor, any guarantor of the whole or any part of the sums advanced to the chargor, any chargee under a subsequent charge or under a *lien* to obtain the best price reasonably obtainable at the time of sale.

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

33. However, irrespective of the Defendant having obtained a current valuation as required by the law, the court nonetheless found that the sale of the subject property to the said Peter Ngotho was unlawful and had no legal basis. The failure by the Defendant to comply with the provisions of Section 90 (2)(b) and Section 96 (2) of the Land Act were serious issues that automatically invalidated the sale of the subject property to the said Peter Ngotho at the public auction on 13th April 2014.

34. In addition, if the sum that was demanded by the Defendant was the whole outstanding sum of the loan that it had advanced to the Plaintiff, this would definitely have denied the Plaintiff an opportunity to first rectify the default.

35. Any transfer to Peter Ngotho would cause her great injustice as she would have been denied her right of redemption which she was entitled to until the fall of the hammer at the public auction. In this regard, the court associates itself with the holding in the case of **Kwanza Estates Limited vs Dubai Bank Kenya Limited (2013) eKLR** that was relied upon by the Plaintiff where the court held as follows:-

“I am satisfied that a party deprived of his property through an illegal process would suffer irreparable loss and or damage...”

36. Although the court should and ought not to re-write the contracts that have been entered into by parties, it must always have at the back of its mind that the sale of a person's property is not a matter that should be taken casually because it deprives a party of right to own property, a right that is enshrined in Article 40 of the Constitution of Kenya, 2010. The importance of not depriving a person his or her property was an issue that was considered in the case of **Alice Awino Akello vs Trust Bank Limited LLR No 625 (CCK)**.

37. The court also wishes to associate itself with the holdings in the case of **Joseph Siro Mosioma v Housing Finance Company of Kenya Ltd & 3 Others (2008) eKLR** where Warsame J had held that damages were not an automatic remedy when deciding whether or not to grant an injunction and that the same could not be a substitute for loss occasioned by a clear breach of the law. This was the same position that was taken in the case of **Sharok Kher Mohamed Ali v Southern Credit Banking Corporation Limited (2008) eKLR** which was cited, with approval, in **Kwanza**

Estates Ltd v Dubai Bank Kenya Ltd (Supra).

38. Indeed, in Muiri Coffee Estate Limited vs Kenya Commercial Bank [2009] eKLR, Khaminwa J (as she then was) quoting from the decision of Ringera J (as he then was) in the case of Lucy Njoki Waithaka vs ICDC observed as follows:-

“It is not an invariable rule that where damages may be an appropriate remedy an interlocutory injunction should never be granted. If that were the rule, the law would unduly lean in favour of those rich enough to pay damages for all manner of trespassers. It would be unjust and be seen to be unjust.”

39. Going further, ordinarily, courts are not inclined to grant an interlocutory injunction pending the hearing and determination of suit on the ground that there was a dispute as to the figures. Indeed, in the case of Civil Application No 108 of 2005 Francis J.K Ichatha v Housing Finance Company of Kenya Ltd, the Court of Appeal had held that a dispute in computation of interest was a mathematical error that did not warrant restraining a chargee from exercising its statutory power of sale.

40. However, in Halsbury’s Laws of England Vol 32. (4th Edition) Paragraph 725 it is stated as follows:-

“The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute or because the mortgagee has begun a redemption action, or because the mortgagor objects to the manner in which the sale is being arranged. He will be restrained, however, if the mortgagor pays the amount which the mortgagee claims to be due to him, unless, on the terms of the mortgage, the claim is excessive.” (emphasis court)

41. Notably, the Defendant admitted having been paid a sum of Kshs 333,191/= and a further sum of Kshs 595,954/= was deposited into the joint names of advocates for both the Plaintiff and the Defendant. However, the rate at which interest accrued between February 2013 and June 2013 was an issue the court found necessary to interrogate as it appeared to have been colossal and almost double the amount the Plaintiff had been advanced by the Defendant. From the advanced sum of Kshs 600,000/= in February 2013, the same had risen to Kshs 1,152,415/= by the time the Statutory Notice was issued on 4th June 2013.

42. This is despite the rate of interest having been shown to have been five (5%) per cent on reducing balance basis on any outstanding amount in the Loan Application Form and that any defaulted amount would also be charged a fine of Higher of 2000 (sic) or 5% of outstanding loan balance.

43. The fact that the said Peter Ngotho purchased the subject property at the auction would not validate the purported sale of the same. Title had not passed to him as no transfer had been effected in accordance with Section 37 (2) of the Land Registration Act Cap 300 (laws of Kenya) which stipulates as follows:-

“A transfer shall be completed by-

- a. **filing the Instrument; and**
- b. **registration of the transferee as proprietor of the land, lease or charge.”**

ar. The court was thus satisfied that the Plaintiff met the threshold set out in the case of Giella v Cassman Brown (1973) EA 360 in which the court stated as follows:-

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. 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.”

45. Having considered the pleadings, the affidavit evidence and oral and written submissions, the court found that the Plaintiff had made out a *prima facie* case with a probability of success. In view of the illegality of the process as aforesaid, the Plaintiff would suffer loss that would not be compensated by way of damages if the interlocutory injunction was not granted pending the hearing and determination of the suit herein. The balance therefore tilts in the Plaintiff's favour.
46. The above notwithstanding, the Plaintiff ought not to be allowed to escape her contractual obligations under her contract with the Defendant particularly where there was a clear admission of certain monies. In Paragraph 13 of her Further Affidavit sworn and filed on 18th March 2014, the Plaintiff admitted owing the Defendant a sum of Kshs 595,954/=. The monies were deposited in a joint interest earning account in the names of the advocates for the Plaintiff and the Defendant.
47. The Defendant ought not to be kept away from such monies even a minute longer. The Plaintiff cannot keep the subject property and keep the Defendant from accessing monies that she had admitted owing the Defendant. It is therefore in the interest of justice that the said sum of Kshs 595,954/= be released to the Defendant as the same was not contested.

DISPOSITION

48. Accordingly, the upshot of this court's ruling is that the Plaintiff's Notice of Motion application dated and filed on 8th November 2013 was merited and the same is hereby granted in terms of Prayer No (2) therein.
49. It is hereby directed that the admitted sum of Kshs 595,954/= now deposited in a joint interest earning account in the names of the Plaintiff's and Defendant's advocates be released forthwith to the firm of M/S Koceyo & Company Advocates who are acting on behalf of the Defendant herein.
50. The parties are hereby directed to fully comply with the Practice Directions of the High Court of Kenya Commercial & Admiralty Division Kenya Gazette Notice Number 5179 of 28th July 2014 and thereafter fix a date for the case management conference at the registry.
51. Costs shall be in the cause.
52. It is so ordered.

DATED and DELIVERED at NAIROBI this 4th day of December 2014

J. KAMAU

JUDGE