



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ELC NO. 6 OF 2013

MICHAEL NJUGUNA T/A

NJUAKIM COMMERCIAL AGENCIESPLAINTIFF

VERSUS

EQUITY BANK LTD.....DEFENDANT

RULING:

The applicant herein **Michael Njuguna T/A Njuakim Commercial Agencies** has brought this **Notice of Motion** against the Defendant herein Equity Bank Ltd under **Section 3(1) and 2, 13(1), 2 (D) (7) and Section 19,(1), (2),of the ELC Act and Section 78, 79(3) and Section 84, and also under Section 1A,1B,3A,of the Civil Procedure Act and Order 40 Rule 1, 2 and 3 of the Civil Procedure Rules and also Article 159 (2) d Article 46(1) e, Article 40 of the Constitution.**

The applicant prayed for Orders that the Court do issue an Order of injunction to restrain the Defendant, its servant or agent-Antique Auctions Agencies from proceeding to dispose by way of Public Auction, sale or private treaty or to transfer or deal in any manner whatsoever prejudicial to the Plaintiff's interest as the registered owner of the suit premises, **Parcel No. Kiambu /Municipality Block 1/57** pending the hearing and determination of this suit.

The applicant also prayed for costs of the application. The application was premised on the grounds on the face of the application. Among these grounds are; that the suit premises is a matrimonial home which houses many tenants. Applicant further averred that the intended sale is unlawful as the Respondent changed the loan interest rate from (18% to 25% without notice) . He also stated that the Statutory Notice as required by the law was not complied with. That the correct market value of the property is about 25 M and the applicant fees. If the suit property is sold then his entire life savings will have been wiped entirely.

The applicant also relied on his Supporting Affidavit and explained the reasons why he defaulted in payment of the loan. The application was opposed. Steve Biko, an employee of the Defendant put a Replying Affidavit. He admitted that the applicant took a mortgage facility of Kshs. 4,200.000/= on 23/9/2009. He was supposed to pay Kshs. 106,653 /= per month for a period of 60 months.

The applicant subsequently executed a charge instrument dated 16/11/2009. That in May 2012, the Applicant defaulted in making monthly payments. Further that, the Respondent issued applicant with a formal demand letter on 12/7/2012 but the Plaintiff continued to default.

That since the Applicant failed to satisfy the loan amount, the Defendant properly served upon the Plaintiff with the Mandatory Notice of intention to exercise Statutory Power of Sale in accordance with

Section 74 of Registered Land Act [RLA] and after the lapse of 45 days, the Respondent appointed Antique Auctioneers. Agencies to effect the sale of the charged property by public auction to recover the amount.

That on the issue of the interest rate, the applicant was aware that it would vary depending with the prevailing market conditions as provided by clause 3(1) of the Charge document dated 16/11/2009. The Respondent further deposed that since May, 2012, the applicant has not done anything to remedy the situation.

The applicant filed a Further Affidavit and controverted the contents of the Replying Affidavit by the Respondent. The applicant averred that he paid Kshs.150,000/= on 5/2/2012 and further 750,000/= on 12/3/2013 and that is enough proof that he has been paying the loan. Applicant also denied receiving any documents from *Antique Auctions Agencies*. He further averred that the said sale is unjustified and un-procedural and that, the Registered Land Act Cap, 300 Laws of Kenya was repealed when the new land laws came into effect. He therefore reiterated that a charge on matrimonial home shall only be valid .It is executed and ascertained by his wife which is not the case herein. The applicant prayed to court to allow his application. The parties herein canvassed the application through written submissions .

I have considered the Written Submissions and the relevant law and I make the following findings:- The applicant relied on the provisions of the Land Act 2012 and the Land Registration Act 2012. However, it is evident that the applicant took his mortgage loan in the year 2009 during the existence of the Land Registered Act Cap 300 Laws of Kenya (Now Repealed). Section 162 of the land Act is the savings and transitional provisions with respect to rights, actions disposition, etc.

Section 162(1) provides:

“ Unless the contrary is specifically provided in this Act, any rights , interest, title, power or obligation acquired , accrued, established coming into force or exercisable before the commencement of this Act, shall continue to be governed by the law applicable to it immediately prior to the commencement of Act”

The applicant submitted that the Charge is subject to *Section 78 (1)* of the Land Act and not the *Repealed Registered Land Act (Cap 300 Laws of Kenya)*. The applicant therefore submitted that the charge is void for failure to comply with section 93 (4) on matrimonial home and section 84 (1) on the interest rates. A look at section 162 of the Land Act shows that the Act does not provide retrospective provisions of the land Act 2012 in respect of Charge which was executed before the Land Act came into operations.

The Respondent relied on the case of **Overseas Private Investment Corporation & 2 Others Vs Attorney General (2013) eKLR** decided by Judge Majanja who held that:-

“These transitional provisions are intended to mitigate the full rigour of the retrospective effect of the provisions of part VII. Section 162 of the Act permits the application of the repealed law to specific instruments made or any rights on interest accrued prior to the Act coming into force. Specifically, section 162(2) of the Act permits transaction commenced prior to the Act to continue in accordance with the repealed Law”

Again it was submitted that section 106(2) of the Land Registration Act No. 3 of 2012, provides for the status of any charge registered prior to the commencement of the Act. The said Section 106 (2) provides as follows:-

“ Nothing in this Act shall affect the rights, liabilities and remedies of the parties under any mortgage, charge, memorandum of equitable mortgage, memorandum of charge by deposit of title or lease that immediately before the registration under this Act of the land affected was registered under any of the Registered Land Acts”

From the reading of the above section, it is clear that the rights and liabilities accrued under a charge registered before the commencement of the new Land laws are saved.

The applicant cannot use the provisions of the land Act and Land Registration Act 2012 to defeat the charge herein which he took in the year 2009. The applicant herein took the mortgage loan alone. He did not take it jointly with his wife. By amending his Plaintiff to include Mary Wanjiku Ciire his wife is to include a party to a charge who was not a party to in the first place. The applicant submitted that the Defendant varied the interest rates without referring to him. Applicant relied on section 84 (1) of the Land Act which provides that:

“Where it was continually agreed upon that the rate of interest is variable the rate of interest payable under a charge may be reduced by a written Notice served on the charger by the charges :-

- a. *giving the charger or at least thirty days notice of the reduction or increase in the rate of interest and;*
- b. *Stating clearly and in a manner that can be readily understood the new rate of interest to be paid in respect of the charge”*

However, the Defendant submitted that the Plaintiff by signing the charge document dated 16/11/2009 was fully aware that the interest rate of 18% was not fixed but would vary depending on the prevailing conditions and the bank could have its sole discretion to adjust the interest rate and was not required to advise the Plaintiff prior to any change in the rate of interest.

I have considered the provisions of clause 3(.) of the charge which charge document was signed by the applicant herein. He was made aware by the said clause that the interest rate would vary and that the bank on its sole discretion would adjust the interest rate. From the reading of clause 3(1). I find the applicant’s submissions unfounded and I will concur with the Defendant that the applicant was aware that interest rate would vary.

I have no doubt that the applicant defaulted in payment of his loan due. Applicant gave reasons as to why he defaulted. However, those reasons cannot stand as applicant knew he had an obligation to pay back his loan due. The bank has right exercised its right of redemption. As was held in the case of **Sammy Thuo Kangea & Another Vs Housing Finance Co. of Kenya (2006) eKLR** by Judge Kimaru who cited with approval the case of **Joseph Okoth Wandu Vs National Bank of Kenya Civil Appeal No. 77 of 2004** (Mombasa , unreported) where the Court of Appeal held as follows:-

“ it is trite law that a court will not restrain a mortgagee from exercising its statutory power of sale because the amount due is in dispute or because the mortgage has began redemption action or because the mortgagee objects to the manner in which the sale is being arranged .It will be restrained however if the mortgagor pays the amount claimed which the mortgagee claims to be due to it unless on terms of the mortgage, the claim is excessive”.

Having now analysed the above position, is the applicant entitled to equitable remedy of temporary injunction?. The applicant needed to satisfy the court on the three main principles established in the case of **Giella Vs Cassman Brown & Co.ltd (1973) EA 358** before he is granted the temporary injunction. These principles are:-

- a. Applicant must show he has a prima-facie case with probability of success.
- b. Applicant must show that he will suffer irreparable harm which cannot be compensated with damages.
- c. If Court in doubt to decide on a balance of convenience.

It is very clear herein that applicant took a loan mortgage and signed a charge document dated 6/11/2009.Applicant knew the terms and conditions stipulated in the said charge documents.The applicant failed to meet his obligations as per the charge document i.e. he defaulted in payment of the loan due. The Defendant therefore exercised his statutory power of sale as provided for in the charge document.The

applicant stated that the charge is null and void as it did not adhere to the provisions of Land Act 2012 and land Registration Act 2012. However, the applicant took the loan in the year 2009 under the Registered Land Act. Section 162 of the Land Act and Section 106 (2) of the Land Registration Act is the Savings and Transitional Provisions with respect to rights, actions, liabilities and remedies of parties over land that were registered before the two acts came into effect.

The two acts cannot be used retrospectively to defeat the terms of conditions of the charge between the applicant herein and the defendant. The applicant cannot therefore be found to have a prima facie case with high chance of success. The applicant took a loan facility and changed his parcel of land or the suit land. He knew the consequences of defaulting to pay the defendant herein is a Bank and in any event it will be able to pay damages that the plaintiff may suffer.

I rely on the authority quoted by the Defendant herein. The case of **Samson Khasian Amusibwa Vs Alphonse Ambali & 2 others (2005) ekl** where Judge GBM Kariuki relied on the case of **Mureithi Vs City Council of Nairobi (1981) KLR**, where Madan JA cited a section from the Judgement of Lord Diplock in **American Cynamind Vs Ethicon Ltd (1975)** which reads as follows:-

“ The object of interlocutory injunction is to protect the Plaintiff against injury by violation of right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial if damages in the measures recoverable at common law would be adequate remedy and the Defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted , however, strong the Plaintiff’s claim appealed to be at that stage”.

The applicant herein has failed to meet the first two principles and therefore the Court is not in doubt and balance of convenience will tilt in favour of the Defendant/ Respondent.

Having now considered the applicant’s Notice of Motion dated 1/3/2012 in totality, the Court finds that the said application has no merit and it is dismissed with costs to the Defendant.

It is so ordered.

Dated, Signed and delivered this 5th day of **July, 2013**.

L.N. GACHERU

Coram Before Gacheru Judge

Court Clerk Anne

Okemwa for Plaintiff

Wanjohi for Defendant

Ruling read in open court in the presence of Mr Okemwa for the Plaintiff / Applicant

Wanjohi for the Defendant/Respondent

L N GACHERU

A. I seek for stay pending appeal.

L N GACHERU

Okemwa : I apply for certified copy of the proceedings.

L N GACHERU

Wanjohi : I oppose the stay. Order 44 is clear on appeals and on how that application should be made.

L N GACHERU

Certified copies of the proceedings to be supplied on stay.

Applicant to make a formal application.

L.N. GACHERU