



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 94 OF 2013

DAVID GITOME KUHIGUKA PLAINTIFF

VERSUS

EQUITY BANK LTD. DEFENDANT

RULING

1. Before this Court is the Plaintiff's Notice of Motion dated 13th March 2013 brought under Certificate of Urgency as well as under **Order 40 Rules 1 and 2, Order 51 Rules 1 and 2** of the *Civil Procedure Rules* and **sections 1A and 1B** of the *Civil Procedure Act* and all other enabling provisions. The Application seeks a temporary injunction, pending the hearing and determination of the suit, to restrain the Defendant whether by itself, its servants and/or its agents or whomsoever is acting on its behalf from trespassing onto, advertising the sale and/or dealing with Title No. Ngong/Ngong/13355 (hereinafter "the suit property") in any manner whatsoever. The Application is supported by the Plaintiff's Affidavit sworn on 13th March 2013. The same very much repeated what was detailed by the Plaintiff in the grounds supporting the Application as are hereunder.
2. The Application is brought before this Court on the following grounds:

"1. THAT the Plaintiff is the registered proprietor of TITLE NO. NGONG/NGONG/13355 the subject of this suit.

2. THAT sometimes on or about 14th March, 2012 he charged his property TITLE NO. NGONG/NGONG/13355, in favour of the Defendant to secure a loan facility amounting to Kshs.5,500,000/= Kshs. Five Million Five Hundred Thousand Only).

3. THAT the sum of Kshs.5,500,000/= (Kshs. Five Million Five Hundred Thousand only) was repayable within a period of 3 years and at the rate of Kshs.218,680.00 (Kshs. Two Hundred and Eighteen Thousand, Six Hundred Eighty only).

4. THAT the Plaintiff has been making payments to the Defendant towards the settlement of the loan facility as due and owing to the Defendant.

5. THAT from the date the defendant advanced to him the loan, he has never received any demand for unpaid monies.

6. THAT Defendant sent the Auctioneers, Antique Auctioneers to the Plaintiff's

premises with a Notification of Sale of the Plaintiff's charged property around 4th February 2013.

7. THAT it is the Plaintiff's legal right and entitlement to receive the statutory Notice before any sale of his property can be legitimate.

8. THAT the Defendant's action to issue Auctioneers Notification of Sale before serving the plaintiff with a 90 days statutory Notice is a clog on the Plaintiff's equity of redemption and denies the Plaintiff the legal duration provided for under section 90 (1) and 96 (2) of the Land Act No. 6 of 2012.

9. THAT in furtherance of its illegal threats and harassment, the defendant instructed Antique Auctioneers to sell the Plaintiff's piece of land being TITLE NO. NONG/NGONG/13355 for an alleged unpaid loan.

10. THAT the Notification of Sale from Antique Auctioneers informing the Plaintiff that the Defendant has instructed them the sale the Plaintiff piece of land being TITLE NO. NGONG/NGONG/13355 by public auction on 12th April 2013 is premature, illegal and irregular as the law requires the Defendant to first serve upon the Plaintiff a statutory Notice of 90 days as per section 90 (1) of the Land Act No. 6 2012.

11. THAT the Defendant has not served the plaintiff with a notice to sell as stipulated in the Land Act section 96 (2) which should be served upon a defaulting chargor at least forty (40) before the property subject of the charge can be sold. There is no lawful Statutory Notice in force served upon him before the intended sale and/or exercise.

12. THAT the piece of land the Defendant intends to sell illegally is his prime property of which the Defendant has not carried out any valuation to ascertain the current value save for valuation done in the year 2012 and if the Defendant is allowed to carry out the intended illegal sale, the piece of land may be sold at a throw away price far below its true value.

13. THAT the Plaintiff stands to lose a property worth Kshs. 43,200,000.00 (Forty Three Million Two Hundred Thousand Only) should the intended sale be allowed to proceed in violation of the Plaintiff's statutory underpinned equity of redemption rights.

14. THAT the Plaintiff stands to suffer irreparable loss and damage should the illegal, unlawful and unprocedural sale of his property be allowed to proceed since it is his matrimonial home and investment.

15. THAT the Plaintiff stands to lose a property worth Kshs.43,200,000.00)Forty Three Million Two Hundred Thousand Only) should the intended sale be allowed to proceed in violation of the Plaintiff's statutory underpinned equity of redemption rights. This application therefore ought to be heard as a matter of urgency.

16. THAT the Defendant's action to issue Auctioneers Notification of Sale before serving the plaintiff with a 90 days statutory Notice is a clog on the Plaintiff's equity of redemption and denies the Plaintiff the legal duration provided for under section 90 (1) and 96 (2) of the Land Act No. 6 of 2012. Unless the application herein is certified as urgent, the intended sale will proceed and the plaintiff will lose his matrimonial home for no just cause.

17. THAT the Plaintiff has a prima facie case with a probability of success as lack of the statutory notice makes the intended sale a nullity, illegal and unlawful.

18. THAT the balance of convenience tilts in preservation of status quo until both parties are heard on the merits of the instant application as the defendant will still be in a position to recover their money. This is in consideration of the fact that the property is worth Kshs. 43.2 million while the loan advanced in March 2012 is only Kshs. 5.5 million. The defendant stands no chance to losing any money as opposed to the plaintiff who may lose his investments and matrimonial home”.

3. The Application is opposed, the Defendant filing a Replying Affidavit sworn by the Manager of its Debt Recovery Unit one **Purity Kinyanjui** dated 8th April 2013. The deponent made two interesting observations in her said Affidavit in reply. Firstly, she pointed out that since the *Land Act (2012)* came into force on 2nd May 2012 the circumstances detailed in grounds nos. 8, 10, 11 and 13 of the said Application were misconceived or intended to mislead this Court. Further, under clause 15 of the Charge document dated 14th March 2012 (annexed to the Affidavit in support of the Application) any notice required or authorised by law or by the Charge would be deemed as properly served on the Plaintiff if it had been sent, *inter-alia*, by registered post to the Plaintiff’s last known postal address in Kenya. The deponent noted that the Plaintiff’s postal address in the Charge was given as P. O. Box 20437 – 00100 Nairobi. She went on to state that by a letter dated 30th August 2012 sent to the Plaintiff through registered post on 7th September 2012, the Defendant had notified him of the outstanding balance of Kenya shillings 6,430,288.40 under the said Charge. Miss Kinyanjui detailed that the Plaintiff had failed to clear his outstanding balance and accordingly the Defendant sent a Statutory Notice to the Defendant under cover of its letter dated 10th October 2012 through registered post on 15th October 2012 attaching copies of these documents including the Certificate of registered postal packets from the Postal Corporation of Kenya.
4. Miss Kinyanjui went on to say that upon expiry of the 3 months’ notice, the Defendant had given instructions to Messrs Antique Auctions to sell the suit property. In turn, Antique Auctions had served a 45 day Notification of Sale upon the Plaintiff by personal service. The deponent stated that it was incorrect that the Plaintiff had been repaying his loan regularly and annexed a copy of the Plaintiff’s Loan account statement which clearly revealed irregular repayments and default in payment by the Plaintiff. As a result, the Defendant had complied with the necessary provisions of the law and, in the opinion of the Deponent, the Application before Court was only meant to frustrate or delay the Defendant in exercise of its rights under the Charge, particularly its statutory power of sale.
5. The Plaintiff relied upon **section 90 (2) (b)** of the *Land Act 2012* which details the necessity for a chargee to issue a 3 month statutory notice of intention to sell. He maintained that the two demand letters annexed to the Replying Affidavit dated 30th August 2012 and 10th October 2012 both demanded from the Plaintiff the entire amount due and not the amount that the Plaintiff was required to pay to rectify his default. The Plaintiff emphasised that **section 90 (2) (b)** of the *Land Act* which reads as follows:

“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.”

The Plaintiff further relied upon the provisions of **section 90 (3)** of the *Land Act, 2012* which opens with the words:

“If the chargor does not comply within two months after the date of service of a notice under subsection (1), the chargee may –.....”.

The Plaintiff maintained that two months had not passed as between the service of the statutory notice and the selling of the suit property. I must confess that I did not quite understand the Plaintiff’s reference in this connection as, quite clearly, 2 months had passed as between the service of the Statutory Notice, the date of which, as per the Charge, was the date of posting by Registered Post being 15th October 2012. The Notification of Sale issued by the said Antique Auctions was dated 1st February 2013 three and a half months after the service of the Statutory Notice.

6. Further, the Plaintiff relied upon **section 96 (2)** of the *Land Act, 2012* which reads as follows:

“(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 40 days have elapsed from the date of the service of that notice to sell.”

If I understood the Plaintiff correctly, the allegation as against the Defendant was that the suit property had been put up for sale by the auctioneers prior to the expiry of the 45 day notice. Again, I do not accept this point made by the Plaintiff. The Notification of Sale was dated, as above, 1st February 2013 and the auction sale was scheduled (until suspended by the status quo Order of this Court given on 3 April 2013) for 12th April 2013.

7. The last point made by the Plaintiff in his submissions was that under **section 97 (2)** of the *Land Act, 2012*:

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

It was the Plaintiff’s point that the Defendant had failed to carry out such valuation before sale. Finally, the Plaintiff submitted that he had made out a *prima facie* case with a probability of success as regards the lack of service of the Statutory Notice and that he stood to suffer irreparable loss and damage should the sale of his property be allowed to proceed since it was his matrimonial home.

8. In its submissions, the Defendant pointed out that the Plaintiff had quoted and seemed to rely upon the provisions of the *Land Act, 2012* extensively. It noted that the *Land Act 2012* had come into force on 2nd May 2012. The Charge herein had been executed on 14th March 2012 and registered on 15th March 2012 prior to the *Land Act, 2012* coming into effect. The Defendant drew the attention of the Court to the provisions of the *Land Act, 2012* **section 162 (1)** which reads:

“unless the contrary is specifically provided in this Act, any right, 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 immediately prior to the commencement of this Act”.

The Defendant maintained that as the Charge herein was registered on the 15th March 2012 such was before the commencement of the *Land Act* and consequently the provisions of the *Registered Land Act, Cap 300* (now repealed) applied to the transaction before this Court. It was the Defendant’s submission that it had complied with **section 74** of the said *Registered Land Act* by sending the letters to the Plaintiff dated 30th August 2012 and 10th October 2012 (the Statutory Notice) and the auctioneers, Antique Auctions had also given the Plaintiff the requisite Notification of Sale. In light of this, the Defendant maintained that the Plaintiff had made out no *prima facie* case against it.

9. That being said, the question is whether the provisions of the *Land Act* (and the *Land Registration Act*) are therefore applicable in the instant suit, given that the Charge instrument was executed and entered into before the said Acts were enacted. The savings and transitional provisions with respect to rights, actions, dispositions etc. are provided under **Sections 107 (1) & (2)** of the *Land Registration Act* and **Sections 106 (1) & (2)** of the *Land Act*. Both regimes of the law provide that **“unless the contrary is specifically provided for in this Act”**, any rights, interests, obligations acquired, accrued, or established before the commencement of the Act shall continue to be governed by the law applicable. This is the saving transitional clause for the transition into the new laws with the repeal of all previous land laws, including the *Land Registration Act, Cap 300*. The **“contrary provision”** aspect that the *Land Act* provides for is the issue of the matrimonial home. Having established that the suit premises is matrimonial property as per grounds Nos. 14 and 18 of the Application, the other issue is to establish what are the remedies available to both the chargee and chargor under the Act and whether the same is applicable in the instant application.

Mabeya, J in his determination in the case of Jimmy Wafula Simiyu v Fidelity Commercial Bank Ltd [2013] eKLR on the issue of applicability of the new land laws detailed:

“A careful reading of this Section will show that there is the use of the words “unless the contrary is specifically provided in this Act.” Section 78 of the Land Act, 2012 which the Plaintiff relies on, is in my view, express and specific that Part VII of the Act on “General provisions on charges” applies to all charges on land including any charge made before the coming into effect of that Act. That part VII generally deals with the creation, transfer, contents of charges and the remedies thereon. Part VII extends from Section 78 to 106 of the Act. In my view therefore, notwithstanding the provisions of Section 162(1) of the Act, the provisions of Section 78 of the Act being express and specific as to the application of Part VII of the Act, that part applies to the charges made before 2nd May, 2012 when the Land Act, 2012 came into effect. In this regard, I hold the view that prima facie, the provisions of the Land Act, 2012 is applicable in this case as regards part VII thereof.”

10. **Section 78 (1)** and by extension *Part VII of the Land Act*, are applicable in the instant application, following and considering the determination in Jimmy Wafula Simiyu v Fidelity Commercial Bank Ltd (supra). Therefore, pursuant to the said proviso under Part VII, and with particular emphasis on **Sections 90 (1)** as read with sub-section (3), and **Section 107 (1) & (2)** of the *Land Registration Act* and **Sections 106 (1) & (2)** of the *Land Act*, have the Applicants established a *prima facie* case with a probability of success? I am satisfied from the evidence before this Court that the Statutory Notice dated 10th October 2012 was properly served upon the Plaintiff by Registered Post as provided for under clause 15 of the Charge document on 15th October 2012. I am also satisfied that the said Antique Auctions properly served the 45 day Notification of Sale on the Plaintiff as otherwise, how could he annexe a copy of the same to the Affidavit in support of the Application? I consider that my finding on those two points cover the Plaintiff’s objections as per grounds 7, 8, 10 and 11 of his Application.
11. However, in reference to ground No. 12 of the Application, I find that the Defendant had a valuation of the suit property carried out by Zenith (Management) Valuers Ltd dated 25/02/2012. The Defendant sought to sell the suit property at auction over a year later on 12th April, 2013. **Section 97 (2)** of the *Land Act 2012* reads:

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

The said valuation undertaken by Zenith (Management) Valuers Ltd dated 25/02/2012 read as per its terms of reference:

“Duly instructed by the Manager, Equity Bank Limited; Rongai Branch, we inspected the above referenced property with a view to advising on its current open market value for mortgage purposes”.

Ironically, at page 13 of the report, the valuers detail the forced sale value of the suit property at Shs.30,100,000.00. However, is this enough to satisfy the requirements of **section 97 (2)** of the *Land Act* as aforesaid? In my opinion, it does not do so for two reasons. Firstly, the valuer has clearly stated in its terms of reference that it had been asked to advise on the suit property’s current market value for mortgage purposes. In other words, it related to the amount that the Defendant could/would lend to the Plaintiff as per the said Charge dated 14th March 2012 being Shs.5,500,00/= . Secondly, the valuation, by the time that the sale came round in April 2013, was over a year out of date. With properties in and around Nairobi in the current property market boom, it may well be that the suit property could have vastly increased in value even for forced sale purposes in the 14 months period. As a result, I find that the Defendant has not complied with **Section 97 (2)** of the *Land Act* in this connection. The obligation on a chargee to ensure that a forced sale valuation is undertaken by a valuer comes under the heading to **Section 97** of the *Land Act, 2012* – “Duty of chargee exercising power of sale”. To my mind, such a duty is obligatory.

12.If that was not enough for this Court to allow the Plaintiff's Application, the Defendant would seem to have also fallen foul of **Section 90 (2) (b)** of the *Land Act 2012*. I have perused the Statutory Notice issued by the Defendant to the Plaintiff dated 10th October 2012. That letter details the full amount of Shs.6,546,892.20 owing by the Plaintiff to the Defendant in respect of the former's loan account as at that date. It does not detail the amount that must be paid to rectify the default as required by **Section 90 (2) (b)** (supra). The up-shot of all the above is that I find some merit in the Plaintiff's Notice of Motion dated 13th March 2013 and I allow the same with costs.

DATED and delivered at Nairobi this 3rd day of October, 2013.

J. B. HAVELOCK

JUDGE