



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
CIVIL SUIT NO. 595 OF 2012

PATRICK WAWERU MWANGI 1ST PLAINTIFF

LUCY NUNGARI WAWERU 2ND PLAINTIFF

VERSUS

HOUSING FINANCE CO. OF KENYA LTD...DEFENDANT

R U L I N G

1. For determination by the Court is an application by the Plaintiffs dated 27th August, 2012. The application is brought under the provisions of **Order 40 Rules 2(1),(2),(3),(4),3 & 8** of the *Civil Procedure Rules*, **Section 97(1),97(3)(b) & 98(1)(d)** of the *Land Act, Act No. 6 of 2012*, **Sections 1,1A,1B, 63(c) & (e)** of the *Civil Procedure Act* and the Inherent Powers of the Court. The applicant prays for the following orders *inter alia*;

“1. Pending the hearing and determination of the Notice of Motion herein, a temporary injunction do issue, restraining the Housing Finance Company of Kenya Ltd the Respondent herein, by its Advocates, agents, servants, auctioneers or otherwise howsoever, from selling by public auction, private treaty, or otherwise howsoever dealing in the 1st Plaintiff’s property known as L.R No. 76/401 (Original No. 76/381/15), until the hearing of this Notice of Motion, or until further Court Orders;

2. Pending the hearing and determination of the suit, a temporary injunction do issue, restraining the Housing Finance Company of Kenya Ltd the Respondent herein, by its Advocates, agents, servants, auctioneers or otherwise howsoever, from selling by public auction, private treaty, or otherwise howsoever dealing in the 1st Plaintiff’s property known as L.R No. 76/401 (Original No. 76/381/15);

3. Costs of this application be to the applicant in any event”.

2. The application is predicated upon the grounds as set out in the application. It is averred that the 1st Applicant is the registered owner of L.R No. 76/401 (hereinafter referred to as “the suit premises”) and secured mortgage facilities from the Respondent over the suit premises consolidated at Kshs. 23 Million. It is contended that due to malicious issues being determined in Nairobi *H.C. J.R. Case No. 152 of 2011* and Industrial Court Case No. 1281 of 2011, the 1st Applicant’s salary was suspended, curtailing the monthly repayments of the mortgage. The

Applicants contend that the Respondent has threatened to move and sell by public auction the suit premises, and unless and until the Court intervenes, a grave injustice shall be visited upon the Applicants, which cannot be compensated for in damages. Further, the Applicants contend that the delay in remitting repayment to the Respondent is beyond their control, owing to the internal issues with the 1st Plaintiff's employer, Kenya Airways.

3. The application is supported by the Affidavit of **Patrick Waweru Mwangi**, sworn on 27th August, 2012. The deponent attested that he is the registered owner of the suit premises, vide Indenture dated 7th November, 1996 from Thindigua Company Ltd and the suit premises are situate South East of Kiambu Township. It is deponed that on 1st September, 2009, the 1st Applicant applied and was offered by the Respondent a loan facility for Kshs. 6.5 Million, at a reduced interest rate of 12.75% repayable over a period of Five (5) years and a further loan, applied for on 21st September, 2010 for Kshs. 16.5 Million, under the terms and condition stipulated in the loan offer. Vide a letter dated 22nd July, 2011, the deponent's salary was suspended, but his employment still subsisted. Following this predicament, the deponent was unable to meet his financial obligations, subsequent to which on 6th January, 2012, a Statutory Demand was issued by the Respondent demanding the remittance of the outstanding loan amount and, soon thereafter, a Notification of Sale of the suit premises. It is the deponent's apprehension that the Respondent may move to execute the intended sale, depriving the applicants of their matrimonial home. They fear that the property will be disposed of at a grossly deflated value. The Court's intervention is prevailed upon, to prevent the Respondent from selling off the suit premises pending the amicable amelioration of the instant suit, and the other pending suits.
4. The application is opposed. The Replying Affidavit was sworn by **Joyce Rienya**, the Legal Manager-Commercial of the Respondent Company, on 14th September, 2012. It is contended that the Applicant did indeed apply for and was offered mortgage/loan facilities by the Respondent to the tune of Kshs. 21 Million at a concessionary interest rate of 12.75% which has been maintained to date. It is contended that the 1st Applicant's failure to service the loan amount necessitated the issuance of the Statutory Notice by the Respondent dated 6th January, 2012, which notice period effluxed without the Applicants making any efforts to repay the outstanding loan amount. Further, it is deponed that the Applicants agreed to sell the suit premises by 25th July, 2012 which they failed to do, whereupon the Respondent then offered assistance in disposing of the suit premises on 17th July, 2012. It is averred that the Applicants' asking price of Kshs. 75 Million was too high and constituted a deliberate attempt at frustrating the Respondent in executing its accrued statutory rights. As such it should not be held hostage by circumstances of the 1st Applicant's own making. It is deponed that no *prima facie* case has been established by the Applicants to warrant the Orders sought, and which, in any event, damages may suffice as adequate compensation.
5. In an application for injunction such as the instant one, the conditions precedent are well set out under **Order 40** of the *Civil Procedure Act*, and in **Giella v Cassman Brown (1973) E.A 358**. The applicant has to establish a *prima facie* case with a probability of success and demonstrate irreparable loss and damage that will be suffered. In the aforementioned case, it was held that:

“The conditions for a 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 must otherwise suffer irreparable injury, which would not adequately be compensated by an award for damages. Thirdly if the court is in doubt, it will decide an application on the balance of convenience.”

In the application, the Applicants admit that they took out a loan facility with the Respondent Company. It is also admitted that the loan amount was secured by the suit premises. In the supporting affidavit of the 1st Applicant at paragraphs 5 and 8, he reiterates that indeed he did furnish the suit premises as collateral for the securing of the loan facilities. This is further admitted at paragraph 4 (a) in the grounds adduced in support of the application, where the Applicant avers;

“b) By a mortgage duly executed by the 1st Plaintiff and Defendant on 6th

October, 2009, the Defendant in securing its moneys advanced to the Plaintiffs in the sum of Kshs. 6.5 Million has mortgaged the said property”.

It is also admitted that indeed the Applicants are indebted to the Respondent, as stated in paragraph 4 (g) of the grounds of the application, as well as paragraphs 16, 17, 26, 27, 29, 39 and 50 of the Supporting Affidavit of **Patrick Waweru Mwangi**, the 1st Applicant herein. This position is also postulated in the submissions dated 2nd February, 2013 filed on behalf of the Applicants. At paragraph 11, the Applicants admit and do not contest that indeed there is a mortgage debt. However, the main basis upon which the application seems to be premised is the 1st Applicant’s employer’s action to suspend his pay. It is further submitted that the Applicant has not deliberately defaulted in the repayment of the outstanding mortgage facility, but due to the actions of his employer, which are the subject matter pending determination in Court in **H.C.J.R. 152 of 2011** and **Industrial Court No. 1281 of 2011**.

6. Further in their submissions, the Applicants have purported to establish a prima facie case by adducing the provisions of **Section 103 (1) (c)** of the *Land Act* and **84** of the *Land Registration Act*. Their claim is that the aforementioned Act, forbids, and indeed bars the Respondent from exercising its statutory accrued right of acquisition and disposition of the suit premises, as the same is matrimonial property, protected under Article 45 of the Constitution of Kenya. It is submitted that the disposition of the suit premises would deprive the Applicants of their right to shelter, a home and a safe environment. The Respondent, however, refutes these allegations. At paragraph 5 of the Replying Affidavit of **Joyce Rienya**, it is deponed that:

“5. That paragraph 7 of the 1st Applicant’s affidavit is not entirely true as at no time has the 1st Applicant disclosed to the Respondent that the subject matter property L.R No. 76/401 was matrimonial property. The 1st Applicant applied as the sole registered proprietor of the property without revealing any other overriding interest and the Respondent’s due diligence revealed none”.

In as much as the Respondent admits that the 1st Applicant’s employer may have failed to remit monthly repayments to the 1st Applicant’s mortgage account on or about July, 2011, the same did not estop the accrual of the Respondent’s statutory rights. It is also submitted, and indeed not refuted by the Applicants, that there was a meeting held to resolve the matter, with the Applicants committing themselves to repaying the outstanding amount, notwithstanding the suspension of the payment of salary by the 1st Applicant’s employer.

7. As reiterated in ***Giella v Cassman Brown*** (supra), an Applicant for injunctive orders has to establish a *prima facie* case, which has a probability of success. The instant application is predicated upon **Order 40 Rules 2 (1), (2), (3), (4), 3 & 8** of the *Civil Procedure Rules* and **Sections 97 (1), (3) (b) and 98 (1) (d)** of the *Land Act*. **Section 97 (1)** of the *Land Act* reads:

“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”.

Section 97 (3) (b) also reads;

“The chargor whose charged land is being sold for that price may apply to a court for an order that the sale be declared void, but the fact that a plot of charged land is sold by the chargee at an undervalue being less than twenty-five per centum below the market value shall not be taken to mean that the chargee has complied with the duty imposed by subsection (1)”.

It is the Applicants' contention that the Respondent intends to sell the suit premises below the market price. The Applicants submitted a document marked as "PWM-17", purporting that the same constituted a valuation of the property at Kshs. 75 million. This, however, is not a valuation report by Knight Frank (Kenya) Ltd, but an Agency Agreement, setting out the terms of business between the Applicants and Knight Frank. The value of Kshs. 75 Million in Clause 12 of the Agreement entered into on 2nd July, 2012, reads the asking price which the Applicants intended to get from the property, and was not, in any way, an indication of any valuation that was purportedly carried out by Knight Frank Ltd. Indeed, there is a note in handwriting on the document which reads "consider all offers coming through". The only valuation report on record is the one by **Ark Consultants Ltd**, who were instructed by the Respondents to determine the market value of the suit premises. The Valuation Report dated 30th July, 2012 values the suit premises at Kshs. 40 Million. The claim therefore, by the Applicants that the property is valued at Kshs. 75 Million is unsupported as no Valuation Report has been submitted to substantiate such claim. It would therefore follow that the issues raised with regards to **Section 97 (1) and (3) (b)** of the *Land Act* are unmerited as no valid Valuation Report has been adduced to countermand the one commissioned by the Respondent dated 30th July, 2012.

8. However, the Applicants also purport to rely on the provisions of **Section 103 (1) (c)** of the *Land Act*. This provision reads:

"(1) An application for relief against the exercise by the chargee of any of the remedies referred to in section 85 (3) (a) and (b) may be made by –

(c) a spouse of the chargor;".

It is submitted that vide this proviso, the 2nd Applicant has a stand -alone claim, which by itself raises a *prima facie* case that ought to be upheld by the Court. The Applicants have contended that the suit premises are matrimonial property, to which special protection under the Act is accorded. In order for such protection to suffice, the Applicant has to establish that the suit premises are indeed matrimonial property as per the provisions of the Land Act and Land Registration Act. Under **Section 2** of the Land Act, matrimonial property is construed as:

"matrimonial home" means any property that is owned or leased by one or both spouses and occupied by the spouses as their family home".

In the submissions made by the Applicants, it is contended that the property, being matrimonial property, does not have an ascertainable value that may then be compensated in damages. It is their submission that if the Respondent proceeds with its intended sale of the property, they will be deprived of a family home, and hence a denial of their rights as postulated under Article 45 of the Constitution. At paragraph 7 of the said Affidavit of the 1st Applicant, it was stated that the suit premises constituted the matrimonial home constructed thereon, and was a residential home for the applicants and their children. It was further stated at paragraph 7 that the loan facilities were acquired to make improvements to the matrimonial home, and the eminent threat of sale of what is not just their shelter, but a home and safe environment for the family and their children. In the premise, and in following the provision of **Section 2** of the Land Act, the suit property is deemed as the matrimonial property of the Applicants, having been in actual occupation of the house built thereon.

9. That being said, the question is whether the provisions of the Land Act and Land Registration Act are therefore applicable in the instant suit, given that the Charge instruments were executed and entered into before the said Acts were enacted. The savings and transitional provisions with respect to rights, actions, dispositions e.t.c 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 indeed the suit premises is matrimonial property, 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, on the issue of the protection of matrimonial property? The Court is empowered under **Section 91 (2)** of the *Land Act*, to stop the commencement of any proceedings, until the chargee (the Respondent), has exhausted all remedies available to it, under **Section 90 (3)**.
11. With regard to the issue of damages being an adequate remedy, Warsame, J (as he then was) in **Joseph Siro Mosiomo v Housing Finance Company of Kenya Nairobi H.C.C.C No. 265 of 2007; (2008) eKLR**, referred to and adopted in the ruling in **Jimmy Wafula Simiyu v Fidelity Commercial Bank Ltd** (supra), the learned Judge held that;

“Damages [are] not and cannot be a substitute for the loss, which is occasioned by a clear breach of the law. In any case, the financial strength of a party is not always a factor to refuse an injunction. More so a party cannot be condemned to take damages in lieu of his crystallized right which can be protected by an order of injunction.”

12. The Mortgage Deed dated 6th October 2009 annexed to the 1st Applicant’s said Affidavit as “PWM6” clearly shows that it is the 1st Applicant alone who is the registered owner of the suit premises. Indeed the Mortgage Statement annexed to the Replying Affidavit dated 14th September 2012 details solely the name of the 1st Applicant. However, the application before Court is brought in the joint names of the applicants. In my view, the 1st applicant is undeserving of any interim relief but what of the 2nd Applicant? **Section 103 (1) (c)** of the *Land Act* (supra) details that an application for interim relief may be made by a spouse of the chargor. It does not say that it is incumbent upon the Court to allow such application. Indeed, Section 104 of the Land Act, 2012 gives the Court complete discretion as to whether or not to grant an Order or any relief against the operation of a chargee’s remedy that the circumstances of the case may require.
13. I have perused the Mortgage Statement annexed to the Replying Affidavit dated 14th September 2012. Although regular monthly repayment instalments of Shs.272,513/= were made from December 2010 to July 2011, since that time the Plaintiffs have failed to make any payment towards settling the mortgage loan. Indeed, as at 13th September 2012, the outstanding amount on the mortgage account was Shs.22,679,550/15. There is nothing before me to show that further payments have been made since that date, over a year ago. In this regard, I am cognizant of the

finding of Njagi J in **Kyangaro v Kenya Commercial Bank Ltd & Another** (2004) 1 KLR 126. At page 145 the learned Judge had this to say:

“Secondly, the injunction sought is an equitable remedy. He that comes to equity must come with clean hands and must also do equity. The conduct of the plaintiff in this case betrays him. It does not endear him to equitable remedies. He admitted in this Court, quite frankly, that since leaving the employment of the bank over four years ago, he has never paid a cent towards redemption of the loan. He admits that he is in default, and yet he is also in possession. He can’t have it both ways. Either he pays the loan, or allows the bank to realize its security. He who comes to equity must fulfill all or substantially all his outstanding obligations before insisting on his rights. The plaintiff has not done that. Consequently he has not done equity. In the hands of the plaintiff, a permanent injunction would wreak havoc to the first defendant, and that would be inequitable. While chargees are enjoined by law to follow the laid down procedures for the realization of their security, the Courts must not at the same time be converted into a haven of refuge by defaulters. Even lenders and chargees have their own rights.”

I concur with and adopt the Ruling of Njagi J as above. To my mind, the Plaintiffs in this suit have done little or nothing to alleviate their position since the status quo Order issued by this Court on 18th September 2012 again over a year ago.

14.As a result, I do not consider the Plaintiffs are worthy of further interim or status quo orders, even despite the suit premises being matrimonial property. The 2nd Plaintiff has all along been aware of the position as regards the property as evidenced by paragraph 44 of the Affidavit in support of the Application which reveals that she and the 1st Plaintiff made several personal visits to the Defendant’s Recoveries Manager. Accordingly, I dismiss the Plaintiffs’ Notice of Motion dated 27th August 2012 with costs to the Defendant.

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

J. B. HAVELOCK

JUDGE