



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

CIVIL CASE NO. 739 OF 2012

ZADARACK OYARO ACHOKI 1ST PLAINTIFF

GRACE KEMUNTO MOKUA 2ND PLAINTIFF

VERSUS

CONSOLIDATED BANK OF KENYA LIMITED DEFENDANT

R U L I N G

1. The Application before this Court is the Plaintiffs' Notice of Motion dated 26th November 2012 brought under **Order 40 Rules 1 (a) and 3** of the *Civil Procedure Rules* as well as the enabling provisions of **sections 1A, 1B, 3A and 63 (c) and (e)** of the *Civil Procedure Act*. The Plaintiffs seek an order that pending the hearing and determination of the main suit, this Court be pleased to issue a temporary injunction restraining the Defendant by itself, its servants, agents and/or employees from advertising the sale, selling, disposing of or in whatever manner dealing in the suit property. In that regard this Court when the matter came before it under Certificate of Urgency, issued a temporary injunction pending the hearing *inter-partes* of the said Application on 27th November 2012 as regards the property L. R. No. Ngong/Ngong/29983 (hereinafter "the suit property"). The Application was supported by the Affidavits of 3 persons namely Zadarack Oyaro Achoki (1st Plaintiff), Boaz Odenyo and Zachary Kopphen Nyamongo.
2. The Application is brought on the following grounds:

“a. That the Defendant has unlawfully advertised or caused the advertisement of the sale, by way of Public Auction, in the Daily Nation issues of 12th November, 2012 and 19th November, 2012, of the Applicants' charged property L.R. No. Ngong/Ngong/29983, scheduled to take place on 28th November, 2012.

b. That the intended auction, of the suit property, is unlawful, fraudulent, malicious as the same is being pursued by the respondent in bad faith and without reasonable cause in so far as the Respondent has failed to accept the buying of the mortgage loan advanced to the Applicants, by a new financier, namely M/s. Kenya Commercial Bank Limited.

c. That the sale is unlawful to the extent that no service of Notification of sale was effected upon the Plaintiffs/ Chargors and is, therefore, in contravention of the mandatory provisions of the Land Act, 2012, to wit, Sections 90 to 98 of

the said Act.

d. That the Respondent has failed, refused and/or ignored to furnish the Applicants and/or their financiers, M/s. Kenya Commercial Bank Limited, with a comprehensive statement of accounts to facilitate the taking over of the Applicants' loan account by the said financiers.

e. That in contravention of the mandatory provisions of the Land Act, 2012, as well of the Auctioneering Act, the Respondent's agent, M/s. Dalali Traders have advertised for sale, the Applicants' charged property, subject to a reserve price yet they have not carried out a recent valuation of the suit property, L.R. No. Nong/Ngong/29983 for the purpose of the threatened sale scheduled for 28th November 2012 in contravention of the express provisions.

f. That the Plaintiffs/Applicants will suffer irreparable loss of their property, conservatively valued at Kshs.8,500,000/= if the unlawful threatened auction is not stopped by this Honourable Court.

g. That the grant of the injunction thereby allowing M/s. Kenya Commercial Bank Limited to buy the outstanding mortgage loan owed to the Respondent, shall not in any way adversely affect the Respondent's interests in this matter".

3. The Supporting Affidavit of the first Plaintiff detailed *inter-alia* that he had been authorised by his wife, the second Plaintiff, to swear the same. He noted that in November 2009 he and his wife had taken up a mortgage facility with the Defendant in the amount of Shs. 2 million in order to finance the purchase of the suit property – a three bedroomed bungalow within Ongata Rongai Township. There followed a long history of the relationship with the Defendant and the repayment of the loan including the fact that when it had been applied for, both Plaintiffs were in employment. At paragraph 6 of the said Affidavit, the first Plaintiff detailed that the second Plaintiff had lost her job at Prime Bank Ltd. At the same time, he attached a letter from the said Prime Bank Ltd to his said Affidavit as exhibit "ZOA 2" which clearly detailed that his wife had resigned her job at the said Bank which had accepted her resignation. However, as a result of this loss of employment, the Plaintiffs were unable to repay the monthly instalments, particularly when they rose to Shs. 53,156/-per month. The deponent made reference to the number of payments that he had made from time to time to regularise the loan account. In my opinion, looking at the Account Statements exhibited by the Defendant, the repayments were made piecemeal not by regular monthly repayments which, the deponent stated, had been agreed with the Defendant. The first Plaintiff then related how he had sought alternative financing from a proposed new financier, the Kenya Commercial Bank Ltd. (hereinafter "KCB"). Indeed a valuation had been carried out of the suit property at the instigation of KCB which placed the open market value of the suit property at Shs. 8.5 million.
4. Continuing as regards his Supporting Affidavit, the first Plaintiff related how he had changed his P. O.Box Number as he had been using that of the said Zachary Kopphen Nyamongo. His new Box Number was 51673 – 00100 Nairobi whilst Mr. Nyamongo's address was P. O. Box No. 1088-00100 Nairobi. The deponent went into a long story as to how he had advised the Defendant by 3 letters of his new address but that he was surprised that notices had been sent to him at Mr. Nyamongo's address, including the 45 day Notification of Sale notice from the Defendant's auctioneers, Dalali Traders. Paragraph 19 of the Supporting Affidavit detailed the position that the Plaintiffs found themselves in by the end of 2012. They enjoyed a rental income from the suit property paid by the said Boaz Odenyo of Shs. 35,000/-per month but both the Plaintiffs had lost their jobs, the second Plaintiff in February 2012 and the first Plaintiff in July 2012. Once the Plaintiffs were aware of the sale scheduled for 28th November 2012, they approached the Defendant's Managing Director with the request that the sale should be cancelled as the loan was to be taken over by KCB. As the deponent put it:

“to my surprise and despite giving evidence that we have continued to pay regularly Kshs 35,000/= each month and that I had actually lately paid a sum of Kshs 82,000/= towards the reduction of our mortgage loan, the Respondent’s Management declined to cancel the advertised sale of the charged property, LR No. Ngong/Ngong/29983 charged to it.”

Concluding his Supporting Affidavit, the first Plaintiff noted that he had been advised that the public auction of the suit property was unlawful since it did not comply with the mandatory provisions of the Land Act, 2012. This was as regards what the deponent termed the “mis-service” of the 45 day mandatory notice as well as there being no current valuation of the suit property to be auctioned.

5. This Court saw little relevance to the Application before it as regards the said Affidavits of Boaz Odenyo and Zachary Kopphen Nyamongo. The former merely recorded that he was the tenant of the suit property, paying Shs. 35,000/-per month in rent and attached a copy of the Tenancy Agreement that he had with the Plaintiffs. The latter recorded the change of Post Office boxes which he had requested the first Plaintiff to effect, as well as detailing that he had found registered letters in his postal box addressed to the Plaintiffs.
6. On behalf of the Defendant bank, one of its remedial officers at its Koinange Street, Nairobi branch, one Peter Abuor swore a Replying Affidavit dated 17th December 2012. He attached a copy of the Letter of Offer which the Defendant had issued to the Plaintiffs for the mortgage facility of Shs. 2,000,000/-repayable over 144 months at Shs. 29,377/-per month. He noted that there was no six-month grace period before repayments commenced as had been suggested by the first Plaintiff in his Affidavit in support of the Application. The deponent averred that the Plaintiffs had defaulted in making their loan repayments since June 2011 and had failed to regularise their account with the Defendant ever since. He rejected the suggestion that regular statements of account had not been provided to the Plaintiffs. He maintained that the Plaintiffs had detailed knowledge of the status of their loan account as it was obvious from the correspondence annexed to the Supporting Affidavit that the first Plaintiff, at least, had queried the interest charges thereto. Mr. Abuor went on to say that the Defendant was never a party to the Plaintiffs’ dealings with KCB and from his perusal of the correspondence, he felt that it was clear that the reason for the failure of the KCB mortgage facility take over was a delay at the valuation stage and had nothing to do with the alleged failure by the Defendant to deliver statements of account to the Plaintiffs.
7. Mr. Abuor then commented upon the provisions of the Letter of Offer which specified events of default. He denied that the Plaintiffs had not been served with statutory notices in relation to the Defendant’s intention to sell the suit property as a result of the Plaintiffs’ default. He referred to the first Plaintiff’s letter dated 11th June 2012 addressed to the Defendant in which there had been an acknowledgement of the statutory notice when the first Plaintiff detailed therein:

“We acknowledge receipt of your statutory notice [dated 20th March 2012] which was sent to our previous address, please note our current address”.

The deponent maintained that the Plaintiffs were perfectly aware of the Defendant’s actions in appointing auctioneers to sell the suit property. At paragraph 17 of the Replying Affidavit, Mr. Abuor detailed that the address provided by the Plaintiffs when applying for the facility and consequently detailed in the Letter of Offer, the Charge and the Guarantee documents, was always P. O. Box 1088-00100 Nairobi.

8. At paragraph 19 of the Replying Affidavit, Mr. Abuor summarised the Defendant’s position as regards the Plaintiffs’ loan as follows:

“19. THAT in reply to paragraph 13 to 23 of Plaintiffs Supporting Affidavit, the Defendant avers that the advertisement for public auction of the suit property was as a direct consequence of the Plaintiffs continued default in repaying their loan, in breach of the terms of the Charge document and Letter of Offer, and that the same was regular and devoid of any illegality as shown here below:

- i. In June 2011 the Plaintiff defaulted in making their loan repayments as explained in paragraphs 8 and 9 above.
 - ii. The allegations in paragraph 19 that they have been making regular monthly instalments of Kshs.35,000.00 are therefore utterly false and an attempt to mislead this Honourable court as evidenced by the Plaintiffs Bank Statements annexed herewith and marked “EXH 3”.
 - iii. The Defendant due to continued default issued the Plaintiffs with a statutory demand notice on 20.03.2012 in accordance with Section 74 of the Registered Land Act (Repealed) Cap 300 and which is now provided for under Section 90 (1) of the Land Act 2012 through registered post asking that the outstanding amount then standing at Kshs. 2,217,969.60 be settled within three months failure to which the Defendant would exercise its statutory power of sale; I annexe hereto and mark “EXH 4” a copy of the Statutory notice.
 - iv. It was only after issuing the said demand notice to the Plaintiff as aforesaid, and after the Plaintiffs failure to regularize their account within the stipulated period of 3 months, that the Defendant instructed Dalali Traders a class B licensed Auctioneer in September 2012 to realize the Charge over the suit property in exercise of the Defendant’s power of sale as provided.
 - v. The afore said auctioneers on 19.09.2012 as per the provisions of Section 96 (2) issued the Plaintiffs with a notification of sale of the suit property through registered post together with a notice to redeem the suit property by paying the outstanding loan then standing at Kshs. 2,243,184.75. I annex hereto and mark “EXH 5” a copy of the Notification of sale.
 - vi. On 12.11.2012, 52 days after issuing the notification for sale the Plaintiffs continued in their default to repay the amounts outstanding, as a consequence of which the Defendant was left with no option other than to realize the security held, they therefore instructed the aforesaid auctioneers to put up an advertisement for sale by public auction of the suit property.
 - vii. The Plaintiffs were well aware of the Defendant’s statutory power of sale which is an express provision OF THE Charge and which both Plaintiffs duly acknowledged “We the above named Chargors acknowledge that we understand the effect of Section 74 of the Registered Land Act varied by provisions of this charge and we hereby agree that the Bank may exercise its statutory powers of sale ...” which power of sale is exercisable without the need for further negotiations, notifications to, or the consent or acquiescence of, the Plaintiff.
 - viii. That the alleged take-over of the loan by Kenya Commercial Bank and official request for the current loan payoff amount was made by the said Bank on 21.11.2012 well after expiry of the periods stipulated by law specifically 8 months after the Defendant had served the Plaintiffs with the demand notice and more than 60 days after service of the notification of sale.
 - ix. In any case the Defendant was never party to the Plaintiffs dealings with Kenya Commercial Bank Limited and further that the said proposed dealings did not result into anything concrete nor did they result in any payment to the Defendant. It is also clear that the reason for failure of the KCB mortgage facility take over was delay at the valuation stage and not the alleged failure by the Defendant to deliver statements of account to the Plaintiffs”.
9. The first Plaintiff responded to the Defendant’s Replying Affidavit by a Further Affidavit sworn on 14th February 2013. That Affidavit was filed without leave of the Court and on 20th February 2013 I struck out the same and detailed:

“I have perused the contents of the Further Affidavit sworn by the 1st Plaintiff on 14/2/2013 and filed herein without leave. The same would seem to be in response to the Replying Affidavit sworn by Peter Abuor for the Defendant dated 17th December

2012. I don't consider that he brings anything further to the table other than pointless argument and I strike out the same accordingly."

Similarly, the further Affidavits sworn by the said Boaz Odenyo and Zachary Kophen Nyamongo both (again) dated 14th February 2013 were filed without leave of this Court and for the purposes of this Application, the contents thereof will not be considered.

10. The Plaintiffs' submissions were filed herein on 4 April 2013. They commenced by summarising the relief sought from this Court and then proceeded to detail why such relief was deserved. Firstly, the Plaintiffs maintained that the Defendant's statutory power of sale had not arisen in that it had failed and/or stroke ignored to serve upon the Plaintiffs any notice of intention to sell the suit property, contrary to the mandatory provisions of the Land Act 2012 and the Auctioneers' Act. The Plaintiffs were adamant that they had supplied the Defendant with details of their change of postal address and pointed to the first Plaintiff's letters to the Defendant dated 22nd August 2012 and 18th September 2012 which detailed the Plaintiffs' new postal address. They also accused the Defendant of not providing a comprehensive statement of the Plaintiffs' mortgage loan account in order to enable such account to be taken over by KCB. The Plaintiffs noted that the first that they had come to know of the intended sale of the suit property was when the first Plaintiff received a telephone call from a friend who had spotted the sale advertisement in the Daily Nation issue of the 12th November 2012. In view of the aforementioned letters clearly stating that the Defendant should note the Plaintiffs' new postal address, the failure of the Defendant to forward notices to that new address clearly indicated the Defendant's ill will and abuse of the tenets of fair administration of justice. There had been no proof of service of the notice of intent to sell. As a result, the failure to serve the notice of intention of sale, as required by the law, nullified the Defendant's statutory power of sale. The Plaintiffs referred this Court to the decision of **Emukule J. in Officequip Services Ltd v the Co-operative Bank of Kenya Ltd (2005) e KLR** in which the learned judge had stated:

"... A notice addressed to a wrong address, is no notice at all, it is as if no such notice were issued..."

Further to this end, the Plaintiffs drew the Court's attention to the provisions of **section 96** of the *Land Act 2012*.

11. On the question of whether or not proper service of the notice of intention to sale had been effected, the Plaintiffs referred to the cases of **Onyango v Barclays Bank of Kenya Ltd (2008) eKLR** as well as **Kisumu Civil Appeal No. 148 of 1995 N.Ocieng & Anor. v F. Ochieng & Ors** where the Court of Appeal had held that, in respect of **section 74 (1)** of the *Registered Land Act* (now repealed), which provision was similar to **section 96 (2)** of the *Land Act, 2012*, that it was incumbent upon a Chargee to prove posting of the notice of intention to sell. In the same vein, the Plaintiffs complained that the conduct of the Defendant was unconscionable and inequitable. They did not consider that the Defendant had any right to pursue equitable remedies against them as a result of such conduct. To this end, the Plaintiffs were specifically referring to their request to be supplied with statements of their mortgage loan account, which request had fallen upon deaf ears. As a result, the Plaintiffs maintained that they had been unable to finalise the taking over of their mortgage loan from the Defendant by KCB.

12. Thereafter, the Plaintiffs submitted that should the interlocutory Orders not be granted by this Court, then they stood to suffer irreparable loss. They brought to the attention of the Court the evaluation of the suit property carried out by Highland Valuers Ltd on behalf of KCB which detailed what they termed a "conservative value" of the suit property at Shs. 8.5 million. **Section 97 (2)** of the *Land Act 2012* quite clearly detailed that, before exercising the right of sale, a chargee should ensure that a forced sale valuation is undertaken by valuer. In this case, the Defendant had not instructed a valuer to value the suit property for forced sale purposes prior to the intended sale taking place. Finally and in conclusion, the Plaintiffs stated that they had shown and proved that the Defendant had failed to comply with the mandatory law of service of the notice of intention to sell, had failed to carry out a valuation of the suit property and further, had

failed to furnish the Plaintiffs with a comprehensive statement of accounts in order to facilitate a loan take-over by another financier. The Plaintiffs were already in possession of the suit property as a result the balance of convenience lay with them.

13. In response, the Defendant's submissions commenced by detailing the background details as regards the mortgage loan facility advanced by it to the Plaintiffs. The Defendant maintained that the Plaintiff was indeed indebted to the Defendant, which had not been disputed. It also maintained that the Plaintiff had been issued with the relevant notices in respect of the sale. It commented that the Plaintiffs' contention was that they had only received the notification of sale on 15th November 2012. Since the Defendant had sent the notices to the Plaintiffs' previous address, the Defendant submitted that it and the Auctioneer complied with the applicable requirements of the Land Act 2012 by sending the necessary notices to the Plaintiffs who did not receive the same on time owing to their failure to pick up their registered mail. Indeed, the Plaintiffs were well and already aware that the Defendant bank was proceeding with recovery proceedings as against them. The Defendant submitted that the address of P. O. Box 1088-00100 Nairobi was the address provided by the Plaintiffs and contained in the Letter of Offer, the Charge document, the Guarantee documents and all other applicable such documents. This was the address to which all correspondence regarding the loan facility was directed at the Plaintiffs and which was correctly addressed. The Defendant maintained that this was in compliance with the applicable provisions of the Charge instrument, the Registered Land Act (now repealed) and the Land Act 2012.
14. The Defendant's submissions continued with the statement that the Plaintiffs were not entitled to the prayers sought in their Application firstly for the reason that that the Defendant's power of sale had accrued, secondly that it was the Plaintiffs' conduct which was inequitable and thirdly, that the Plaintiffs were guilty of laches. As regards the question of the Plaintiffs' conduct, the Defendant referred the Court to the finding in **Kyangavo v Kenya Commercial Bank Ltd & Anor. (2004) 1 KLR126** as per **Njagi J.** The learned Judge had this to say at P. 145:

“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.”

The Defendant went on to say that it did not consider that the Plaintiffs would suffer irreparable injury if the injunction was not granted. The Plaintiffs had offered the suit property by way of security to secure the loan facility. As such, the suit property had become a commodity for sale and, as such, any sale of the same would be compensable in damages. To this end, the Defendant referred this Court to the case of **Mutua Tutuma v Cooperative Bank of Kenya Ltd (2008) eKLR.**

15. The Land Act (2012) came into effect from 2nd May 2012. By that date, the Defendant herein had dispatched to the Plaintiffs, the Statutory Notice a copy of which is annexed to the Replying Affidavit as Exhibit 4. Such was issued under the provisions of section 74 of the Registered Land Act, which applied to the suit property at the time. Although dispatched to P. O. Box 1088-00100 Nairobi, the said Notice was received by the Plaintiffs as acknowledged by the first Plaintiff in his letter to the Defendant dated 11th June 2012. To this end, I am satisfied that the Plaintiffs were served with and received the Statutory Notice. Moving on to the notice to sell, by the time that the Defendant got around to instructing Dalali Traders to auction the suit property, the *Land Act, 2012*

had come into effect. As a result, the Defendant necessarily would have to comply with **section 96** of that Act as regards the Chargee's power of sale. **Section 96** reads as follows:

“96. Chargee's power of sale

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.**
3. **A copy of the notice to sell served in accordance with subsection (2) shall be served on –**
 - a. **the Commission, if the charged land is public land;**
 - b. **the holder of the land over which the lease has been granted, if the charged land is a lease;**
 - c. **a spouse of the chargor who had given the consent.**
 - d. **any lessee and sublessee of the charged land or of any buildings on the charged land;**
 - e. **any person who is a co-owner with the chargor;**
 - f. **any other charge of money secured by a charge on the charged land of whom the chargee proposing to exercise the power of sale has actual notice;**
 - g. **any guarantor of the money advanced under the charge;**
 - h. **any other person known to have a right to enter on and use the land or the natural resources in, on, or under the charged land by affixing a notice at the property; and**
 - i. **any other persons as may be prescribed by regulations, and shall be posted in a prominent place at or as near as may be to the charged land”.**

16. From the Affidavit evidence before Court, the Notification of Sale issued by Dalali Traders dated 19th September 2012 was again sent to P. O. Box 1088-00100 Nairobi. By that date, the Plaintiffs had on no less than 3 occasions by letter, informed the Defendant of their change of address. It was the evidence of the first Plaintiff that he only received the letter from Dalali Traders together with the Notification of Sale both dated 19th September 2012 on 15th November 2012. To my mind, the provisions of section 96 of the Land Act, 2012 have considerably tightened up what chargees are required to do when wishing to sell off charged land as a result of chargor default, as compared to the provisions of the now repealed Registered Land Act. There is a necessity to serve a notice to sell on the chargor and not to proceed with any sale until at least 40 days have elapsed from the date of the service of such notice to sell. In this matter, there is no evidence of service produced before this Court by the Defendant. There is neither Certificate of Posting nor indeed, any Affidavit of Service produced. To my mind, the Defendant has failed to prove to this Court that the 45 day sale notice had been served on the Plaintiffs. As if this was not enough, the letter from Dalali Traders dated 19th September 2012 is only addressed to the first Plaintiff whereas the suit property is owned by the Plaintiffs jointly. As a consequence, the Defendant has failed to satisfy the requirements of **section 96 (3) (f)** as well as **(e)** of the *Land Act, 2012*. In relation to the latter subsection, the Defendant has failed to show that the notice to sell was served upon the tenant of the suit property. The other complaint by the Plaintiff was that the Defendant made no attempt to ensure that a forced sale valuation in respect of the suit property was undertaken by a

valuer. Indeed, such is a mandatory requirement under the provisions of **section 97 (2)** of the *Land Act, 2012*.

17. As a consequence of these lapses by the Defendant, this Court has no option but to allow prayer 3 of the Plaintiffs' Notice of Motion dated 26th November 2012. Further, with reference to prayer 4 of the Application, it is obvious that the intended sale of the suit property by the Defendant was irregular and unlawful as a result of the breaching of the mandatory provisions of **sections 96 (3) and 97 (2)** of the Land Act, 2012. However in finding such, I am aware that the original borrowing from the Defendant by the Plaintiffs was Shs. 2 million which now, according to Exhibit 3 attached to the Defendant's Replying Affidavit, had a balance due and owing as at 30th November 2012 of Shs. 1,924,216.95 with arrears at Shs. 357,753/-. Of course, I must bear in mind the dictum of **Njagi J.** in the **Kyangavo** case to the extent that:

“He that comes to equity must come with clean hands and must also do equity”.

Accordingly, I am of the opinion that if the Plaintiffs are to enjoy the interim Orders that I have granted above pending the hearing and determination of this suit, they must make some effort to commence repayment of monies that they undoubtedly owe to the Defendant. As a consequence, I direct that the interim injunction that I have granted, will only remain in place provided that the Plaintiffs pay to the Defendant the aforementioned sum of Shs. 357,753/- being the arrears of repayment as at 30th November 2012 within 30 days from today's date. Order accordingly. The Plaintiffs shall have the costs of the Application.

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

J. B. HAVELOCK

JUDGE