



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO.154 OF 2018

JOSEPH KAIRUKI KINYUIGWA..... PLAINTIFF/APPLICANT

-VERSUS-

MWANANCHI CREDIT LIMITED..... 1ST DEFENDANT/RESPONDENT

MARY RITA WANJIKU

T/A MISTAN AUCTIONEERS.....2ND DEFENDANT/RESPONDENT

RULING

The Plaintiff/Applicant filed a claim against the Defendants/Respondents on **21st May 2018**, and sought for a permanent injunction to restrain the Defendants by themselves and/or agents from advertising for sale, distributing posters, alienating, selling, disposing off and/or in any other manner from dealing with **LR.No.Ruiru/Kiu Block 3/912/Ruiru**.

Simultaneously, the Plaintiff/Applicant also filed a **Notice of Motion** application even dated and sought for temporary orders of injunction to restrain the Defendants from advertising for sale, selling or in any other manner adversely dealing with the Plaintiff's interest over **LR.Ruiru/Kiu Block 3/913**, pending the hearing and determination of the suit.

The Plaintiff alleged that he took a **loan** of **Kshs.5,000,000/=** from the 1st Defendant and used the suit property as security. Further, that the Defendants/Respondents have issued a **Statutory Notice** of their intention to sell the suit property by **Public Auction**. However, the Plaintiff/

Applicant has found a **Private purchaser** for the suit property, who is willing to buy it for **Kshs.22,000,000/=** and liquidate the loan account balance of **Kshs.9,814,956/=** but the 1st Defendant/Respondent has refused to accept the undertaking given by the Plaintiff's advocate, thus frustrating his right to redeem the suit property. He also contended that the Plaintiff's property which is valued at **Kshs.22,000,000/=** should not be sold at the **Forced Sale Value** of **Kshs.9,814,956/=** and that the 1st Defendant should not frustrate the Plaintiff's right of redemption. Further, that if the Plaintiff's suit property is sold, the Plaintiff will suffer irreparable loss and damages and thus the injunction sought.

The application is contested by the 1st Defendant who filed its **Replying Affidavit** through **Dennis Mwangeka Mumbo**, one of its **Directors**, who averred that it indeed advanced **Kshs.5,000,000/=** to the Plaintiff/Applicant and the Plaintiff was to repay the same through monthly instalments of **Kshs.1,148,0377/=** for **6 months**. Further that the Plaintiff created a legal **Charge** over the property **LR.No.Ruiru/Kiu Block 3/913**, the suit property herein.

However, the Plaintiff/Applicant has breached the said **loan Agreement** and as provided by the **Charge document**, the 1st Defendant has a right to sale the suit property through Public Action. That a **Notice** under **Section 90** of the **Land Act** was issued to the Plaintiff on **21st August 2017**, but he defaulted. Further **Notice to sell**, under **Section 96(7)** of the same Act was issued on **10th January 2018**, but the Plaintiff did not regularize his account. The 2nd Defendant again issued a **Redemption Notice** pursuant to **Rule 15** of the **Auctioneers Rules** and therefore the Defendants have acted within the law but the Plaintiff has continued with the default.

The 1st Defendant/Respondent denied having frustrated the Plaintiff's endeavour to redeem his property and that the Plaintiff is only trying to stall the foreclosure. He averred that the Plaintiff/Applicant is in default and his application should be dismissed.

The Plaintiff filed a **Supplementary Affidavit** and reiterated most of the contents of his **Supporting Affidavit**.

The application was canvassed by way of written submissions which this Court has carefully read and considered. The Court has also considered the pleadings in general, the annexures thereto, the relevant provisions of law and the cited authorities and makes the following rendition;-

There is no doubt that the Plaintiff/Applicant herein took a **loan** of **Kshs.5,000,000/=** from the 1st Defendant and offered his land parcel **LR.No.Ruiru/Kiu Block 3/912**, as security for the said Charge. It is not in doubt that once a property has been offered as security over any loan or Charge, it becomes a commodity for sale. See the case of **Paul Muhoro Kihara...Vs...Barclays Bank (K) Ltd, Milimani HCCC No.33 of 2002 (2001) 2EA 420**, where the Court held that:-

“Once land has been given as security for a loan, it becomes a commodity for sale by that very fact and any romanticism over it is unhelpful as there is no commodity for sale whose loss cannot be adequately compensated by an appropriate quantum of damages”.

It is also not in doubt that the loan advanced to the Plaintiff was to be repaid in a monthly instalment of **Kshs.1,148,037/=** for a period of **6 months**. The Plaintiff has not denied having not taken the above stated loan facility. It is also evident that parties are bound by the terms of their Contract and the court cannot alter terms of any contract. See the case of **Emo Investment Ltd...Vs...Stephanus Petrus Kiinge (2010) eKLR**, which quoted the case of **National Oil...VS...Pipeplastic Samkolit (K) Ltd & Prof Samson K. Ongeru (CA No.95 of 1999)**, where the Court held that:-

“A court of law cannot rewrite a contract between the parties. The parties are bound by their contract, unless coercion, fraud or undue influence are pleaded and proved”.

The Court has seen the loan statement for the Plaintiff and it is clear that the Plaintiff did not repay the advanced loan at a monthly instalment of **Kshs.1,148,037/=** as per the **loan Agreement**. The Plaintiff himself has not denied that he is in default of payment of the loan facility.

Further, it is evident that from the terms of the Charge, in the event of any default by the Plaintiff and after the relevant **Notices**, the 1st Defendant who is the **Chargee** has a right to sell the charged property as provided by the **Land Act**. The Court has perused the annexures to the pleadings and has seen a **Letter** to the Plaintiff dated **21st August 2017**, notifying him of his arrears and the said **Notice** was in accordance to **Section 90(1)** of the **Land Act**.

The Court has also seen a **Notice of Intention to Sell** as provided by **Section 96(2)** of the **Land Act** dated **10th January 2018**.

The Plaintiff took a loan facility and he had an obligation to repay the same. Even by the time he came to court on **14th June 2018**, he was in default and did not offer a scheme of how he would repay the loan facility. He only sought an injunctive order to restrain the 1st Defendant from carrying on with the Intended Sale of the charged property.

As the Court observed earlier, the parties are bound by the terms of their Contract and the Plaintiff/Applicant herein is bound by the terms of the Charge document that he executed and he is therefore bound to repay the loan as stated in the said Contract. Failure to do so, the 1st Defendant has a right to exercise its **Statutory Power of Sale** as provided by **Section 96** of the **Land Act**.

Having now carefully considered the available evidence, the Court finds that the Plaintiff/Applicant is in default on his part of the bargain and having come to court of equity, he cannot benefit from the equitable remedies since **‘he who comes to equity must come with clean hands.’**

For the above reasons, the Court finds that the Plaintiff/Applicant has not established any of the principles set out in the case of **Giella..Vs...**

Cassman Brown & Company Ltd 1973 E.A 358. These principles being that:-

- a) The Applicant must establish that he has a prima facie case with probability of success.**
- b) That the Applicant will suffer irreparable loss which cannot be adequately compensated in any way or by an award of damages.**
- c) When the Court is in doubt, to decide the case on a balance of convenience.**

Consequently, the Court finds that the Plaintiff's/Applicant's **Notice of Motion** application dated **21st May 2018**, is not merited and therefore this Court dismisses the said application with costs to the Respondents.

For avoidance of doubt, **any Interim Orders in force are hereby vacated**.

It is so ordered.

Dated, Signed and Delivered at **Thika** this **5th** day of April 2019.

L. GACHERU

JUDGE

5/4/2019

In the presence of

Plaintiff/Applicant in person

Mr. Kiptoo holding brief for Mr. Kuloba for the Defendants/Respondents

Lucy - Court Assistant.

L. GACHERU

JUDGE

5/4/2019