



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

CONSTITUTION PETITION NO. 7 OF 2017

1. RUWEYA ALI SAID

2. MWINYI ALI MWINYI

3. MAHMOUD ALI MWINGI T/A ECONO AGENCIES.....PETITIONERS

VERSUS

1. CHASE BANK(KENYA)LTD.....1ST RESPONDENT

2. PAUL RUSSO, RECEIVER MANAGER.....2ND RESPONDENTS

RULING

1. By a Notice of Motion dated and filed herein on 10th April 2017, the three Petitioners pray for an order that pending the hearing of the Petition, this Court be pleased to issue a conservatory order restraining the two Respondents acting through their agent, namely Keysian Auctioneers from proceeding with the intended sale by public auction of all that parcel of land described as CR No. 29765/LR No. MN/III/1673.

2. The application which is supported by an affidavit sworn by the 1st Petitioner Ruweya Ali Said is premised on the grounds:-

i) That the 1st and 2nd Respondents have through the said Keysian Auctioneers advertised the subject property for sale by public auction on 11th April 2017 in purported exercise of the statutory power of sale in respect of monies advanced and loaned to the Petitioners.

ii) That the Respondents have refused to supply the Petitioners with the Charge and other related documents as a result of which the Petitioners are unable to ascertain the amount due and owing to the 1st Respondent.

iii) That the Petitioners have learnt that the amount being charged by the Respondents as interest is excessive, exorbitant and illegal as the Respondents have failed to provide the Petitioners with the Charge documents in clear and blatant contravention of Article 35 of the Constitution.

iv) That unless the Respondents are stopped from proceeding with the said auction, the Interested Party's right to own the property as enshrined in Article 40 of the Constitution will be violated.

3. In a Replying Affidavit sworn by its Manager, Debt Recovery Unit, Chase Bank (Kenya) Ltd (the 1st Respondent) is vehemently opposed to the grant of the orders sought herein. The 1st Respondent avers that on 1st March 2012, the Bank advanced the Petitioners a term loan facility of Kshs 10,726,985/- which sum was secured by a Charge over the suit property. It was agreed by the parties that the interest rate charged on the facility would be based on the bank's lending rate of 19% per annum and that there would be a default penalty rate to be determined solely by the Bank in the event the Petitioner defaulted in making payments.

4. The 1st Respondent further avers that on 17th April 2013, the Petitioner requested to have the facility restructured and as such a Letter of Offer dated 17th April 2013 was executed by the Petitioner, the Interested Party and the 1st Respondent. It was a term of the Letter of Offer that the security to cover for the restructured amounts was to be a further charge over the suit property and a Personal Guarantee and Indemnity from the Interested Party for Kshs 11,056,000/-. The Interested Party later declined to execute the Further Charge and the loan restructure was never effected.

5. It is the 1st Respondent's position that the Petitioner has failed and/or neglected to honour the repayment terms of the facility and continues to default and the loan account is currently outstanding to the tune of Kshs 25,221,331.50/- with areas of a similar amount as at 18th May 2017. This is what compelled the 1st Respondent to issue the requisite statutory notices with a view to commencing the recovery process by alienating the suit property through a public auction.

6. The 1st Respondent avers that the Petitioner was duly supplied with a copy of the Charge document and she cannot now purport to be a stranger to the outstanding loan amount and the interest due. In addition, the 1st Respondent denies that the Petitioner's Constitutional rights have been violated as alleged or at all and it is their case that the Petition herein as framed does not raise any constitutional issues but is a mere cloak the Petitioner is using in an attempt to defeat the ends of justice.

7. I have considered the application and the response thereto. I have equally considered the written submissions and the authorities as filed herein by the Learned Advocates for the parties. In ***Centre for Rights Education and Awareness(CREAW) & 7 Others –vs- Attorney General, (2011)eKLR***, Musinga J (as he then was) stated and I agree as follows:-

“At this stage, a party seeking a conservatory order only requires to demonstrate that he has a prima facie case with a likelihood of success and that unless the Court grants the conservatory order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution.”

8. What amounts to a prima facie case was described in ***Mrao-vs- First American Bank of Kenya Ltd & 2 Others(2003) KLR 125*** in the following manner:-

“A prima facie case in a civil application includes but is not confined to a “genuine and arguable case.”. It is a case which on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

9. In ***Nguruman Limited –vs- Jan Bonde Nielsen & 2 Others(2014)eKLR*** the Court of Appeal outlined the key ingredients of a prima facie case as follows:-

“The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion.”

10. From the material placed before me, it is evident that by a Charge dated 27th May 2010, Aisha Abdalla Mohamed (the Interested Party) offered her parcel of land-LR No. MN/III/1673 Mtwapa to the 1st Respondent Bank as security for a loan which was extended to the three Petitioners herein who were jointly running a business known as Econo Agencies.

11. It is the Petitioner's case that contrary to usual practice, they were not supplied with a copy of the Charge document and as a result, they are unable to ascertain the amounts owing to the 1st Respondent. In addition it is their position that the amounts of interest being charged by the Respondents is excessive, exorbitant and illegal.

12. A perusal of the Charge document reveals that the three Petitioners described therein jointly as “the borrowers” duly executed the Charge in which they bound themselves to repay the principal sum indicated therein as Kshs 8,240,000/= plus interest and other Charges, costs and expenses.

13. In the application before me, the Applicants/Petitioners do not dispute that the funds were disbursed. Similarly, they do not dispute that they are in default. Nor do they dispute that the Respondents served them with the requisite Statutory notices prior to the advertisement to sell the Interested Party's suit property by way of public auction.

14. I did not hear the Petitioner's claim that when they executed the Charge document, they did not understand the contents thereof. Clause 3.1.1 of the Charge boldly puts the interest rate chargeable at 19% per cent per annum while Clause 3.2 thereof allows the 1st Respondent to set and charge different interest rates if the Borrower is in default. As it were, nothing was placed before me to demonstrate that the amounts of interest charged by the Respondents were in violation of the agreement as reflected in the aforementioned Clauses.

15. At any rate, I think it is trite that disputes on accounts, the amount of loan and/or interest cannot be the basis for the grant of conservatory orders. As was stated in ***Mrao Ltd –vs- First American Bank of Kenya Ltd Case(supra):-***

“The circumstances in which a mortgagee may be restrained from exercising his statutory power of sale are set out in Halsbury's Laws of England, Vol. 32(4th Edition) paragraph 725 as follows:-

“725. When mortgagee may be restrained from exercising power of sale. The Mortgagee will not be restrained from exercising his power of sale because the amounts due is in dispute, or because the Mortgagor has begun a redemption action, or because the Mortgagor objects to the manner in which the sale is being arranged. He will be restrained, however, if the Mortgagor pays the amount claimed into Court, that is, the amounts which the mortgagee claims to be due to him, unless, on the terms of the mortgage, the claim is excessive. (Emphasis ours).”

16. Arising from the foregoing, I did not find merit in the Motion dated and filed herein on 10th April 2017. The same is dismissed with

costs to the Respondents.

Dated, signed and delivered at Malindi this 29th day of May, 2019.

J.O. OLOLA

JUDGE