



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CASE NO.60 OF 2018

FLORENCE WAMBUI CHIRA.....1ST PLAINTIFF/APPLICANT

CONSOLIDATED EVENTS MANAGEMENT LIMITED....2ND PLAINTIFF/APPLICANT

VERSUS

FAULU MICROFINANCE BANK LIMITED.....DEFENDANT/RESPONDENT

RULING

The matter for determination is the *Notice of Motion* application dated *23rd February 2018*, brought by the Plaintiffs/Applicants herein under *Section 3A* of the *Civil Procedure Act*, and *Order 40 Rules 1 & 2* and *Order 51 Rule 1* of the *Civil Procedure Rules 2010*, wherein the Applicants have sought for the following prayers;

1. That the Defendant/Respondent, its servants and/or agents be restrained from disposing off by way of public auction, private sale or in any other way, property known as parcel number LR.No.Kiambu/Mun.Block 5 (Kiamumbi) 1523 & Kiambu/Mun.Block 5(Kiamumbi)1524 registered in the name of Florence Wambui Chirah, 1st Plaintiff herein pending the hearing and determination of this suit.

2. Costs of the Application.

This Application is premised on the grounds stated on the face of the application and on the supporting Affidavit of the Applicant, ***Florence Wambui Chirah***. These grounds are:-

1. The Plaintiffs have filed this suit challenging the purported claim by the Respondent.

2. The 2nd Plaintiff around the 22nd of September borrowed a loan from the Respondent to boost its business which loan the 1st Plaintiff guaranteed by offering as security her titles number LR.No. Kiambu/Mun.Block 5 (Kiamumbi) 1523 and Kiambu/Mun.Block5 (Kiamumbi)1524.

3. The Loan repayment fell due and the Respondent has threatened to exercise its statutory power of sale of the said properties to realize the amount owing.

4. There is a dispute as to the actual amount that plaintiffs owes the Respondent.

5. The Respondent has undervalued the properties below market value and refused to hand over initial valuation report.

6. Respondent intends to sell the suit properties valued over Kshs.25,000,000/= for Kshs.15,000,000/= and have indicated the current, market value at Kshs.17,500,000/=.

7. The Respondent has instructed auctioneers, who have advertised the said property for public auction.

8. Plaintiffs/Applicants have filed the suit challenging the manner and/or method adopted by the Defendant /Respondent in valuing the said properties and also for failure to issue her with statements of accounts, initial and current valuation report in the banks possession to enable her ascertain the true account owing and this contrary to the provisions of the Land Act 2012.

9. To the best of the Applicant's knowledge Respondent is owned money less than Kshs.11,876,209/=.

In her **Supporting Affidavit**, the 1st Applicant averred that she is the **Director** of the 2nd Applicant. She further averred that on the **22nd September 2015**, she borrowed from the Defendant/Respondent of **Kshs.15,000,000/=** guaranteed by offering as security her land parcels **No.Kiambu/Mun.Block5(Kiamumbi)1523 & Kiambu/Mun.Block 5 (Kiamumbi)1524** and executed a charge in favour of the Respondent. She further averred that the Respondent has refused to give her a counterpart of the charged document, original letter of offer and copy of valuation document as evidenced by **annexture B**. She further averred that she managed to service the loan but fell due after she was met by economic problems and that the Respondent has threatened to exercise its **Statutory Power of Sale**. She further averred that there is a dispute as to the actual amount, the 2nd Plaintiff/Applicant owes the Respondent and that the Respondent has undervalued the properties below the market value.

She further averred that the Respondent intends to sell the suit properties by way of public auction and has instructed **Antique Auctioneers** who have already advertised as evidenced by **annexture D**. It was her further contention that she owes the Respondent **Kshs.11,876,209/=** and that there is a potential buyer willing to purchase the suit property at **Kshs.32,000,000/=** and the said buyer only needs to look at the counterpart of the charged document and the original **Offer Letter**. She further averred that if given more time, she would be able to sell the said properties at market value and pay off the Respondent its money and urged the court to allow its Application.

The Application is opposed and the Respondent filed its **Ground of Opposition** dated **28th February 2018**. The Respondent averred that the Application has no merit and warrant dismissal. It was their contention that the Application has been filed inordinately late as the Applicant was served with requisite **Notices** more than four months before the intended date of the auction and that no justification has been rendered for the delay in presenting the present Application. They further averred that the Applicants having admitted that the 2nd Applicant took out a charge of **Kshs.15,000,000/=** and that it defaulted in repaying the loan and further the Applicant having admitted that they executed a Charge over the suit property, the Respondent's **Statutory Power of Sale** arises directly from the charge. The Respondent further averred that they complied with all applicable laws and that there is no dispute as to the amounts owing and urged the court to allow the bank realize and recover its moneys under the contract of the parties contained in the charge. It was their further contention that the Applicants have not established a *prima facie* case and urged the court to dismiss the Application.

The Application was canvassed by way of written submissions and the Plaintiffs/Applicants through the **Law Firm of F.N. Kimani & Associates** filed their written submissions on **11th June 2018**. They relied on various case laws and provisions of law. It was submitted that the Applicants have met the threshold as set out in the case of **Giella...Vs... Cassman Brown (1973) EA 358**, where the court held:-

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

It was therefore submitted that the Applicants have made out a prima facie case as against the Respondent. It was further submitted that there were procedural defects in the process and that though the Auctioneers issued the Applicants with a **Notification of Sale** and **Redemption Notice** but the Respondent never served any **Statutory Notice**. The Applicants further relied on **Section 96(2)** of the **Land Act** that provides;

“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 lapsed from the date of the service of that Notice to sell.”

The Applicants further relied on the case of **Albert Mario Cordeiro & Another...Vs...Vishram Shamji(2015) eKLR**, where the Court held:-

“...If the sale of the suit property is carried through in the absence of a proper Notice to sell it will amount to a clog on the Chargor's Equity of Redemption.”

The Respondent through the **Law Firm of Muchoki Kangata Njenga & Co. Advocates**, filed their written submissions on **9th October 2018** and urged the court to dismiss the Applicants application with costs. It was their submissions that the Applicants are in breach of their obligations under the terms of the loan agreement and the registered charge as against the suit property and that the Respondent complied with all the applicable laws and served all the required Notices.

The Respondent relied on the case of **John Edward Ouko....Vs.... National Industrial Credit Bank Limited (2013) eKLR**, where the Court held:-

“A court of law cannot re-write a contract between parties. The parties are bound by the terms of their contract unless coercion, fraud and undue influence is pleaded and proved”

They further relied on the case of **Simon Njoroge Mburu...Vs... Consolidated Bank Ltd (2014) eKLR**, where the Court held:-

“The Plaintiff in this matter has claimed rightly that the Statutory Notice issued by the Defendant was invalid. He also complains that the Defendant did not have a valuation of the suit property carried out before the sale. That is as may be, but I do not consider that the Plaintiff has made out a prima facie case entitling him to an injunction and I am of the view that he would well be compensated by damages. Despite his argument that the suit property has been sold at an under valuation, the Plaintiff has not put in evidence before this court of an alternative valuation to prove his point in that regard.”

It was therefore submitted that the Plaintiffs/Applicants did not deserve any orders against the Respondent and the court was urged to dismiss their Application with costs.

This Court has now carefully considered the pleadings in general and the annexures thereto. The Court has further considered the rival written submissions, the cited authorities and the relevant provisions of law and

makes the following rendition.

It is evident that the Plaintiffs/Applicants have sought for injunctive orders which are equitable remedies granted at the discretion of the court. However, the said discretion must be exercised judicially. See the case of *Nyutu & Others...Vs...Gatheru & Others (1990) KLR 554*, where the Court held that:-

“Whether or not to grant an injunction is in the discretion of the Court and the discretion is a free one but must be judicially exercised”.

Further, it is evident that at this interlocutory stage, the court is not called upon to decide the disputed facts with a finality. See the case of *Airland Tours and Travel Ltd...Vs...National Industrial Credit Bank, Milimani HCCC No.1234 of 2003*, where the Court held that:-

“In an Interlocutory application, the Court is not required to make any conclusive or definitive findings of facts or law, most certainly not on the basis of contradictory affidavit evidence or disputed proposition of law”.

All that the court is called upon is to determine whether the Applicants have demonstrated that they deserve the injunctive order sought based on the issue criteria set out in the case of *Giella...Vs...Cassman Brown & Co. Ltd 1973, EA 358*. These criterias are:

- 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.**

What is not in dispute herein is that the 2nd Plaintiff/Applicant took a loan facility of *Kshs.15,000,000/=* from the Defendant/Respondent herein. The said loan was guaranteed by the 1st Plaintiff/Applicant who offered the suit properties *Kiambu/Mun.Block 5 (Kiamumbi)/1523 & 1524* as security for the said loan. Subsequently, a legal **Charge** was executed on *22nd September 2015*, between the 1st Plaintiff/Applicant and the Defendant/Respondent. In the said legal **Charge**, there were terms and conditions and the parties therein had duties and obligations. It was the duty and obligation of the **Chargor**(1st Plaintiff/Applicant) to pay the agreed dues in repayment of the loan as per the terms of the charge document. It was also the duty of the **Chargee** to remit the borrowed money to the **Chargor** and in default of repayment of the loan, the Chargee had a duty to give the *Chargor(borrower)* at least *30 days Notice* of the charge in the rate of default interest payable. As provided by all charge documents, the **Chargee** has the right to exercise its **Statutory Power of Sale** in the event of default of the loan amount by the **Chargor(Borrower)**.

It is also evident that the **Chargee** caused an advertisement for sale of the charged properties through **Antique Auctions**. The said **Public Auction** was advertised on *12th February 2018*, and the said **Public Auction** was to take place on *28th February 2018*. The Plaintiffs/

Applicants came to court on *23rd February 2018* and conditional interim injunction was granted on *28th February 2018*.

The Applicants have denied having been served with the relevant **Statutory Notices** as provided by *Sections 90 and 96* of the *Land Act*. Further, the Applicants have denied having been served with a forced Valuation Report as provided by *Section 97* of the *Land Act*. However, they admitted having been served with the Redemption Notice by the Auctioneers as provided by *Rule 15* of the *Auctioneers Rules*.

The Defendant/Respondent have contested the Applicants averments and contended that they issued the relevant **Statutory Notices** and that the Applicants have just brought this application in order to frustrate the Respondent's right to realize their security by exercising its **Statutory Power of Sale**.

In determining this application, the Court will take into account that it is not mandated to make definitive findings of facts especially basing that on the affidavit evidence.

The Applicants first needed to establish that they have a *prima-facie* case with probability of success. *Prima-facie* case was described in the case of *Mrao Ltd...Vs...First American Bank of Kenya Ltd & Others (2003)KLR*, to mean:-

“A case in 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”.

From the above description, it is clear that the Applicants have to demonstrate that their rights have been infringed by the Respondent herein.

The Applicants have not denied that the 2nd Applicant was advanced **Kshs.15,000,000/=** by the Respondent herein and that the said loan was secured and guaranteed by the 1st Plaintiff/Applicant. However, the Applicants have alleged that they are not in arrears but have been paying their dues as and when they fall due. They also alleged that the Respondent has failed to provide them with the Statement of Account to show the extent of the Applicants indebtedness. Further that the Defendant/Respondent did not serve the Applicants with the relevant **Statutory Notices** as provided by law and thus the Respondent has infringed on the Applicants' right to know how much is claimed from them by the Respondent.

The Respondent deposed that they indeed served all the relevant **Statutory Notices**. However, the Respondent only filed **Grounds of Opposition** and did not attach any annexures to their pleadings. The Respondent alleged that they issued the relevant **Statutory Notices**. They had a duty or onus to demonstrate issuance of such **Notices** by attaching them as annexures to their pleadings. As provided by **Section 90(2)** of the **Land Act**, the **Chargee** had a mandatory duty to inform the **Chargor** of the nature and extent of the default. It states as follows:-

“The notice required by subsection (1) shall adequately inform the recipient of the following matters—

(a) the nature and extent of the default by the chargor;

(b) 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;

(c) if the default consists of the failure to perform or observe any covenant, express or implied, in the charge, the thing the chargor must do or desist from doing so as to rectify the default and the time, being not less than two months, by the end of which the default must have been rectified;

(d) the consequence that if the default is not rectified within the time specified in the notice, the chargee will proceed to exercise any of the remedies referred to in this section in accordance with the procedures provided for in this sub-part;

and

(e) the right of the chargor in respect of certain remedies to apply to the court for relief against those remedies.

There is no evidence that such **Statutory Notice** was issued to the Plaintiffs/Applicants herein.

Further, the Applicants have alleged that they were not served with the **Notice to sale** as provides by **Section 96(2)** of the **Land Act**, which provides:-

“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.”

Though the Respondent alleged that such a **Statutory Notice** was not served, the Court observed no evidence of such **Notice** was attached to the pleadings.

Again the Plaintiffs/Applicants alleged that before the said intended sale, the Respondent did not cause a **Force Sale Valuation** to be undertaken as provided by **Section 97(2)** of the **Land Act**, which provides:-

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

The Applicants have annexed a **Valuation Report** to their pleadings which shows that the suit properties are valued at **Kshs.25 Million**. It is not evident that the Respondent have demonstrated that they ensured such a **Forced Sale Valuation** to be undertaken. This is a Mandatory provision and if the Respondent missed the Mandatory requirements and provisions before undertaking to carry out the intended **Public Auction**, then the said omissions infringed on the Applicants' rights and have indeed clogged the Chargor's right of redemption. The Applicants have therefore demonstrated that they have a *prima-facie* case with probability of success.

On the **second limb** of if the orders not granted, the Applicants will suffer irreparable loss which cannot be compensated by an award of damages, it is evident that on the suit properties stands the 1st Applicant's home. Though it is trite that once a property has been given out as security for any loan, it becomes a commodity for sale, it is evident that the Respondent did not carry out all the relevant steps before exercising its **Statutory Power of Sale**. Though the suit properties can be quantified and award of damages can compensate the same, the payment of damages cannot compensate infringement of rights. See the case of **Joseph Siro Mosioma... Vs... HFCK & 3 Others[...]** eKLR:-

“On my part, let me restate that damages is not automatic remedy when deciding whether to grant an injunction or not. Damages is not and cannot be a substitute for the loss which is occasioned by a clear breach of the law..... a party cannot be condemned to take damages in lieu of his crystallized right which can be protected by an order of injunction”.

Therefore, it is evident that payment of damages is not an automatic remedy for loss occasioned by breach of law as breached herein by the Defendant/Respondent.

On the **third limb** of if the court is in doubt to decide on a balance of convenience, the Court finds that it is not in doubt. However, even if it was in doubt, the balance of convenience would tilt on favour of maintaining the **status quo** and the **status quo** herein is not to allow the sale of the suit property by **Public Auction** until the suit is heard and determined. See the case of **Agnes Adhiambo Ojwang ..Vs.. Wycliffe Odhiambo Ojjo, Kisumu HCCC No.205 of 2000**, where the Court held that:-

“the purpose of injunction is to preserve the status quo and the status quo to be preserved is the one that existed before the wrongful act”.

Having now carefully considered the available evidence herein, the Court finds the Plaintiffs/Applicants **Notice of Motion** application dated **23rd February 2018** merited and the same is allowed entirely in terms of **prayer No.(c)** with costs to the Applicants herein.

Further, the Court directs the parties to prepare the main suit for hearing expeditiously so that the disputed issues can be resolved at once.

It is so ordered.

Dated, Signed and Delivered at Thika this 17th day of May 2019.

L. GACHERU

JUDGE

17/5/2019

In the presence of

No appearance for Plaintiffs/Applicants

No appearance for Defendant/Respondent

Diana - Court Assistant

Court – Ruling read in open court.

L. GACHERU

JUDGE

17/5/2019