



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

ENVIRONMENT AND LAND COURT

ELC NO. 167 OF 2016

TERESA WAMBOI MWANGI.....APPLICANT

VERSUS

KENYA COMMERCIAL BANK LIMITED1ST RESPONDENT

NYALUOYO AUCTIONEERS2ND RESPONDENT

R U L I N G

1. The application for determination before me is a Notice of Motion dated 25/11/2016 filed here on the same day, contemporaneously with a suit of even date. The Applicant is **TERESA WAMBOI MWANGI**, who is the Plaintiff in the suit. The application is expressed to be brought under Order 40 Rules 1, and 2 and Order 50 Rule 1 of the Civil Procedure Rules 2010, together with Sections 3 and 3A of the Civil Procedure Act (cap 21). It is brought against the two Respondents – **KENYA COMMERCIAL BANK LTD** and **NYALUOYO AUCTIONEERS** – who are 1st and 2nd Defendants in the suit.

2. The application came with four (4) prayers, two of which – prayers 1 and 3 – were considered at the *ex parte* stage. These two prayers are now moot and the prayers for consideration now are 2 and 4, which are as follows:

Prayer 2: That this honourable court be pleased to issue a temporary order of injunction restraining the Defendants by themselves, their agents, workers and/or assignees from disposing off by public auction the Applicant's land parcel title number BUKHAYO/MUNDIKA/1597 pending the hearing and determination of the suit herein.

Prayer 4: costs be provided for.

3. It is anchored on grounds, *inter alia*, that the Applicant has not been served with the 90 days requisite notice and redemption notice contrary to the terms of the charge. The amount sought to be recovered together with interest was also said to be unlawful. The Applicant was said to be likely to suffer irreparable loss.

4. In the affidavit that came together with the application, the Applicant deposed, *inter alia*, that she obtained a mortgage facility from the 1st Respondent sometimes in the year 2014. The amount received was Kshs.5,200,000/= and land parcel No. BUKHAYO/MUNDIKA/1597 ("suit land" hereafter) was offered as security. Then sometimes in November 2016, the Applicant got to learn that the 1st Respondent had instructed the 2nd Respondent to sell the suit land. According to the Applicant, she has been faithfully servicing the loan facility and had even paid Kshs.328,000 which the 1st Respondent had failed to take into account.

5. The Applicant averred that she had not been served with the 90-day notice required to be served before sale and she had also not been served with any redemption notice. The 1st Respondent was also accused of unilaterally changing the rate of interest. The Applicant feared that the suit property might be sold at a throw away price. According to her that might be done without even conducting the valuation necessary before sale.

6. The 1st Respondent made a response vide a replying affidavit filed on 21/5/2018 and a further replying affidavit filed on 22/5/2018. According to the 1st Respondent, the allegations made by the Applicant are not true. It was deposed, *inter alia*, that the monthly re-payment was Kshs.93,336 for a period of 10 years from the date of draw down. The Applicant defaulted in payment and was asked in writing to rectify the default. Even then however, she persisted in default and the 1st Respondent issued her with a 3-month statutory notice as required by law. The Applicant still did nothing and what followed was a notice of intention to sell the suit property.

7. When all this was happening, the 1st Respondent undertook pre-sale valuation of the suit property as by law required. When the Applicant completely failed to pay, and with legal requirements substantially complied with, the 1st Respondent instructed the 2nd Respondent to start the process of sale. The 2nd Respondent then issued the Applicant with a 45 days redemption notice and after nothing was forthcoming from the Applicant, the suit property was advertised for sale. This is the advertisement that the Applicant acknowledges to have seen.
8. The 1st Respondent's narrative came with the necessary documentary back-up, with the 90, 40 and 45 day notices availed as FM-5(a), FM-6(a) and FM-5(10)a respectively. The notices were shown to have been sent to the postal address given by the Applicant and the certificates of postage were also availed. The Applicant was said to have acknowledged receipt of the notice to sell dated 21/7/2016. She did so vide a letter dated 3/8/2016. The court was told that, given all this, the Applicant was guilty of material non-disclosure and had therefore misled this court.
9. The application was canvassed by way of written submissions. The Applicant's submissions were filed on 28/7/2018. The Applicant gave an overview of the matter and reiterated the substance of the application. There was then an attempt to explicate the law relating to notices, with Sections 90, 96, and 97 of the Land Act, 2012, being cited together with the Auctioneers Act Rule 15. The position taken is that the Applicant was never served with the notices envisaged by the cited provisions of law and should therefore be granted the orders she is seeking. Two decided cases: **DAVID GITOME KUHIGUKA Vs EQUITY BANK LIMITED [2013] eKLR and FLORENCE NJERI KARANJA Vs MOLYN CREDIT LIMITED** were cited to reinforce the position taken.
10. The Respondents submissions were filed on 17/9/2018. According to the Respondents, the issues to consider include whether the Applicant was issued with the required notices; whether the amount sought to be recovered together with interest is lawful; whether the Respondents undertook a pre-sale valuation of the suit property; whether the threshold required for issuance of the orders sought has been attained; and, finally, whether the Applicant has approached the court with clean hands.
11. What followed was an almost blow-by-blow account of how the Respondents complied with the issues raised. For instance: All the notices were shown to have been served by being sent to the address given by the Applicant. The notices themselves and evidence of postage were all availed. As to the issue of the amount owed and interests charged, it was submitted that all were within the terms of the contract and the applicable law.
12. The Applicant had expressed fears that sale might take place without a pre-sale valuation being conducted. It was submitted and shown that such sale was indeed conducted. It was further submissions of the Respondents that the Applicant failed to meet the threshold required for issuance of injunctive orders. She was said too to have approached the court with unclean hands, having lied that she only got to know about the intended sale in a newspaper advertisement.
13. I have had a look into the suit as filed. I have considered the application, the response made and rival submissions. It is necessary to point out that each side tried to enrich its submissions with decided cases that favour the positions they took. For the Applicant the decided cases availed were **DAVID GITOME KUHIGUKA Vs EQUITY BANK LIMITED [2013] eKLR and FLORENCE NJERI KARANJA Vs MOLYN CREDIT LIMITED [2014] eKLR**. The Respondents cited quite a number, some of them being **MRAO Vs FIRST COMMUNITY BANK OF KENYA & 2 others: Civil Appeal No. 39/2002, MOMBASA, LAMECK MBAKA MOTEGI Vs BANK OF BARODA (Kenya) LIMITED & Another: HCC No. 8 of 2016, NAKURU** and **NATIONAL BANK OF KENYA LIMITED Vs SHIMMERS PLAZA LIMITED: Civil Appeal No. 26 of 2002, NAIROBI**. I have had a look at these and other cases availed.
14. The Applicant's complaint, whether one is looking at the suit as filed or the application itself, is that she obtained a mortgage facility from the 1st Respondent and has **"been faithfully servicing the said loan"** (see para 6 of the affidavit supporting the application) and/or has **"substantially repaid the mortgage loan"** (see paragraph 8 of the plaint) but the 1st Respondent, **"without the requisite notices advertised the Plaintiff's land parcel number BUKHAYO/MUNDIKA/1597 for sale by public auction"** (see paragraph 6 of the plaint) thus making the Applicant **"surprised to learn from the local dailies that the 1st Defendant has instructed the 2nd Defendant to advertise my said land for sale by public auction scheduled for the 8th December 2016"** (see para 5 of the affidavit supporting the application).
15. In simple terms, the Applicant is saying that she has been duly servicing the mortgage facility advanced to her by the 1st Respondent. The 1st Respondent is however hell-bent on selling the property offered as security without even giving the Applicant the requisite notices.
16. The 1st Respondent responded and averred that the Applicant has defaulted in payment and has been served with all the requisite notices. To drive the point home, the 1st Respondent availed the bank statement relating to the repayment (FM-3), a letter written to the Applicant to rectify the default (FM-4), a 3 months statutory notice sent to the Applicant (FM-5), a forty days' notice of intention to sell (FM-6), pre-sale valuation report (FM-7), a 45 days redemption notice from 2nd Respondent (FM-10) and the eventual advertisement for sale after default in repayment persisted (FM-11).
17. The court was also availed the Applicant's own written communication acknowledging the notice to sell the land (FM-2), sent to her by 1st Respondent. All this led the 1st Respondent to accuse the Applicant of being guilty of material non-disclosure and of approaching the court with unclean hands.
18. When the Applicant procured the mortgage facility, the address she gave to the 1st Respondent for all her dealings regarding the facility was P.O. Box 252 – 50400 BUSIA. All the notices sent to her used this address. She was granted a restraining order by this court on 1/12/2016. The assumption then was that truth was possibly on her side. The 1st Respondent, though served, was shown to have failed to respond to the application at that stage. But the 1st Respondent's response that came later clearly displaced the assumption that the court had made in favour of the Applicant. It is now clearly shown that when the Applicant told the court that she had not been served with the requisite notices, she was being less than honest.

19. It came out too that the Applicant's allegations of pre-sale valuation not having been done and/or the averment of faithfully servicing the loan were all untrue. Equally untrue was her averment that she was surprised to learn of the intended sale of the suit property in the daily newspapers. Her very own written communication dated 3/8/2016 clearly dispels any notion that the Applicant was un-aware of what was happening. Nothing was done behind her back.

20. It is shown well and clearly that the Applicant is a dishonest character and was in fact trying to steal a march on the Respondents in the early part of this application. Simply put, the Applicant came to court with unclean hands. The Respondents cited the cases of **UHURU HIGHWAY DEVELOPMENT LTD Vs CENTRAL BANK OF KENYA & 2 others: Civil Application No. 140/1995, NAIROBI**, and **JACKSON MUKAYA Vs JAMES ONCHANGWA MACHARIA: ELC No. 415 of 2013, KISII**, to demonstrate the kind of action the court should take against a party who has no respect for truth.

21. To these cases, and noting that the Applicant is seeking an equitable remedy, I may add the case of **MOSES NGENYE KAHINDO Vs AGRICULTURAL FINANCE CORPORATION: HCC No. 1044/01, NAIROBI** where Ringera J (as he then was) observed as follows:

“And of course it requires no stressing that an injunction is a discretionary equitable remedy. If the Applicant's conduct in relation to the subject matter of the suit is shown not to meet the approval of a court of equity, the relief may not be granted however meritorious the case may otherwise have been”.

22. The same position obtained in the case of **B Vs Attorney General [2004] IKLR 431** where Ojwang J (as he then was) held, *inter alia*, that once a court is satisfied that an Applicant had obtained an order by concealing other relevant material, the court is entitled not to consider the Applicant's application any further for the courts must be able to protect themselves from parties who are prepared to deceive.

23. On this ground alone, the court would be entitled to dismiss the application. But it might be useful to consider whether Applicant would be entitled to injunction if she had not lied to court. It is crucial to appreciate that the Applicant is disputing the amount owed, the interest charged, and/or the manner that the 1st Respondent is handling the intended sale of her property. In **Halsbury's Laws of England: Vol 32, 4th Edition, page 725**, the law is stated as follows:

“The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has begun 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 in court, that is the amount which the mortgagee claims is due to him, unless on the terms of the mortgage, the claim is excessive”.

24. Home grown jurisprudence – see **NG'AYO TRADERS Vs SAVINGS LOANS (K) LTD: CIVIL APPEAL NO. 165/05, NAIROBI (UR. 99/2005)**, **JOSEPH MURIITHI GICHOBI Vs KENYA COMMERCIAL BANK LTD & Another: HCC No. 25/1999, NAIROBI** and **JOSEPH OKOTH WAUDI Vs NATIONAL BANK OF KENYA: CA Civil Appeal No. 77/2004, MOMBASA** – has emphasized this position and declined issuance of injunctive orders on these grounds.

25. And even assuming that the notices falsely alleged by the Applicant not to have been issued were actually not issued, the way forward is as stated in the Respondent's submissions, which is in accordance with the position espoused by the court in **NATIONAL BANK OF KENYA LIMITED Vs SHIMMERS PLAZA LIMITED: Civil Appeal No. 26 of 2002, NAIROBI**. The position is that the Applicant would get injunctive relief for a limited time only while the 1st Respondent would be expected in the meantime to issue the requisite fresh notices in order to proceed with the sale.

26. When all is said and done however, the application herein is premised on falsehoods. It is therefore found unmeritorious and is hereby dismissed with costs.

Dated, signed and delivered at Busia this 30th day of July, 2019.

A. K. KANIARU

JUDGE

In the Presence of:

Applicant: Absent

1st Respondent: Absent

2nd Respondent: Absent

Counsel for the Applicant: Absent

Counsel for the Respondents: Present

Court Assistant: Nelson Odame