



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT KAJIADO**

**ELC CASE NO. 807 OF 2017**

**JANE WAKIURI GITAU.....1<sup>ST</sup> PLAINTIFF**

**DENNIS MUCHINA GITAU.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**KCB KENYA LIMITED.....1<sup>ST</sup> DEFENDANT**

**JAMES ONYANGO JOSIAH M/S**

**NYALUOYO AUCTIONEERS.....2<sup>ND</sup> DEFENDANT**

**RULING**

The application before Court is the Plaintiffs' Notice of Motion dated 5<sup>th</sup> July, 2017 brought pursuant to Section 3 A of the Civil Procedure Act, Order 51 of the Civil Procedure Rules and Section 13 of the Environment and Land Court Act and all the other enabling provisions of the law.

It is premised on the grounds that the Plaintiffs were granted a mortgage facility of Kshs. 12, 000,000 by the 1<sup>st</sup> Defendant which was secured by a Charge over the 1<sup>st</sup> Plaintiff's land title number KAJIADO/KAPUTIEI – NORTH / 8749 – Milimani hereinafter referred to as the 'suit land'. The Plaintiffs' have repaid over 75% of the mortgage and are now faced with unforeseen financial constraints that have stalled the process of repayment. The Plaintiffs' made a suitable repayment proposal to the 1<sup>st</sup> Defendant but it refused and proceeded to instruct the 2<sup>nd</sup> Defendant to sell the suit land through public auction.

Application is supported by the affidavit of JANE WAKIURU GITAU the 1<sup>st</sup> Plaintiff herein where she deposes that by a letter dated 12<sup>th</sup> April, 2017 she requested the 1<sup>st</sup> Defendant to allow them pay a minimum of Kshs. 100,000 every month instead of Kshs. 187, 014 starting end of April but the 1<sup>st</sup> Defendant turned down their request. She avers that in total disregard to their request, the 1<sup>st</sup> Defendant has now indicated their intention to exercise their statutory power of sale by public auction of the suit land. She claims the 2<sup>nd</sup> Defendant under instructions of the 1<sup>st</sup> Defendant issued her with a notification of sale by public auction of the suit land. She contends that the said property is their only residential property and if sold she will have nowhere to accommodate the family. She reiterates that given the opportunity by the Court, she will be in a position to complete her project and the 1<sup>st</sup> Defendant will have its mortgage paid. Further that in the alternative, the 1<sup>st</sup> Defendant can finance completion of the project

and rent out the premises. She states that the purpose of the loan was to put up a residential home for her family and in the alternative she can dispose off the property to pay the bank. She insists the bank is not acting in good faith.

The application is opposed by the Defendants who filed a replying affidavit sworn by FREDRICK MUNG'ATHIA, the 1<sup>st</sup> Defendant's Recovery Manager who confirmed that the Plaintiffs took a mortgage facility of Kshs. 12 million from the 1<sup>st</sup> Defendant and secured it by a legal charge over the suit land. The 1<sup>st</sup> Defendant issued the Plaintiffs with a Letter of Offer dated 29<sup>th</sup> May, 2015 which they signed and returned to the bank. He states that the Plaintiffs' persistently defaulted payment of the mortgage facility loan as instalments fell due thereby breaching the agreed contract and prompting the 1<sup>st</sup> Defendant to commence the realization process. He contends that the Plaintiffs blatantly disregarded the terms of the mortgage facility's letter of offer, culminating in notices being issued by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and they should not cry foul. He insists the Plaintiffs' application is soiled with falsehoods, half truths, mischief and is an utter abuse of the court process as the 1<sup>st</sup> Defendant issued both verbal and formal demand notices to them calling them to regularize mortgage repayment which the Plaintiffs' failed/refused to honour. He affirms that the 1<sup>st</sup> Defendant issued the Plaintiffs with the Statutory Notice required under section 90(3) (e) notifying them that upon the expiry of 40 days the 1<sup>st</sup> Defendant would have no option but to exercise its right as protected by the law. Further that the 1<sup>st</sup> Defendant sought the services of the 2<sup>nd</sup> Defendant to exercise its statutory right and the sale is legal as all the required legal procedures were adhered to. He avers that the Plaintiffs were in default from the onset and the 1<sup>st</sup> Defendant declined to respond to the Plaintiffs' request to reschedule the repayment plan of the mortgage facility based on their representation of the ability to pay the said mortgage facility. He further insists that if the orders sought are granted, it will create hardship to the 1<sup>st</sup> Defendant, and that the Plaintiffs' have not established a prima facie case to warrant issuance of the injunction orders. Further that the 1<sup>st</sup> Defendant has not infringed on the Plaintiffs' right either statutorily or contractually and should therefore not be enjoined.

Both parties filed their respective submissions that was highlighted on 5<sup>th</sup> October, 2017 which I have considered.

### **Analysis and Determination**

Upon consideration of the materials presented and arguments canvassed by the Plaintiffs in respect of their Notice of Motion dated 5<sup>th</sup> July, 2017, I find that the only issue for determination at this juncture is whether the Plaintiffs are entitled to the injunctive orders sought pending the determination of this suit.

It is not in dispute that the Plaintiffs took out a mortgage facility of Kshs. 12 million with the 1<sup>st</sup> Defendant and secured it with a charge over the suit land. It is not in dispute that the Plaintiffs' have defaulted in the mortgage repayment. It is also not disputed that the Defendants have served the requisite notices to the Plaintiffs to exercise their statutory power of sale. What is in dispute is that the Plaintiffs' presented a new mortgage repayment plan to the 1<sup>st</sup> Defendant but this was declined, with the 1<sup>st</sup> Defendant instructing the 2<sup>nd</sup> Defendant to commence the process of selling the suit land by public auction to realize the security.

It is now established in Kenya that the principles for consideration in determining whether temporary injunction can be granted or not is well settled in the case of **Giella Vs. Cassman Brown & Co. Ltd (1973) EA 358** as follows:

**"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 adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."**

In line with this principle, I wish to interrogate whether the Plaintiffs/Applicants have made out a prima facie case with a probability of success.

The question we need to ask is whether the 1<sup>st</sup> Defendant should accept the fresh mortgage repayment plan presented by the Plaintiffs. The Plaintiffs granted the suit land as security for the mortgage with the 1<sup>st</sup> Defendant and has admitted its indebtedness to it. The Plaintiffs claim they have paid upto 75% of the mortgage which fact is disputed by the 1<sup>st</sup> Defendant. The 1<sup>st</sup> Defendant contends that the Plaintiffs have been in default from the onset and they declined to accept the new repayment plan as the Plaintiffs' had demonstrated their ability to repay the loan.

Section 90 (1) stipulates that '**If a chargor is in default of any obligations, fails to pay interest or any other periodic payment or any part thereof due under any charge or in the performance or observation of any covenant, express or implied, in any charge, and continues to be in default for one month, the chargee may serve on the chargor a notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be.**'

Section 90 (3) stipulates that '**if the chargor does not comply within two months after the date of the service of the notice under, subsection (1), the chargee may -**

- (a) sue the chargor for any money due and owing under the charge;**
- (b) appoint a receiver of the income of the charge land;**
- (c) lease the charged land, or if the charge is of a lease, sublease the land;**
- (d) enter into possession of the charged land; or**
- (e) sell the charged land.**

I note this section gives the Chargee various remedies against the Chargor. I note by the Plaintiffs mortgaging the suit land, it became the security the Chargee had in case of default of repayment of the loan granted. In so far as the Plaintiffs' claim to have paid 75% of the loan, they are still in default. They request the court to intervene for the 1<sup>st</sup> Defendant to allow them present a new repayment Plan which the 1<sup>st</sup> Defendant has declined.

In the case of **MRAO LTD vs FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS [2003] KLR 125**, where it was emphasized by Kwach JJA as he then was as follows: '**I have always understood that it is the duty of any person entering into a commercial transaction particularly one in which a large amount of money is involved to obtain the best possible legal advice so that he can better understand his obligations under the documents to which he appends his signature or seal. If courts are going to allow debtors to avoid paying their debts just by taking some defences I have seen in recent times for instance challenging contractual interest rate, banks will be crippled if not driven out of business altogether and no serious investors will bring their capital into a country in whose courts are a haven of defaulters.**'

Further in the case of **LABELLE INTERNATIONAL LTD. AND ANOTHER – VS – FIDELITY COMMERCIAL BANK & ANOTHER, CIVIL CASE NO. 786 OF 2002** it was established that "**. . . when part of amount claimed is admitted or proved to be due, a Chargee cannot be restrained by an injunction.**"

In relying on the legal provisions and authorities cited above, I find that the 1<sup>st</sup> Defendant is legally entitled to seek for the repayment of the loan granted to the Plaintiffs so long as it adheres to the spelt out legal procedures. Further, I find that the Court is an independent arbiter and should not be dragged into managing contractual obligations for parties litigating before it, as this might prejudice one party as opposed to the other.

In the circumstances, it is clear that Plaintiffs have not established a prima facie case to meet the threshold for the grant of orders of injunction.

On the question of irreparable loss which cannot be compensated by way of damages, I concur with the 1<sup>st</sup> Defendant that that it is a bank which is able compensate the Plaintiffs if the sale of the suit land does not proceed in a proper manner.

On the issue of balance of convenience, I find that the balance tilts in favour of the Defendants especially the 1<sup>st</sup> Defendant whose statutory power of sale has crystallized and it has adhered to the proper laid down legal procedures to do so.

It is against the foregoing that I find the Plaintiffs Notice of Motion dated the 5<sup>th</sup> July, 2017 not merited and I consequently dismiss it with costs.

**Dated, signed and delivered in open court at Kajiado this 29<sup>th</sup> day of January, 2018**

**CHRISTINE OCHIENG**

**JUDGE**

**Present:**

Cc – Mpoye

Muia holding brief for Ador for Plaintiff/Applicant

Njue holding brief for Mr. Kimani for Defendant/Respondent