



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO 819 OF 2017

J M K PLAINTIFF

VERSUS

HOUSING FINANCE COMPANY

OF KENYA LIMITED..... DEFENDANT

RULING

The application before Court is the Plaintiff's Notice of Motion dated 20th July, 2017 brought pursuant to Order 40 rules 1 and 2 of the Civil Procedure Rules, Sections 1A and 3A of the Civil Procedure and all the other enabling provisions of the law.

The application is based on the following grounds which in summary is that the Plaintiff charged her parcels of land title numbers NGONG/NGONG/2725 and NGONG/NGONG/14666 to secure a loan with the Defendant. Land parcel number NGONG/NGONG/ 2725 is registered in the joint name of the Plaintiff and A J K and A S K who are both minors. The Defendant has been collecting rental income from the suit premises to the tune of Kshs. 145, 000 monthly by virtue of deeds of assignment of rental income. The Plaintiff was never served with statutory notices of sale and the Defendant has failed to furnish her with statement of accounts.

The application is supported by the affidavit of J M K the Plaintiff herein where she deposes that on 25th October, 2005 she charged her property LR NO. NGONG/NGONG/14666 with the Defendant to secure repayment of Kshs. 1 million which had been advanced to her. She subsequently made a charge and second further charge over the property known as NGONG/NGONG/14666. She avers that on 19th March, 2014 a charge was created over land parcel number NGONG/NGONG/2725 in favour of the Defendant to secure payments due to the bank. She claims she has been effecting monthly payments to the Defendant, which has also been collecting rental income amounting to Kshs. 145, 000 from the suit premises pursuant to the Deed of Assignment that they had signed. She confirms the two parcels of land were advertised in the Daily Nation Newspaper dated the 10th July, 2017 by Garam Auctioneers, to be sold by auction. She denies being served with the statutory notices and insists the intended auction is irregular and contrary to the law. Further that the intended move to sell land parcel number NGONG/NGONG/2725 is illegal as the minors are not part of the transaction. She reiterates that it was irregular and unlawful for the bank to charge land parcel number NGONG/NGONG/2725 as it is registered in the name of the minors as well. She contends that the entire auction is in bad faith and that she has established a prima facie case with a probability of success.

The application is opposed by the Defendant whose Assistant Legal Manager – Litigation EUNICE KAMAU swore a replying affidavit where she deposed that the Plaintiff and one A S K applied for a

credit facility from the Defendant in the principal of Kshs. 5,300,000 which they were granted vide a letter of offer dated the 25th July, 2012 and secured by a legal charge over land parcel number NGONG/NGONG/14666. She avers that part of the loan facility granted was to be applied to offset a then existing mortgage loan facility in the name of the Plaintiff held with the Defendant under loan account number ML 600 – 0010992 and whose repayment had been secured by way of a first charge, further charge and second further dated 25th October, 2005, 12th March, 2008 and 31st July 2009 respectively registered by the Plaintiff over land parcel number NGONG/NGONG/14666. She claims the Plaintiff duly created and registered a legal charge dated 27th August, 2012 over title number NGONG/NGONG/14666 to secure payment of the principal sum of Kshs. 5.3 million exclusive of interest and other bank charges advanced to her and her co – borrower A S K. Further that the loan was disbursed to the Plaintiff and her co – borrower on 31st August, 2012 vide loan account number ML 600 – 0011780 held in their joint names. She contends that the Plaintiff and her co – borrower further applied for a further credit facility from the Defendant for the principal sum of Kshs. 15 million vide a written application dated 1st December, 2013 which was granted on 10th March, 2014. She confirms that from 2nd August, 2015 the then Housing Finance Company of Kenya Limited transferred its mortgage finance business, certain assets and liabilities in relation thereto to HFC LIMITED and the security by way of legal charges over title numbers NGONG/NGONG/14666 and NGONG/NGONG/2725 created to secure repayment of the credit facilities granted to the Plaintiff and her co – borrower remained in full force and effect. She denied that that the credit facilities have been repaid on a monthly basis nor any rental income in the sum Kshs. 145, 000 or part thereof, received by the Bank on monthly basis towards payment of the said loan facilities. She reiterates that the loan has been repaid erratically and as at 10th July, 2017, the arrears stood at Kshs. 4,507,411.85. and that on 24th July, 2017 the Plaintiff offered to pay Kshs. 500,000 while in court within a period of 30 days, thereby acknowledging her indebtedness. She contends that the Plaintiff has acknowledged formally and informally that the repayment of the loan facility has been unsatisfactory and that despite the Deed of Assignment of Rental Income, no rent was remitted to the Defendant. She insists the Plaintiff and her co – borrower have admitted their default and the statement of accounts were mailed to the Plaintiff.

She reaffirms that following the default, the Plaintiff was served with statutory notices dated the 26th February, 2016 under section 90 of the Land Act by way of registered post. Further that through a letter dated the 30th November, 2016 addressed to the Defendant by messrs Mungai Kalande & Co. Advocates, the Plaintiff acknowledged the statutory notice dated the 26th February, 2016. She further claims that the Defendant served a 40 days' notice to sell dated the 24th November, 2016 in accordance with the provisions of Section 96(2) of the Land Act, by way of registered post. She states that in line with the requirements of section 97 of the Land Act, the Defendant caused the suit property to be valued by Njihia Muoka Rashi & Co.Ltd. Further that Garam Auctioneers in accordance with the provisions of the Auctioneers Rules 1997 served the requisite redemption notice dated the 23rd May, 2015 as well notification of sale both personally and to the Plaintiff and also by way of registered post. She further insists that the Plaintiff owns the suit land jointly with the minors who enjoy all the indicia and rights of the property owner by virtue of being joint registered owners. Further that the Plaintiff never raised an issue of the security of the charge on NGONG/NGONG/2725 to be invalid and the suit has not been brought by and/or for the benefit of the minors who have a legitimate basis and capacity to agitate any claim touching on the invalidity of the said charge.

Both parties filed their respective submissions which I have considered.

Analysis and Determination

The court has considered the materials presented and arguments canvassed by the respective parties in respect to the Notice of Motion dated 20th July, 2017 and analyzed that the following are the issues for determination:

- whether statutory notices were issued to the Plaintiffs before Defendant exercised its statutory power of sale

- Whether the Defendant furnished the Plaintiffs with statement of accounts
- Whether the Plaintiff is entitled to an injunction

From the Applicant's opening and closing arguments, it is not in dispute that the Plaintiff charged properties NGONG/NGONG/ 14666 and NGONG/NGONG/2725 to secure credit facilities with the Defendant at different intervals as enumerated above. The Plaintiff is not denying in principle that they owe a debt to the Defendant. She is seeking for a temporary injunction claiming that the Defendant did not serve her with the requisite notices as stipulated under section 90 of the Land Act; the Defendant has not furnished her with statement of accounts and Land parcel number NGONG/NGONG/ 2725 is registered in the joint names of the Plaintiff and A J K and A S K who are both minors.

On the Plaintiffs allegation that no statutory notices were issued to her in accordance with the provisions of sections 90 (1) and 90 (1) (3) and 96 of the Land Act, the Defendant submitted various notices it issued to the Plaintiffs. According to the said annexures 'EK 12'a' and 'EK 13'a' , I note the Plaintiff was served with statutory notices dated the 26th February, 2016 under section 90 of the Land Act by way of registered post. The firm of messrs Mungai Kalande & Co. Advocates through their letter dated the 30th November, 2016 which is annexure 'EK 11', wrote to the Defendant acknowledging the said Statutory Notice. I note the Defendant served a 40 days' notice to sell dated the 24th November, 2016 in accordance with the provisions of Section 96(2) of the Land Act, by way of registered post. I further note that Garam Auctioneers served the Plaintiff with the redemption notice dated the 23rd May, 2015 as well notification of sale both personally and also by way of registered post. The Plaintiff has not denied that the postal address indicated in the statutory notices including the Certificate of posting are not hers.

The Defendant further conducted a valuation of the said property and through messrs Njihia Muoka Rashi & Co.Ltd. They indicated the current market value of NGONG/NGONG/14666 is Kshs. 11, 000 and forced Sale value Kshs. 8,250,000 while NGONG/NGONG/2725 had a market value Kshs. 15 million and a forced sale value of Kshs. 11, 250,000.

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.**

Further, the court notes that it is exactly one year since the Plaintiff admitted her indebtedness to the Defendant. Injunction is an equitable remedy and I note the Plaintiff has not come to court with clean hands. It is a long established legal rule that **“. . . when part of amount claimed is admitted or proved to be due, a Chargee cannot be restrained by an injunction.”** This position has clearly articulated in the case of **LABELLE INTERNATIONAL LTD. AND ANOTHER – VS – FIDELITY COMMERCIAL BANK & ANOTHER, CIVIL CASE NO. 786 OF 2002.**

The principles for granting of temporary injunctions were 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."

I note the Plaintiff claims the Charge on NGONG/NGONG/2725 is defective as she said land is registered in her name with two minors. I note from the title deed marked as annexure 'EK14 a' that the Plaintiff is a joint proprietor of the said land and hence had capacity to charge it. In annexure 'EK8 b' which is the Charge document for NGONG/NGONG/2725, I note at page 164 that one of the alleged minors A S K indeed signed the charge document and indicated his identity card number as [Particulars withheld]. This is clear indication that the Plaintiff does not have clean hands when she is seeking for an injunction to stop the bank from exercising their statutory power of sale. On the issue of the property being jointly owned with minors, I concur with the Defendant that by the Plaintiff executing the charge in her capacity as the next friend and trustee of the minors, she created a legally enforceable contract on their behalf. This position is articulated in the case of **Halima Abdinoor Hassan & 3 others Vs Corporate Insurance Company Limited [2015]eKLR** where it was held that: '**...As a general rule, a minor may not have the legal capacity to enter into a contract unless through guardians and trustee....'**

It is against the foregoing that I find that that Plaintiff has not established a prima facie case to meet the threshold for the grant of orders of injunction.

On the issue of irreparable harm which cannot be compensated by way of damages, I note the plaintiff's only claim is that the suit land Ngong/Ngong/2725 is jointly owned by minors.

She however has not demonstrated any harm she will suffer if the defendant exercised its statutory power of sale.

I further find that the balance tilts in favour of the defendant whose statutory power of sale has crystalized.

I consequently dismiss the Plaintiff's Notice of Motion dated the 20th July, 2017 with costs.

The status quo order granted on 18th October, 2017 be and is hereby vacated.

Dated, signed and delivered in open court at Kajiado this 25th day of January, 2018.

CHRISTINE OCHIENG

JUDGE

Present:

Cc Mpoye

Miss Kinyua holding brief for Mutua for Plaintiff

N/A for Kabue Thumi for Applicant