



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 839 OF 2017

LORRAINE WANJA KAITHIA.....PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK.....DEFENDANT

RULING

The application for determination is the Plaintiff's Notice of Motion dated the 15th August, 2017 brought pursuant to Order 40 rules 2(1) and Order 51 rule 1 of the Civil Procedure Rules, Section 1A, 1B, 3A and 63 (e) of the Civil Procedure Act, the inherent power of the Court and all enabling provisions of the law. It is based on the following grounds which in summary is that in September 2011 the Plaintiff took a loan of Kshs. 5.6 million from the Defendant to enable her complete the purchase of the property known as NGONG/NGONG/10638 hereinafter referred to as the 'suit land.' Plaintiff charged the suit land as security over the loan and also executed a Deed of Assignment of Rental Income on 4th October, 2011 thereby authorizing payment of rental income direct to the Defendant. At the time of taking the loan she was able to service it at the monthly instalment of Kshs. 92,000. On 29th June, 2017 the Defendant without having issued the mandatory three months' statutory notice to the Plaintiff, sent Garam Investments Auctioneers to serve Notifications of Sale upon the Applicant. Upon the Plaintiff pointing out to the said auctioneers that the postal address indicated in the Notifications was not hers, the auctioneers left and returned on 8th July, 2017 with Notifications bearing the correct address and rescheduling the intended auction to 12th September, 2017 due to what they termed as change of postal address on the part of the Applicant. Plaintiff has never changed her address and neither did she receive the mandatory three months' statutory notice before the Defendant is allowed to exercise its statutory power of sale. The purported exercise of the statutory power of sale by the Defendant is pre mature, illegal, null and void as the same has not arisen. There is a genuine dispute as to accounts since in the Notification of Sale, the Defendant is demanding payment of the mortgage debt of Kshs. 5, 166,992.91 as at 21st June, 2017 while the statement of Account from the Respondent it indicates Kshs. 4, 701,674.95 as at 17th July, 2017. The Plaintiff is also apprehensive that the Defendant will dispose off the suit land at a gross undervalue thereby causing irreparable damage to her.

The application is supported by the affidavit of LORRAINE WANJA KAITHIA who is the Plaintiff herein where she deposes that she is the registered proprietor of the suit land upon which she has erected a residential house. She states that she is a business woman carrying on in the name and style of Crystal Fashion Accessories and at the time of taking the loan from the Defendant, she was also in gainful employment with Safaricom Kenya Limited, which job she lost in 2017. She insists her postal address has always been P.O. Box 2727 – 00200 Nairobi. She avers that the Defendant has been evasive and declined to deal with her nor to supply her with copies of the notices or valuation report. She claims the Defendant did not issue her with the mandatory three months' notice before the intended sale of the suit land save for the 40 days' notice prior to Sale. She reiterates that at the time of taking the facility in September, 2011,

the suit land was valued at Kshs. 7.8 million but is now valued at about Kshs. 20 million. She contends that she has sought to have the Defendant re-schedule the terms of repayment of her loan but it has adamantly declined to do so, insisting they will proceed to realize the security as arranged. She seeks an order of injunction to restrain the Defendant which persists with its illegal action that will occasion irreparable loss and damage to her.

The Application is opposed by the Defendant whose Legal Officer TOM OGOLA filed a replying affidavit where he deposed that pursuant to a Loan Facility vide a Letter of Offer dated the 6th July, 2011, the Defendant advanced the Plaintiff Kshs. 5.6 million which was secured with a legal Charge over the suit land. He states that the loan facility was to be paid over a period of twenty (20) years at a monthly instalment of Kshs. 77,025 each and in accordance with the said terms, the interest rate charged would be 15% p.a, although it could be varied at the Defendant's sole discretion. He claims as at 18th April, 2017, the Plaintiff's account was in arrears of Kshs. 520, 155.21 with the outstanding debt amount due to the Defendant in respect of the loan account at Kshs. 5,129,344.11. He insists despite the Defendant making relentless efforts and communications to the Plaintiff demanding for the clearance of the outstanding arrears to regularize facility, she failed to do so, compelling the Bank to send the 90 days Statutory Notice to her through registered post pursuant to section 90 (1) (2) (3) (e) of the Land Act 2012. He contends that having failed to honour and settle the outstanding arrears, the Defendant issued the Plaintiff another forty (40) days' notice pursuant to Section 96 (2) (3) of the Land Act and on 28th April, 2017 which notice was sent to the Plaintiff via registered post. Further that as a consequence of the Plaintiff's refusal and/or failure to honour and settle the arrears, the Defendant proceeded to demand the entire debt by exercising its statutory power of sale pursuant to section 90 (1) and 3 (e) as read together with section 96 (2) of the Land Act and instructed Garam Investments Auctioneers to realize the security. He confirms that on 8th July, 2017 Garam Investments Auctioneers issued the Plaintiff with a 45 days' notice to redeem the suit land but she ignored and/or failed to honour her obligations despite acknowledging receipt of the letter. Further, the Plaintiff was subsequently issued with a Notification of Sale informing her of the intended auction which was scheduled on the 12th September, 2017 but she still ignored/failed to honour her obligations despite acknowledging receipt. He admits that the Plaintiff's address was erroneously indicated but insists she was properly served by the Auctioneers. He reaffirms that on 13th March, 2017 the Defendant undertook a valuation of the suit land to ascertain its market value, with the same being valued at Kshs. 12.8 million. He avers that any waiver in interest is at the discretion of the Defendant and that the bank is justified in exercising its statutory power of sale as the Plaintiff had proved unwilling to honour the loan repayment terms as set out in the offer letter and charge document that she voluntarily executed. Further that the Plaintiff's application should be dismissed as it is an abuse of the court process, unmerited and is not brought in good faith.

The Plaintiff filed a supplementary affidavit sworn by herself, where she reiterated her claim and insisted the Defendant did not issue her nor did she receive from the Bank, the mandatory ninety days' statutory notice. She reiterates that the Defendant has not exhibited any evidence of postage of the notice to prove they issued the said notice to her, but it has only exhibited a receipt from the Postal Corporation of Kenya. She claims due to the Defendant's admission on the error on her address, the purported exercise of the statutory power of sale is premature, unprocedural, null and void with no legal consequence. She insists the valuation report by the Defendant is too conservative and gives a gross undervaluation of the suit land, with the said land being valued in excess of Kshs. 15 million for forced market value and Kshs. 20 million for open market value. She contends that the Defendant conveniently failed to explain the disparity on the outstanding amounts namely, Kshs. 5,166,992.91 as at 21st June, 2017 and Kshs. 4,701,674.95 as at 17th July, 2017. She reaffirms that she has established a prima facie case with a probability of success to be entitled to the equitable remedy of an injunction.

The Plaintiff filed her written submissions where she reiterated her claim and relied on the following cases including **GIELLA Vs. CASMAN BROWN, Trust Bank Kenya Limited Vs. Okoth (2000) 1EA 274 eKLR and Trust Bank Limited Vs. Eros Chemists Limited (2000) 2 EA 550** to support her case. The Defendant also filed its submissions to oppose the Plaintiff's case and relied on the following cases including **Morris & Co. Ltd Vs. Kenya Commercial Bank Ltd & Anor (2003) 2 EA 605; Maltex Commercial Supplies Limited & Anor Vs. Euro Bank Limited (In Liquidation) (2007)**

eKLR; Mrao Ltd Vs. First American Bank Ltd & 2 Others (2003) eKLR; Hyundai Motors Kenya Limited Vs East Africa Development Bank Ltd (2007) eKLR and Bii Vs. Kenya Commercial Bank Limited (2001) KLR 458.

Analysis and Determination

Upon perusal of the Notice of Motion application dated the 15th August, 2017 including the supporting, replying and supplementary affidavits as well as the submissions herein, there are two issues for determination at this juncture:

- Whether the Defendant served the Plaintiff with the three months' statutory notice.
- Whether the Plaintiff is entitled to the injunctive orders sought.

It is not in dispute that the Defendant granted the Plaintiff a loan facility of Kshs. 5.6 million in September, 2011 to be repaid for a period of twenty years. It is further not in dispute that the suit land was granted as security over the loan. What is in dispute is that the Plaintiff is in arrears and the Defendant seeks to exercise its statutory power of sale. Further, that the Plaintiff denies receiving the three months' statutory notice.

On the issue of the three months' Statutory Notice, the Plaintiff alleges that no statutory notices were issued to her in accordance with the provisions of Sections 90 (1) (2) (3) and 96 of the Land Act, but the Defendant submitted various notices it issued to the Plaintiff.

Section 90 (1) of the Land Act 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(2) of the Land Act provides that:-

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.**

Section 90 (3) of the Land Act 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 from the Defendant's replying affidavit, except for the statutory notices contained in annexures 'TO 2' and 'TO3' respectively, there is no Certificate of Posting to prove the Plaintiff was indeed served with the Ninety (90) days statutory notice via registered post. I further note that the Defendant has indeed admitted at paragraph 12 of TOM OGOLA's replying affidavit that the Plaintiff's address was erroneously indicated. I find that all these cannot be termed baseless and reveal an anomaly in the service upon the Plaintiff. The exercise of realizing one's security is serious business, with the provisions within section 90 of the Land Act being couched in mandatory terms, which ought to be meticulously adhered to. From the above the Court finds that the Plaintiff was indeed not properly served with the requisite statutory notices in accordance with section 90 (1) and (2) of the Land Act.

On the issue as to whether the Plaintiff is entitled to the temporary injunction pending the outcome of the suit, the principles for consideration in determining whether temporary injunction can be granted or not are well settled in the case of **Giella Vs. Cassman Brown & Co. Ltd (1973) EA 358** which states 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 relying on the case above, I wish to interrogate whether the Plaintiff has made out a prima facie case with a probability of success. The Plaintiff does not deny her indebtedness to the Defendant but challenges the value attached to the security, accounts rendered and the service of the statutory notices upon her. The Defendant on the other hand contends that the Plaintiff was duly served with the statutory notices, with the suit land valued, hence its statutory power of sale has crystallized.

In the case of **Mrao Limited Vs. First American Bank of Kenya Limited & 2 others (2003) KLR 125** the court held that: *' 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 other.'*

In relying on the above case, I note that the suit land was indeed valued and the question of accounts cannot be decided at this juncture, but since I have already determined that the statutory notices were not properly served upon the Plaintiff, I find that she has indeed established a prima facie case with a probability of success.

On the second limb as to whether the Plaintiff will suffer irreparable harm which cannot be compensated by way of damages, if the injunctive orders are not granted, I reiterate that since the statutory notices were not duly served upon the Plaintiff, at this juncture, she will indeed suffer irreparable harm if the injunctive order is denied.

As to the balance of convenience, I find that the balance tilts in favour of the Plaintiff as she has proven that the statutory power of sale has not crystallized for her property to be sold by public auction.

It is against the foregoing that I find the Plaintiff's Notice of Motion dated the 15th August, 2017 is merited and allow it in the following terms:

A temporary injunction be and is hereby issued against the Defendant, its servants, agents or assigns from advertising for sale, disposing of or selling by public auction or private treaty or in any way dealing with land parcel number NGONG/NGONG/10638 pending the issuance of fresh mandatory notices in accordance with section 90 of the Land Act.

Costs will be in the cause.

Dated signed and delivered in open court at Kajiado this 12th day of February, 2018

CHRISTINE OCHIENG

JUDGE

Present

CC Mpoye

Leuli holding brief for Nyamwata for Plaintiff/Applicant

Namu for Muganya for Defendant