



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CASE NO. 270 OF 2017

MARGARET KYALO.....PLAINTIFF/APPLICANT

-VERSUS-

EQUITY BANK (K) KENYA LIMITED.....DEFENDANT/RESPONDENT

RULING

1. The plaintiff/applicant moved the Court under the provisions of Order 40 of the Civil Procedure Rules seeking the following orders:

(a) Spent

(b) Spent

(c) That a temporary injunction be issued restraining the defendant by itself and/or its servants or agents M/S Dalali Auctioneers or whosoever from selling or disposing or in any manner interfering with plot No. LR MSA/Block XVIII/168 pending the hearing and determination of this suit.

(d) Costs be provided for.

2. The application is premised on the grounds that the applicant is lawfully registered as owner of the suit property which she described as prime commercial cum residential property. The property was charged as security in respect of a loan offered by the defendant. The applicant pleaded that she has been duly making the requisite repayments to date. However the defendant sometime in March 2017 increased the monthly repayments from Kshs 250,000= to 350,000= and also varied the rate of interest thus creating artificial arrears. The applicant contends that as a result of this action of the defendant which she feels is unlawful the defendant proceeded to advertise the suit property for auction without serving her the mandatory statutory notices. She therefore urged the Court to stop the sale pending determination of the suit.

3. The application is opposed vide the defendant's replying affidavit sworn by James Mbutia on 31st July 2017. Mr Mbutia confirmed that indeed the suit property was charged as security in respect of a loan of Kshs 16,800,000 advanced to the plaintiff. He annexed a copy of the letter of offer dated 26th May 2011 and the charge document dated 22nd June 2011 executed between the parties herein. The defendant deposed that the plaintiff soon defaulted in repaying the facility and they served her with the first demand notice on 11th May 2015 – annexed *JM 3 (a) & (b)*.

4. The defendant continued that the plaintiff did not rectify the default and despite extended accommodation they gave, the default persisted. The defendant was thus forced to issue a fresh 90 day statutory notice on 12th August 2016 as per copy of the letter annexed as **JM4** and later the 40 days redemption notice dated 20.1.2017 (**annex JM 5**). Mr Mbutia deposed that he is informed by the Auctioneer Mr Stephen Karanja that the redemption notice and notification of sale was personally served on the plaintiff and she did acknowledge receipt by signing the same as copies of the notices annexed to the replying affidavit. That the property was thereafter advertised for sale by public auction after the lapse of the 45 days. The defendant contends that the plaintiff misled the Court into believing that no notice was served upon her. Secondly on variation of interest, the defendant stated that by a notice of 15th November 2011, the applicant was notified that the interest rate would increase and consequently the monthly instalments from Kshs 265,922 to Kshs 346,441.00 (**annex JM 9**). On issuance of statements, the defendant deposes that statements are always issued as per the customers order. Consequently it is the defendant's position that the present application ought to be dismissed.

5. The plaintiff sought leave to file a supplementary affidavit which leave was granted. However no supplementary affidavit was filed alongside her written submissions as directed by the Court. The defendant also filed its written submissions. I have read and considered both the pleadings and the submissions filed. In paragraph 15 of the charge, it provided **that "any notice required or authorized by law or by this charge to be served by the Bank on the Chargor shall be deemed to have been properly served if served on the chargor personally or left at the chargor's last known place of residence or business in Kenya or if sent by registered post or facsimile at the chargor's last known address in Kenya."** In this instance, the address contained in the charge document and the letter of offer as belonging to the chargor is **P.O Box 85748 – 8011 GANJONI, MOMBASA.**

6. The statutory notices issued by the defendant were all addressed to the applicant at the address of P.O. Box 85748 – 80100 MOMBASA. The defendant went ahead to provide confirmation of registration of the said letters with the postal corporation of Kenya (**vide annex JM4 (b), JM5 (b) & JM 6 (b)**). The plaintiff did not deny that this was her address neither did she present any proof of notifying the defendant of any change of her address. The letters are thus deemed to have reached her through the known address. Further, the applicant did not deny the averment as put by Mr Mbutia that the auctioneer informed him that the redemption notice and notification of sale were personally served on her. In light of all these, the ground put forth by the plaintiff that she was not served by any statutory notices as required by law fails.

7. On the ground of variation of interest, the defendant admitted this fact. However the defendant stated that the applicant was duly served with the notice of increment the only time that there was a variation of interest rates on 15.11.2011. Injunctive relief is an equitable remedy. The equitable doctrine of equity aids the vigilant not the indolent is called into existence. If the applicant was aggrieved with the variation which took place in 2011, she ought to have registered a complaint immediately or within reasonable time and not attempt to do so six years later. In any event as correctly pointed out, the issue of variation of interest would be a matter of accounts that does not form a basis for granting an order for injunction.

8. Lastly the applicant has not shown this Court any evidence that she has been making monthly repayments on time as she deposed in her affidavit in support. For her to enjoy the equitable remedy of the injunction she ought to come to this Court with clean hands. The explanation given by the defendant that the default began in 2015 and has persisted has not been controverted by the plaintiff/applicant. This means that she has come to Court with unclean hands. The burden of proof was shifted on her to disapprove the defendant's action said to have been occasioned by her default to repay the loan but she failed to demonstrate any iota of evidence to the contrary.

9. Given that there is demonstrated evidence of default on the part of the applicant and taking into account that the defendant has duly complied with the law by serving the statutory notices in the manner prescribed by law, I find the present application as failing to meet the threshold principles for granting of injunctions. It fails because the applicant has not convinced me that she has a prima facie case with a probability of success or that she is likely to suffer irreparable loss that cannot be compensated in case the orders are not granted. The balance of convenience tilts in favour of the defendant who has followed the

procedures of exercising statutory power of sale after granting the applicant opportunity to redeem the debt. In the final analysis, this application is dismissed for lacking in merit with costs to the defendant.

Dated, signed & delivered at Mombasa this 7th February 2018.

A. OMOLLO

JUDGE