



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAJIADO**

**ELC CASE NO. 732 OF 2017**

**ERICK KIBINU KINUTHIA.....1<sup>ST</sup> PLAINTIFF**

**LUCY NJOKI KIBINU.....2<sup>ND</sup> PLAINTIFF**

**MARY NDUTA WAMBUI.....3<sup>RD</sup> PLAINTIFF**

**VERSUS**

**KENYA WOMEN MICROFINANCE BANK LIMITED.....DEFENDANT**

**RULING**

The application before this court is a notice of motion dated the 22<sup>nd</sup> May, 2017 brought pursuant to section 1A, 1B and 3A of the Civil Procedure Act and Order 42 Rules 1 and 2 of the Civil Procedure Rules and Section 82(3), 97 and 104 (2) of the Land Act and all the other enabling provisions of the law. It is premised on the following grounds, which in summary is that no statutory notice was served by the Defendant in accordance with the law. The Defendant has charged unlawful and excessive interest rates with a view to creating an artificial debt by means of interest. The power of sale has not crystallized and/or accrued, yet the sale by public auction is fixed for 30<sup>th</sup> May, 2017. The 3<sup>rd</sup> Plaintiff is in a position to liquidate any true debt given a little time.

The application is supported by the affidavit of MARY NDUTA WAMBUI the 3<sup>rd</sup> Plaintiff herein who avers that the Defendant has advertised to sell land parcel number NGONG/NGONG/55812 hereinafter referred to as the 'suit land'. She deposes that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs are the registered owners of the suit land which they charged to the Defendant to secure a loan advanced to her. She avers that none of them has a copy of the Charge Instrument. She confirms the Defendant first advanced a loan of Kshs. 1 million on 7<sup>th</sup> November, 2012 and on 3<sup>rd</sup> February, 2014, the Defendant topped up the loan with a sum of Kshs. 7, 057, 532. Further, that the second loan was advanced following the signing of a Memorandum dated the 6<sup>th</sup> December, 2013 addressed to her by the Defendant, to enable her construct a house. She contends that the Memorandum was supposed to be signed by both guarantors but the 2<sup>nd</sup> Plaintiff did not sign. She insists she has diligently serviced the loan but the Defendant has charged interest on the arrears at a higher rate, which she contends, is illegal, as this was not stated in the Charge Instrument, with the said rates meant to frustrate her repayment thereby creating artificial arrears that the Defendant is utilizing to sell the suit land. She reiterates that the statutory notice issued by the Defendant is defective, illegal, null and void in so far as it purports to demand payment of sums of money allegedly advanced to her over and above the maximum amount for which the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs agreed to secure. She confirms that since August 2016, she has paid Kshs. 1,670,000 including Kshs. 766,000 paid on 16<sup>th</sup> August, 2016 but her failure to repay the loan regularly was due to illness that led to a major operation. Further that she owns two parcels of land being NGONG/NGONG/60132 and NGONG/NGONG/60133, that she has put for sale, and will use the proceeds therefrom to repay the outstanding loan. She reiterates that she has given a proposal to the Defendant on how to repay the loan, and is ready to pay Kshs. 100,000 per month as she arranges to sell the house. She reaffirms that she has established a prima facie case with a high probability of success.

The application is opposed by the Defendant which filed a replying affidavit sworn by BERNARD KIPROTICH who is its Legal Counsel where he deposes that vide a letter dated the 6<sup>th</sup> December, 2013, the Plaintiffs were offered a top up loan facility by the Defendant to which they signed demonstrating they accepted the offer. He explains that as per the terms of the top up loan facility, the Defendant advanced to the 3<sup>rd</sup> Plaintiff a top up loan of Kshs. 7,057,532 to make an aggregate of Kshs. 7,508,598 being the principal exclusive of interest and other costs. The Plaintiffs thereafter executed a charge in favour of the Defendant over the suit land as security for the loan advanced on the 24<sup>th</sup> January, 2014. He avers that the Plaintiffs have defaulted in repaying the loan which fact is conceded in their supporting affidavit sworn on the 22<sup>nd</sup> May, 2017. He contends that the loan arrears plus interest as at the 10<sup>th</sup> April, 2017 stood at Kshs. 5,444,955.41. Further, that it was an accepted term by the Plaintiffs' in the Charge that the Defendant was at liberty to vary the interest from time to time. He insists that courts are not avenues to renegotiate contracts nor relieve a party from its obligations under the contractual bargain and that in any event, a dispute in accounts is not a ground for a grant of an injunction. He reiterates that the Defendant has not breached any terms of the contractual agreement to which the Plaintiffs entered into voluntarily having obtained independent legal advice. He states that as a result of the Plaintiffs' default, the Defendant was compelled to exercise its statutory power of sale so as order to recover the amount owed, by duly complying with the law in issuing the three months statutory notice; 40 days statutory notice; 45 days auctioneer's notice and notification of sale via its agent Garam Investments Auctioneers. The Defendant also undertook a valuation of the suit land before the intended auction. He

reaffirms that the Plaintiffs' application does not meet the threshold for an award of a temporary injunction as stipulated in the case of **Giella Vs Cassman Brown (1973) EA 358**. Further that the Plaintiffs have not come to court in good faith as their application is tainted with ill motives aimed at delaying the Defendant's legitimate sale of the charged land and are undeserving of the orders sought.

The Plaintiffs' filed a rejoinder to the Defendant's replying affidavit through an affidavit sworn by MARY NDUTA WAMBUI the 3<sup>rd</sup> Plaintiff herein where she confirmed receiving the statutory notice dated the 11<sup>th</sup> August, 2016 but denies that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs were served with the said notice. She denies that none of the Plaintiffs' was served with any notification of sale as the same was not served personally on the Chargor or an adult member of the Chargor's family, hence the purported auction of the suit land cannot take place as it would amount to an illegal as well as unlawful exercise. She urged the court to exercise its discretion under section 104(2) of the Land Act and accord her time to sell her house and pay off the Defendant rather than the Bank selling a third party's property. She insists the Defendant is bent on selling the suit land at an undervalue having stated that its current market value is Kshs. 8 million while its value at the time of taking the loan and charging the land in January, 2014 was Kshs. 8.5 million. She explains that there has been further developments in the area including the opening of the Milele Mall which has increased the tremendous value of properties in the area. She contends that the Plaintiffs do not have ill motives and bad faith in falling into arrears.

Both parties filed their respective submissions that I have considered.

### **Analysis and Determination**

Upon perusal of the materials presented by the Plaintiffs' and the Defendant in respect to the Notice of Motion the 22<sup>nd</sup> May, 2017 including their written submissions, I find that the only issue for determination is whether the Plaintiffs' are entitled to the temporary injunction orders sought pending the outcome of the suit.

In the suit, the Plaintiffs' seek to bar the Defendant from exercising its statutory power of sale over the suit land claiming they were not served with the requisite statutory notice, and that the interest rates charged on the loan are exaggerated. The Defendant insists it adhered to all the legal processes and the Plaintiffs were well aware that the Bank could sell the charged suit land in the event of default.

In their submissions the Plaintiffs' relied on various cases including **Albert Mario Cordeiro Vs Vishram Shamji Nairobi HCCC No. 329 of 2014; Yusuf Abdi Ali Co. Ltd Vs Family Bank Ltd; and David Gitome Kihiguka Vs. Equity Bank HCCC No. 94 of 2013** to support their claim. The Defendant relied on the following cases including **Giella vs. Cassman Brown & Co. Ltd (1973) E.A 358; Mrao Limited Vs. First American Bank of Kenya Limited & 2 others (2003) KLR 125; Geoffrey Omondi Otiyo V Cooperative Bank of Kenya Limited & another (2016) eKLR** as well as **Palmy Company Limited Vs Consolidated Bank of Kenya Limited (2013) eKLR**.

The principles of granting interlocutory injunction are well established in the case of **Giella vs. Cassman Brown & Co. Ltd (1973) E.A 358** where the court held inter alia that for an injunctive order to be granted the Applicant has to demonstrate it has a prima facie case with a probability of success; it stands to suffer irreparable loss or injury which cannot adequately be compensated in damages; and if the court is in doubt, it should decide the application on a balance of convenience.

As to whether the Plaintiffs have established a prima facie case with a probability of success, from their arguments, it is not in dispute that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs charged the suit land to secure a loan with the Defendant on behalf of the 3<sup>rd</sup> Plaintiff. The Plaintiffs' are not denying in principle that the 3<sup>rd</sup> Plaintiff owes a debt to the Defendant. On the Plaintiffs' allegation that no statutory notices were issued to them in accordance with the provisions of the Land Act, the Defendant has annexed various statutory notices to wit: **'BK 5a', 'BK 5b, 'BK5c** respectively, which it issued to the Plaintiffs', before the intended auction. Annexure **'BK5a'** is the first Statutory Notice for three months which is dated 11<sup>th</sup> August, 2016 that was sent to the Plaintiffs' and informed them of the default and the outstanding loan that stood at Kshs. 1,973,908.33/=. Annexure **'EBK 5b'** is a statutory notice dated the 6<sup>th</sup> December, 2016 which was issued in accordance with section 90(3) of the Land Act advising the Plaintiffs' to rectify the default and giving them forty (40) days to do so or else the Defendant would exercise its statutory power of sale. Annexure **'BK 5c'** is the forty five (45) days' Notice to Sell dated the 25<sup>th</sup> March, 2017, issued by the Auctioneer Messrs. Garam Investments to the Plaintiffs' on its intention to auction the suit land.

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 (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.**

From the said annexures **'BK 5a', 'BK 5b' and 'BK 5c'** respectively, I note the statutory notices were indeed served upon the Plaintiffs' in

accordance with the law. It is worth noting that the Plaintiffs' addresses on the charge document are the same addresses where the said notices were posted. I note there are Certificates of Posting annexed to the Defendant's replying affidavit and these bear the Plaintiffs' addresses as per the Charge document. All these addresses have not been challenged by the Plaintiffs.

Section 96(1) above is further clear that a chargee shall proceed to exercise its statutory power of sale where a chargor is in default of the obligations under a charge and remains in default at the expiry of the time provided for the rectification of that default. The 3<sup>rd</sup> Plaintiff requests court to intervene and allow her time to sell her two plots in NGONG to offset the existing debt. It is the Court's finding that it cannot be made a party to the contractual obligation between the Plaintiffs' and the Defendant.

In the case of **Mrao Limited Vs. First American Bank of Kenya Limited & 2 others (2003) KLR 125** the court held that: '*In civil cases, a prima facie is a case in 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 latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard, which is higher than an arguable case.*'

It is against the foregoing that I find that the Defendants' have not infringed on any of the Plaintiffs' rights as they charged the suit land to secure a loan from the Defendant. The 3<sup>rd</sup> Plaintiff admits defaulting in repayment due to illness and requests to sell her plot to offset the loan.. The 3<sup>rd</sup> Plaintiff however does not indicate the period she will take to sell her plots to offset the loan with the Defendant. In the case of **LABELLE INTERNATIONAL LTD. AND ANOTHER – VS – FIDELITY COMMERCIAL BANK & ANOTHER, CIVIL CASE NO. 786 OF 2002** it 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 this case I find that the Defendant cannot be restrained from realizing the security since the Plaintiffs already admitted their indebtedness to the bank and once the suit land was charged to secure a loan, it became a commodity that could be sold in case of default in repayment.

On the issue of valuation of the suit land, I note the defendant undertook a valuation of the same in March 2017 before the intended auction.

The plaintiffs claim that the suit land is undervalued but have not provided a comparative valuation report to the contrary and hence find that the defendants indeed valued the suit land.

In terms of the issue raised by the Plaintiffs on the arbitrary interest rate applied to their loan account by the Defendant. The Court notes that the Plaintiffs' indeed signed the Charge document and accepted the terms of interest as contained in clause 5 of the Charge Instrument. . They cannot refute now and claim the interest rates were arbitrary. Section 84 (1) of the Land Act is clear on variation of interest rate and stipulates as follows: '*where it was contractually agreed upon that the rate of interest is variable, the rate of interest payable under a charge may be reduced or increased by a written notice served on the chargor by the chargee.....*

From the above, it is clear that Plaintiff has not established a prima facie case to meet the threshold for the grant of orders of injunction.

It is against the foregoing that I find the Plaintiffs' Notice of Motion dated the 22<sup>nd</sup> May, 2017 unmerited and dismiss it.

Costs in the cause

**Dated signed and delivered in open court at Kajiado this 21<sup>st</sup> day of March, 2018**

**CHRISTINE OCHIENG**

**JUDGE**

**Present :**

Cc Mpoye

Rono for Plaintiff/Respondent

Rono for 2<sup>nd</sup> Defendant

Ms Njimu holding brief for Mutisya for 7<sup>th</sup> Defendant

N/A for 8<sup>th</sup> and 1<sup>st</sup> Defendants

N/A for 6<sup>th</sup> Defendants

N/A for 5<sup>th</sup> Defendants