



**REPUBLIC OF KENYA**

**IN The ENVIRONMENT AND LAND COURT AT NAKURU**

**CASE NO. 272 OF 2017**

**JULIA MUTHONI GITHINJI.....PLAINTIFF**

**VERSUS**

**AFRICAN BANKING CORPORATION LIMITED.....DEFENDANT**

**RULING**

1. This is a ruling in respect of plaintiff's Notice of Motion dated 29<sup>th</sup> June 2017. The application is brought under Order 40 rules 1, 2 and 3 of the Civil Procedure Rules. It seeks the following orders:

**1. Spent.**

**2. Spent.**

**3. That pending the hearing and determination of this suit, the defendant whether acting by itself, through its agents, servants, employees or any other party acting under the instructions of or at the behest of the defendant be restrained from selling, disposing off, transferring, alienating or in any other way so to do interfering with land parcel number Nakuru Municipality Block 1/1201 (Langalanga) Racetrack Estate.**

**4. That costs hereof be provided for.**

2. The application is supported by an affidavit sworn by the plaintiff on 29<sup>th</sup> June 2017. The plaintiff's case as deposed in the affidavit is that on 14<sup>th</sup> September 2011, the plaintiff and her late husband obtained a loan facility of KShs 1,700,000 from the defendant. They charged the parcel of land known as **Nakuru Municipality Block 1/1200 (Langalanga)**, hereinafter "the suit property" as security. The suit property is jointly registered in the names of the plaintiff and her deceased husband. According to the plaintiff, she had paid KShs 2,105,006.10 as at the time of swearing the affidavit. Despite this payment, the defendant instructed an auctioneer who issued to her Notification of Sale on 10<sup>th</sup> June 2017. An amount of KShs 2,501,970.96 is stated in the Notification of sale as due as at 9<sup>th</sup> June 2017. It is also stated therein that the suit property would be sold on 11<sup>th</sup> July 2011. The deposed that the defendant did not issue any 90 days statutory Notice and a 45 days redemption notice. The plaintiff further contends that the defendant's demands are contrary to the Banking Act.

3. The application is opposed by the defendant through a replying affidavit sworn by Evalyn Gachoki, a legal officer employed by the defendant. It is deposed therein that since taking the loan in September 2011, the plaintiff had only paid KShs 829,741 by May 2013 when she approached the defendant and sought a restructuring of her loan. Through letter dated 6<sup>th</sup> May 2013, the defendant acceded to her request and granted her credit of the then outstanding KShs 1,674,099. Despite the restructure, the plaintiff only paid KShs 1,275,265.10. As a result, the defendant wrote to the plaintiff a letter dated 7<sup>th</sup> January 2016 demanding an amount of KShs 1,804,601.37 which was outstanding as at 5<sup>th</sup> January 2016. When the plaintiff failed to settle the amount, the defendant issued a 90 days' statutory notice on 18<sup>th</sup> February 2016 through M/s Mulondo Oundo Muriuki & Co. Advocates. The statutory notice expired with little effort being made to repay the amount owing. Accordingly, the defendant, through the same advocates issued to the plaintiff a 40 days' Notice to Sell on 21<sup>st</sup> June 2016. Subsequently, M/s Saddabri Auctioneers served upon the plaintiff a 45 Day Redemption Notice and Notification of Sale. The deponent further deposed that section 44A of the Banking Act applies only to loans that have become non-performing

4. The application was argued by way of written submissions. The applicant filed submissions on 9<sup>th</sup> October 2017 while the respondent filed submissions on 19<sup>th</sup> January 2018. I have considered the application, affidavits, submissions and the authorities cited.

5. In an application for an interlocutory injunction, the applicant must satisfy the test in **Giella –vs- Cassman Brown & Co. Ltd [1973] E.A 358**. She must establish a *prima facie* case with a probability of success. Even if a *prima facie* case is established, an injunction would not be issued if damages can adequately compensate him. Finally, if the court is in doubt as to the answers of the above two tests then the court would determine the matter on a balance of convenience. As was recently held by the Court of Appeal in **Nguruman Limited v Jan Bonde**

**Nielsen & 2 Others [2014] eKLR**, all the three **Giella** conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially and that if *prima facie* case is not established, then irreparable injury and balance of convenience need no consideration.

6. In the present case, though the plaintiff alleges that she was not served with a 90 days statutory notice and 45 days redemption notice, the defendant in its replying affidavit stated that these notices were issued. A copy of a Notice under Section 90 of the Land Act was annexed to the replying affidavit as “EG4” while a copy of 45 days Redemption Notice and Notification of Sale were annexed to the said affidavit “EG6”. Evidence of postage was included in both theses annexures. There is no evidence from the plaintiff to counter these specific statements made on oath on behalf of the defendant. I note that the notices were sent by registered post to the plaintiff’s postal address which is P.O Box 3366 – 20100 Nakuru. In the circumstances, I am satisfied that the notices required under section 90 of Land Act and rule 15(d) of the Auctioneers Rules were issued.

7. Regarding the plaintiff’s arguments concerning **Section 44A** of the **Banking Act**, let’s begin by reproducing the said section. It provides:

**44A. Limit on interest recovered on defaulted loans**

**(1) An institution shall be limited in what it may recover from a debtor with respect to a non-performing loan to the maximum amount under subsection (2).**

**(2) The maximum amount referred to in subsection (1) is the sum of the following—**

**(a) the principal owing when the loan becomes non-performing;**

**(b) interest, in accordance with the contract between the debtor and the institution, not exceeding the principal owing when the loan becomes non-performing; and**

**(c) expenses incurred in the recovery of any amounts owed by the debtor.**

**(3) If a loan becomes non-performing and then the debtor resumes payments on the loan and then the loan becomes non-performing again, the limitation under paragraphs (a) and (b) of subsection (1) shall be determined with respect to the time the loan last became non-performing.**

8. My understanding of the impact of section 44A of the Banking Act is that it would only limit the amount that is recoverable. It cannot stop the exercise of statutory power of sale especially where, as is the case herein, there is default on the part of the chargor. As I understand it, the law has always been that a dispute on the amount owing cannot be a ground for stopping the exercise of statutory power of sale. In **Shimmers Plaza Limited v National Bank of Kenya Limited [2013] eKLR** the Court of Appeal stated:

**One issue that is loud and clear from the appellant and which it relied on to avail an injunction in its favour is that there were various sums of moneys claimed by the respondent and that there had been a variation of sorts. The judge below, rightly in our view, directed himself in resolving that issue. It has always been the position of the law that a dispute on the exact amount payable under a mortgage is not a ground to restrain the exercise of the mortgage’s power of sale. See J.L. LAVUNA & OTHERS CIVIL SERVANTS HOUSING CO. LTD. & ANOTHER CA. Nai 14/95 and JOSEPH OKOTH WAUDI VS NATIONAL BANK OF KENYA CA. 77/2004 [2006] eKLR.**

***It is to be noted that the appellant did neither deny the principal borrowing, nor the fact that only three out of twenty repayment instalments were paid. The appellant never denied default and despite stating that the property constituting the security was bringing in a substantial monthly income, there was no explanation as to why the repayment was stopped.***

9. In view of the foregoing, I find that the plaintiff has not established a prima facie case with a probability of success. Notice of Motion dated 29<sup>th</sup> June 2017 is dismissed with costs to the defendant.

**Dated, signed and delivered in open court at Nakuru this 20<sup>th</sup> day of March 2018.**

**D. O. OHUNGO**

**JUDGE**

In the presence of:

Ms. Mathenge holding brief for Mr. Murimi for the plaintiff/applicant

Ms. Nasimiyu holding brief for Mr. Opondo for the defendant/respondent

Court Assistants: Gichaba & Lotkomo