



**REPUBLIC OF KENYA**

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

**THIKA LAW COURTS**

**ELC CASE NO.848 OF 2017**

**KINANGOP RELIANCE CO. LTD.....PLAINTIFF/APPLICANT**

**-VERSUS-**

**KCB BANK KENYA LIMITED.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**LEAKEY'S AUCTIONEERS ..... 2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

Coming up for determination is the Plaintiff's/Applicant's *Notice of Motion* dated *27<sup>th</sup> November 2017*, brought under Sections 1A, 1B, 3 & 3A of the Civil Procedure Act, Order 40 Rule 1, Order 51 Rule 1 of the Civil Procedure Rules and all other enabling provisions of law. The Applicant has sought for the following orders:-

**1. Spent.**

**2. Spent.**

**3. Spent.**

**4. That the time for compliance and/or for rectifying any default to redeem title No.New Lari Trading Center/78, be extended for a period of 12 months or for such other period as the court may determine pursuant to powers conferred on the court under Section 104(2) as read with Section 90 of the Land Act, 2012.**

**5. That the 2<sup>nd</sup> Defendant/Respondent's Statutory Power of Sale be suspended and/or postponed for a period of 12 months or for such other period as the court may determine to enable the Plaintiff/Applicant redeem title No.New Lari Trading Center/78.**

**6. That this Honourable Court be pleased to grant such further orders as it shall deem fit and just.**

**7. That the costs of this application be granted.**

This application is premised on the following grounds:-

**1. That the Plaintiff/Applicant is the registered owner of title No.New Lari Trading Center/78 measuring approximately 1.360 Hectares hereinafter referred to as the suit land.**

**2. That sometimes on or about June 2012, the 1<sup>st</sup> Defendant/ Respondent advanced to the Plaintiff/Applicant a loan amounting to Kshs.190,000,000/= and thereafter on or about December 2012 a further loan of Kshs.33,000,000/= was advanced to the Plaintiff/Applicant.**

**3. That the loan facilities were secured by charging the suit land and two other parcels owned by one of the Directors.**

**4. That the Plaintiff/Applicant borrowed the aforementioned amounts with a view of setting up a milk processing plant. However upon commencement of business, it faced difficulties with the machinery purchased leading to losses.**

5. That despite the foregoing, the Plaintiff/Applicant has been making regular payments before the closure of the milk processing plant.
6. That the 2<sup>nd</sup> Defendant/Respondent have put up for sale the suit land vide Public Auction to be conducted on 5<sup>th</sup> December 2017.
7. That any sale vide the public auction is null and void ab initio.
8. That the realization process commenced by the Defendants is a nullity in law.
9. That the Plaintiff/Applicant has put in motion negotiations to sell the suit land, which negotiations are at an advanced stage.
10. That it is therefore imperative that this Honourable Court issued a temporary injunction barring any further dealing with the suit land pending the hearing and determination of this application and the substantive suit filed by the Plaintiff/Applicant herein.

The application is also supported by the *affidavit* of **Charles Mutahi Mwangi**, the Director of the Plaintiff/Applicant who reiterated most of the contents of the grounds in support of the application. He further averred that when the Plaintiff/Applicant started facing challenges, the Director wrote to the 1<sup>st</sup> Defendant vide the letter dated **17<sup>th</sup> December 2017**, stating the challenges but their request was turned down by the 1<sup>st</sup> Respondent. Therefore the Applicant continued to face difficulties leading to losses and thereafter closure of the milk processing plant as it had become unprofitable to maintain.

However, the 2<sup>nd</sup> Defendant did put up for sale the suit property vide **Public Auction** to be conducted on **5<sup>th</sup> December 2017**, though the Defendants failed to serve them with the **Statutory Notice** and a **Notice to Sell** pursuant to Section 90 and 96(2) of the Land Act 2012 respectively and therefore the intended realization process commenced by the Defendants is a **nullity in law**. Further that he has been advised by his Advocate on record that the purported sale by the 2<sup>nd</sup> Defendant is **premature, illegal and irregular**. Further that he was also advised by his advocate on record that the Defendants' action amounted to a clog on the Plaintiff's equity of redemption and thus denied the Plaintiff its right as provided by Section 90(1) and 96(2) of the Land Act 2012. He contended that it is only just and fair that the Plaintiff be granted ample time to redeem its property. He urged the Court to allow the instant application.

The application is *opposed* and **Tom Ogola**, the **Legal Manager in Charge of Litigation Department** in the 1<sup>st</sup> Respondent swore a **Replying Affidavit** on **13<sup>th</sup> December 2017**, and averred that indeed the 1<sup>st</sup> Defendant advanced a loan facility of **Kshs.223,000,000/=** to the Plaintiff/Applicant wherein the Plaintiff **charged** title **No. New Lari Trading Centre/78**, to secure payment of the said loan. However, upon being advanced the said loan, the Plaintiff failed to secure and repay the loan and the current **outstanding amount** is **Kshs.308,128,295.35** pursuant to accrued interest. He contended that despite the challenges, the Plaintiff/Applicant was duty bound to repay the loan instalments as had been agreed in the loan facility. The deponent denied that the Plaintiff had repaid or has been repaying the loan and no evidence of such payment was attached or adduced by the Applicant. He further contended that since the Plaintiff failed to adhere to the agreed contractual repayment of the loan, then the 1<sup>st</sup> Respondent was justified in instructing the 2<sup>nd</sup> Respondent to invoke the law and issue the required **Notices** and exercise its **Statutory Power of Sale** of the charged property.

It was further contended that in compliance with Section 96(2) of the Land Act 2012, the 1<sup>st</sup> Respondent in **July 2014** issued a **40 days Notice** to sell the suit property which **Notice** was sent via a registered mail marked **TOO4-a** and **TOO4-b**. It was his further contention that even with the service of the Statutory Notice the Applicant still failed to repay the outstanding loan so as to redeem the charged property, and therefore the 1<sup>st</sup> Respondent had no option but to instruct 2<sup>nd</sup> Respondent to sell the charged property to recover the outstanding loan amount. It was also deposed that it was illegal and contrary to the duly executed charge for the Applicant to purport to enter into any negotiations to sell the suit property without the consent of the Chargee.

It was also alleged that in **September 2016**, the 1<sup>st</sup> Respondent issued through **M/S Kolato Auctioneers** a **45 Days Redemption Notice** to the Applicant, a **Notice** that they declined to formally acknowledge receipt as is evident from **TW-7**. Further the said property was **advertised** to be sold on **17<sup>th</sup> October 2016**, through **M/S Kilato Auctioneers** who advertised the same in the **Daily Nation TOO-9**. However, the Applicant filed **SRMCC No.152 of 2016** at **Engineer Law Courts** but the same was dismissed on **6<sup>th</sup> February 2017** for want of jurisdiction as is evident from **TW-11**.

Thereafter the 1<sup>st</sup> Respondent instructed **M/S Accurate Valuers Ltd** to conduct the valuation of the suit property on **13<sup>th</sup> November 2017**, and the valuation was attached as **TW-12**. It was his further allegations that the suit was advertised for sale on **20<sup>th</sup> November 2017** and **27<sup>th</sup> November 2017**. The deponent contended that despite the numerous **requests**, the Applicant has ignored, refused and/or declined to fulfil the obligation to service the loan as agreed which continues to attract interest and now stands in excess of **Kshs.308,128,295.23**. Therefore the Plaintiff/Applicant has come to court with unclean hands and this application is an abuse of courts process and should be dismissed with costs.

The Applicant filed a further *affidavit* on **28<sup>th</sup> December 2017**, and averred that the Applicant has embarked on an illegality by seeking to auction the Applicant's property without following the due process as the Applicant has not been accorded the right of redemption as contemplated by the relevant statutes. He further denied having received a copy of Statutory Notice to Sell. It was his further contention that the Applicant had no knowledge of the said Notices and had only come to learn about them through the Replying Affidavit. It was also contended that the 1<sup>st</sup> Respondent Statutory Power of Sale had therefore not arisen so as to permit them to proceed with the sale of the suit land. Therefore any sale of the suit land through an unjust process would occasion the Applicant great injustice and irreparable harm. The Court was urged to allow the Applicant's instant **Notice of Motion**.

This application was canvassed by way of *written submissions*. The Applicant through the *Law Firm of Wairegi Kiarie & Co. Advocates* filed its written submissions on *16<sup>th</sup> January 2018*, and urged the Court to allow its application. The Applicant relied on various decided cases.

The 1<sup>st</sup> Respondent through the *Law Firm of Gikera & Vadgame Advocates* filed the written submissions on *1<sup>st</sup> February 2018*, and urged the Court to dismiss the instant Notice of a Motion. The 1<sup>st</sup> Respondent also relied on various decided cases among them the case of *Mugambi...Vs....Housing Finance Co. Ltd (2006) eKLR*, where the Court held that:-

**“A Plaintiff should not be granted an injunction if he does not have clean hands and no court of equity will aid a man to derive advantage from his own wrong, for the Plaintiff seeks this court to protect him from consequences of his own default. He who seeks equity must do equity. The Plaintiff should not be protected or given advantage by virtue of his own refusal to make repayments to the Defendant/Respondent a debt which he expressly undertook to pay”.**

The Court has now carefully considered the instant Notice of Motion and the annexures thereto. The Court has also considered the reply to the said Notice of Motion and the annexed exhibits. Further the Court has also considered the written submissions, the cited authorities and the relevant provisions of law and makes the following rendition:-

There is no doubt that the Plaintiff/Applicant herein took a loan facility of *Kshs.223,000,000/=* from the 1<sup>st</sup> Defendant and used the title *No.New Lari Trading Centre/78*, as security for the said loan facility. There is also no doubt that the Plaintiff/Applicant is the registered owner of the suit property *No.New Lari Trading Centre/78*, as is evident from the *Certificate of Lease, TOO-2* issued on *17<sup>th</sup> September 2012*. The said certificate of lease was used to secure the instant loan and under the encumbrance Section, it is indicated that the nature of the encumbrance is charge to *Kenya Commercial Bank*, and rights are reserved under Section 82 and 83 of the Land Act. Indeed there is a *Restriction* on the title under Section 87 of the Land Act.

There is no doubt that as per the Charge document, the Applicant had an obligation to pay the said loan facility and further the 1<sup>st</sup> Respondent had its rights protected in the event of default. The 1<sup>st</sup> Respondent had a right to exercise its power of sale in the event of default of repayment of the said loan. There is no doubt therefore that the parties to the said charge were aware of their rights and obligations.

There is also no doubt that after the Plaintiff/Applicant obtained the said loan, it defaulted in repayment of the same. The Applicant alleged that after it set up the milk processing plant using the borrowed money, it faced various challenges relating to difficulties with the machinery purchased leading to losses. It further admitted that due to the said challenges, it defaulted in repayment of the loan and now the 1<sup>st</sup> Respondent has sought to sell the suit property in a bid to have the loan repaid. The 1<sup>st</sup> Respondent alleged that the Applicant failed to repay the loan advances to it and the current loan stands at *more than Kshs.308,128,295.35* and thus the 1<sup>st</sup> Respondent's action.

The Applicant has alleged that the 1<sup>st</sup> Respondent is attempting to sell the suit property without having followed the laid down procedures as provided in the Land Act. However on the part of the 1<sup>st</sup> Respondent, it has alleged that it followed all the necessary processes of realization of security. That it is exercising its Statutory Power of Sale as provided by Section 96(1) of Land Act because the Applicant is in default. The Applicant has now come to Court seeking for orders of suspension of the said realization of security by the 1<sup>st</sup> Respondent.

The question now for determination is whether the Applicant is deserving of the orders sought.

The Applicant is seeking for injunctive orders which are equitable in nature. The said equitable reliefs are granted at the discretion of the Court. However, the said discretion must be exercised judicially. See the case of *CMC Motors Group Ltd & Another...Vs...Evans Kageche Boro, Civil appeal No.295 of 2001*, where the Court of Appeal held that:-

**“in granting the injunctory reliefs, the Superior Court was exercising equitable jurisdiction which is discretionary and the Court of Appeal can only interfere with the judicial discretion of the Learned Judge if it is satisfied that the Learned Judge did not exercise is discretion judicially....”**

Further, the Court is alive to the fact that at this stage, it is not called upon to decide the disputed facts with a finality. All that the Court is called upon is to determine whether the Applicant is deserving of the injunctive orders sought based on the usual criteria. See the case of *Edwin Kamau Muniu...Vs...Barclays Bank of Kenya Ltd Nairobi HCCC No. 1118 of 2002*, where the Court held that:-

**“In an Interlocutory application, the Court is not required to determine the very issues which will be canvassed at the trial with finality. All the Court is entitled at that stage is whether the applicant is entitled to an Injunction sought on the usual criteria...”**

The criteria that will guide this Court is the one laid down in the case of *Giella...Vs...Cassman Brown & Co. Ltd 1973 EA 358*, where the Court held that;

**a. The Applicant must establish that he has a prima facie case with probability of success.**

**b. That the Applicant will suffer irreparable loss which cannot be adequately compensated in any way or by an award of damages.**

**c. When the Court is in doubt, to decide the case on a balance of convenience.**

The Court will now consider the available evidence and then juxtapose it with the above stated criteria to determine whether the Applicant is deserving of the orders sought.

Firstly, the Applicant needed to establish that it has a *prima-facie* case with probability of success at the trial. The description of *prima-facie* case was given in the case of *Mrao Ltd...Vs...First American Bank of Kenya Ltd & 2 Others 2003 KLR 125*, to mean:-

**“so what is a *prima facie* case----- In civil cases it is a case which on the material presented to the Court or a tribunal properly directing itself will conclude that there exist a right which has apparently been infringed by the opposite party so as to call for a explanation or rebuttal from the latter”**

Further, it is evident from the above description that a *prima-facie* case means more than an arguable case. The evidence must point to an infringement of a right and probability of success at the trial.

The Applicant has alleged that the 1<sup>st</sup> Defendant’s intention to sell the suit property by Public Auction is *null* and *void abinitio* as no valuation of the suit property was performed to ascertain the market value and or forced sale value of the suit property. However, the 1<sup>st</sup> Respondents averred that it instructed *M/S Accurate Valuers Ltd* to conduct a valuation on **13<sup>th</sup> November 2017**, over the suit property, *New Lari Trading Centre/78*. Indeed the Court has seen the *Valuation Report TOO-12* which valuation gave the current *open market value* of **Kshs.42,000,000/=** and *forced sale value* of **Kshs.31,500,000/=**. Indeed the Court finds that the 1<sup>st</sup> Respondent who is the Chargee herein complied with Section 97(2) of the Land Act which provides that:-

**“A Chargee shall before exercising the right of sale ensure that a forced sale valuation is undertaken by a valuer”.**

The Applicant further averred that if indeed the said valuation was done, it was not supplied to the Plaintiff/Applicant. However, Section 97(2) does not place an obligatory duty on the Chargee to serve the Valuation Report upon the Chargor who is in default.

The Applicant further averred that it was not served with the *Statutory Notice* and a *Notice to Sell* pursuant to Sections 90 and 96(2) of the Land Act. However the 1<sup>st</sup> Respondent alleged that the said Statutory Notice was served upon the Applicant and the said was *Notice* issued on **17<sup>th</sup> July 2014**. Further the Applicant was also served with the **45 days Redemption Notice** on **7<sup>th</sup> September 2016**, but declined to sign. The loan facility was obtained in the **year 2012**. In the **year 2014**, the Applicant was in default and continued to be in the said default upto the date. The Court has seen the Notice that was sent out to the Plaintiff in **July 2014**. Though the Applicant alleged that it was sent to the wrong address, there was no indication that the same was ever returned to the sender. Further there is a *letter of instruction* dated **22<sup>nd</sup> August 2016**, wherein the 1<sup>st</sup> Respondent instructed *M/S Kolato Auctioneers* to sell the Applicant’s charged properties and the suit property was included. The said letter was copied to the Applicant with the correct address. However, there is no evidence that the Applicant made any effort to clear the outstanding arrears or pay part of it. The Court concurs with the 1<sup>st</sup> Respondent’s submissions that the Applicant cannot rely on a technicality or typographical error to escape from its obligation of repaying the loan facility or prevent the 1<sup>st</sup> Respondent from exercising its Statutory Power of Sale. The Applicant was further served with *Notice* dated **7<sup>th</sup> September 2016**, which captured the accurate postal address and still did not make good the payment. Instead of making any effort to pay, the Applicant filed a civil suit at *Engineer Law Courts* being **Civil Suit No.152 of 2016**, which *Court lacked pecuniary jurisdiction*. Therefore, this Court finds that the Applicant has not come to equity with clean hands. See the case of *Amalo Co. Ltd...Vs...Trust Bank Ltd, Kisumu HCCC No.7 of 2004 (B)*, where the Court held that:-

**“A grant of an interlocutory injunction is an equitable remedy and accordingly the Applicant conduct in all the matters relating to the suit must meet the approval of the court of equity before he can obtain the reliefs he seeks”.**

Further, in the case of *Mrao Ltd...Vs...First American Bank of Kenya Ltd & Others (2000) KLR 125*, the Court of Appeal held that:-

**“The Applicant has come to court of equity having failed to show good faith”.**

The Applicant herein too has not come to court with good faith and cannot therefore seek an equitable relief. The Court says so because it is evident that on **7<sup>th</sup> September 2016**, the Applicant was served with the *Redemption Notice* by *M/S Kolato Auctioneers, TOO-5* but its **Director declined to sign** to acknowledge receipt of the same. The Applicant cannot turn around and allege that it was not served with any of the Notices or was not aware of the 1<sup>st</sup> Respondent’s threat to exercise its Statutory Power of Sale.

The Court finds that the Applicant is in default. It had an obligation to repay the loan advanced to it. The 1<sup>st</sup> Respondent is exercising its Statutory Power of Sale as provided by the provisions of Section 96(1) of the Land Act.

There is no evidence that the 1<sup>st</sup> Respondent has infringed on any of the Applicant’s rights herein and that the Applicant has a *prima-facie* case with probability of success at the trial. Therefore the Court finds that the **Applicant has failed to establish the first condition for grant of injunctive orders.**

On the **second condition of irreparable loss** which cannot be compensated by an award of damages, it is evident that the Applicant offered its suit property as security for the loan advanced to it. Once a property is offered as security to secure a loan, it becomes a commodity for sale and one cannot be heard to say that it will suffer irreparable loss which cannot be compensated by an award of damages. See the case of *Matex Commercial Supplied Ltd...Vs...Euro Bank Ltd (in liquidation) 2008 (HCK)*, where the Court held that:-

**“Any property whether it is a matrimonial home or spiritual house which is offered as security for loan is made with understanding that the same stands the risk of being sold by the lender if default is made on the payment of the debt secured”.**

It is evident that the loan advanced to the Applicant remain unpaid and it keeps growing huge each day it remains unpaid. It is evident that it is the 1<sup>st</sup> Respondent which will suffer greater prejudice if an injunction is granted herein but not the Applicant. Therefore the Court finds that the **Applicant has also failed to establish the second condition for grant of injunctive orders.**

On the **balance of convenience**, the Court finds that it **tilts in favour of the 1<sup>st</sup> Respondent** who is able to compensate the Plaintiff for any eventual loss or injury. Further, it is the 1<sup>st</sup> Respondent (Bank) which stands to be prejudiced if the loan remains unpaid and it accumulates to a level that the Applicant will be unable to repay or the security used by the Applicant will be less in value than the outstanding loan. See the case of **Andrew M. Wanjohi...Vs...Equity Building Society & 7 Others** , the Court held that:-

**“...if the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were restrained from selling off the suit property, there is a very real risk that the debt may outstrip the value of the suit property as the borrower has never made any repayments. .... the stoppage of the intended sale by the chargee would result in the continued growth of the debt and thus exposing them to potentially substantial irrecoverable loss”.**

Having now carefully considered the instant **Notice of Motion** dated 27<sup>th</sup> November 2017, the Court finds that the **Applicant has been unable to establish any of the conditions for grant of the injunctive orders sought.**

For the above reasons, the **Court finds no reason for extending the time for compliance or rectifying of the default and or suspension of the 1<sup>st</sup> Defendant’s exercise of its Statutory Power of Sale.**

The upshot of the foregoing is that the Applicant’s **Notice of Motion** application herein **is found to be unmerited.** Consequently, the said application is **dismissed entirely with costs to the 1<sup>st</sup> Respondent.**

It is so ordered.

**Dated, Signed and Delivered at Thika this 16<sup>th</sup> day of March 2018.**

**L. GACHERU**

**JUDGE**

In the presence of

Mr. Otieno holding brief for Mr. Wairegi for Plaintiff/Applicant

Mr. Njuguna holding brief for Mr. Olao for 1st Defendant/Respondent

No appearance for 2nd Defendant/Respondent

Lucy - Court clerk.

**Court** – Ruling read in open court in the presence of the above advocates.

**L. GACHERU**

**JUDGE**

**16/3/2018**