



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 902 OF 2017**

**WINNIE WANGU MUGWERU.....PLAINTIFF**

**VERSUS**

**AFRICAN BANKING CORPORATION LTD.....1<sup>ST</sup> DEFENDANT**

**VALLEY AUCTIONEERS .....2<sup>ND</sup> DEFENDANT**

**RULING**

The application before Court for determination is the Plaintiff's Notice of Motion dated the 24<sup>th</sup> October, 2017 brought pursuant to Article 40 of the Constitution, Section 1A, 1B & 3A of the Civil Procedure Act, Order 40 & 51 of the Civil Procedure Rules and all the other enabling provisions of the law. It is based on the following grounds which in summary is that the Plaintiff is the registered owner of land parcel number NGONG/NGONG/10236 hereinafter referred to as the 'suit land' which was offered as security to the 1<sup>st</sup> Defendant for a loan of Kshs. 5 million advanced to Stallion Gulf Limited. The Plaintiff duly executed a Charge Instrument dated the 22<sup>nd</sup> January, 2014 and registered on 4<sup>th</sup> February, 2014 in favour of the 1<sup>st</sup> Defendant. On 10<sup>th</sup> October, 2017 the 1<sup>st</sup> Defendant through its agents who are the 2<sup>nd</sup> Defendant's herein advertised the suit land for sale by public auction. Further that the Plaintiff was never informed that Stallion Gulf Limited failed to discharge its financial obligations to the 1<sup>st</sup> Defendant as per the loan agreement. The Plaintiff has not been served with the requisite statutory notices as stipulated under the Land Act, and the Defendants' acts of advertising the suit land for sale is unlawful, irregular, null and void. The Plaintiff stands to suffer irreparable loss and damages if the orders sought are not granted.

The application is supported by the affidavit of WINNIE WANGU MUGWERU the Plaintiff herein where she deposes that she used her parcel of land as security for a loan of Kshs. 5 million advanced to Stallion Gulf Limited by the 1<sup>st</sup> Defendant. She reiterates that she has established a prima facie case with high chances of success under the ration of **Giella Vs. Cassman Brown** Case.

The application is opposed by the 1<sup>st</sup> Defendant who filed a replying affidavit sworn by EVALYN GACHOKI its Senior Legal Officer where she deposed that the Plaintiff's application dated the 24<sup>th</sup> October, 2017 lacks merit as Stallion Gulf Limited approached the 1<sup>st</sup> Defendant for Kshs. 5 million. Further that vide a Board Resolution of Stallion Gulf Limited dated the 2<sup>nd</sup> January, 2014, it was resolved that the Plaintiff being a Director of the Company would surrender a security in form of Title Deed to the 1<sup>st</sup> Defendant. She avers that a Charge Document was registered on the 22<sup>nd</sup> January, 2014 where the Plaintiff was a Chargor while Stallion Gulf Limited was the Borrower for a loan of Kshs. 5 million. She contends that the Plaintiff signed a Deed of Guarantee and Indemnity in favour of the 1<sup>st</sup> Defendant and subsequently the Borrower was given additional facilities by the 1<sup>st</sup> Defendant. She claims the Borrower defaulted in its loan repayment and on 24<sup>th</sup> August, 2016 a demand letter was sent out to the Plaintiff including the Borrower. Further, that the said demand letter failed to elicit any response and on 15<sup>th</sup> November, 2016 the 1<sup>st</sup> Defendant issued a Statutory Notice to the Borrower including the Plaintiff herein. She reiterates that after the lapse of 90 days the 1<sup>st</sup> Defendant proceeded and issued the 40 days' Notice to sell in accordance with the law. Further that the 1<sup>st</sup> Defendant instructed the 2<sup>nd</sup> Defendant to proceed to sell the suit land through public auction after issuing the required notices. She confirms the auction slated for 21<sup>st</sup> June, 2017 did not attract bids and was rescheduled to 25<sup>th</sup> October, 2017. She insists the Plaintiff's postal address 7648 – 00200 indicated in the Charge Document is the same where the Statutory Notices were sent to, and the same were never returned as unclaimed. Further the Plaintiff has used the same address in her supporting affidavit herein. She states that the outstanding balance as at 30<sup>th</sup> October, 2017 is Kshs. 4, 238, 762.14 and the same continues to accrue interest. She reiterates that the Plaintiff stands to suffer no loss as she has no legal rights or proprietary interest over the suit land. She prays the instant application be dismissed with costs.

Both the Plaintiff and 1<sup>st</sup> Defendant submitted on the application on 4<sup>th</sup> December, 2017 where they each reiterated their claim, which submissions I have considered.

**Analysis and Determination**

Upon perusal of the materials presented by the Plaintiff and the 1<sup>st</sup> Defendant in respect to the Notice of Motion the 24th October, 2017, I find that the only issue for determination is whether the Plaintiff is entitled to the temporary injunction orders sought.

The principles of granting interlocutory injunction are 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 prima facie case with a probability of success, and it stands to suffer irreparable loss or injury which cannot adequately be compensated in damages. If the court is in doubt, it should decide the application on a balance of convenience.

The claim herein revolves around a sale of a security, where the Plaintiff contends no statutory notices were issued before the bank exercised its statutory power of sale.

As to whether the Plaintiff has established a prima facie case with a probability of success, the Plaintiff raised an issue that she was not served with the requisite statutory notices in accordance with the Land Act and not made aware of the borrower's default. The Plaintiff seeks to bar the Defendants from selling the suit land and a declaration that the intended Sale is irregular, null as well as void. From the Plaintiff's opening arguments, it is not in dispute that the Plaintiff charged the suit land to secure a loan of Kshs. 5 million with the 1<sup>st</sup> Defendant on behalf of Stallion Gulf Limited. The Plaintiff is not denying in principle that the Borrower owes a debt to the 1<sup>st</sup> Defendant She is seeking for a temporary injunction claiming that the 1st Defendant did not serve her with the requisite notices as stipulated under section 90 of the Land Act; and that she was never informed of the Borrower's default.

On the Plaintiff's allegation that no statutory notices were issued to her in accordance with the provisions of the Land Act, the 1<sup>st</sup> Defendant has annexed various notices to wit: **'EG 5', 'EG 6', 'EG 7'** and **'EG 8'** respectively, which it issued to the Plaintiff in respect of the loan facility, that is indicative of the Borrowers default. Annexure **'EG 5'** is a demand letter 24<sup>th</sup> August, 2016 which was sent to the Plaintiff and copied to the Borrower, informing them of the default and the outstanding loan that stood at Kshs. 3,625,450.62/-. Annexure **'EG 6'** is a statutory notice dated the 15<sup>th</sup> November, 2016 issued in accordance with section 90(1) and 90(2) of the Land Act asking the Plaintiff and the Directors of Stallion Gulf Limited to rectify the default and giving them three (3) months to do so or else the 1<sup>st</sup> Defendant would commence the process of exercising its statutory power of sale. Annexure **'EG 7'** is the 40 days' Notice to Sell dated the 28<sup>th</sup> March, 2017, issued by the 1<sup>st</sup> Defendant to the Plaintiff and Directors of Stallion Gulf Limited while annexure **'EG 8'**, is the 45 days' Notification of Sale dated the 19<sup>th</sup> April, 2017 issued by the 2<sup>nd</sup> Defendant on its intention to auction the suit land.

Section 90 (1) 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.**

The question we need to ponder is whether the defendants served statutory notices upon the Plaintiff in accordance with the Land Act. From the annexures **'EG 5', 'EG 6', 'EG 7'** and **'EG 8'** respectively, within the 1<sup>st</sup> Defendant's replying affidavit the answer is in the affirmative. It is worth noting that the Plaintiff's and Borrower's address on the charge document is the same address where the said notices were posted. I note there are Certificates of Posting annexed to the replying affidavit and it bears the Plaintiff's and Borrower's address as per the Charge document. The Plaintiff has not filed a further affidavit to controvert the 1<sup>st</sup> Defendant's averments. Section 96(1) 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 Plaintiff alleged she was not aware of the Borrower's default, but I note that they were sent for the same statutory notices and that she is one of the directors' of the borrower. I note the Plaintiff is not being truthful.

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.'**

From the foregoing, I find that the Defendants' have not infringed on any of the Plaintiff's rights as she charged the suit land to secure a loan for the Borrower where she is one of the Directors. I find that the Plaintiff has not established a prima facie case to meet the threshold for the grant of orders of injunction. I consequently dismiss the Plaintiff's Notice of Motion dated the 24<sup>th</sup> October, 2017 with costs.

**Dated signed and delivered in open court at Kajiado this 12<sup>th</sup> day of March, 2018**

**CHRISTINE OCHIENG**

**JUDGE**

**Present :**

Cc – Mpoye

Baregu for Applicant

Andolo for Ms Kanai for Respondent