



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MERU**

**ELC NO. 260 OF 2017**

**JOEL MAINGI KIRIGIA.....PLAINTIFF**

**VERSUS**

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

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

**RULING**

1. This suit was filed on 5.9.2017 contemporaneously with an application under a certificate of urgency brought under the following provisions of law; Article 159 (2) of the constitution of Kenya 2010, sections 1A and 3A of the Civil Procedure Act ( Cap 21 Laws of Kenya ), order 40 Rules 1 & 2, Order 51 Rule 1 of the Civil Procedure Rules 2010, Sections 90 & 96 (1) & (2) & 104 (2) of the Land Act, 2012 and all enabling provisions of the law. The applicant is seeking injunctive orders restraining the defendants by themselves, their agents and/or employees or whomsoever is acting on their behalf from offering for sale, selling, taking possession of, leasing, transferring, charging or otherwise in any manner whatsoever interfering with the suit property title no. NTIMA/IGOKI/6029 and Title No. NTIMA/IGOKI/6031, both in Meru County pending inter-parties hearing of this application. Applicant is also seeking for a declaration to invalidate the valuation carried out by the 2<sup>nd</sup> defendant/respondent for reasons that it is illegal in law under section 97 of the Land Act 2012.

2. The grounds in support of the application are that

(i) The plaintiff/Applicant obtained two loan facilities from the 1<sup>st</sup> defendant/Respondent. The first loan facility was obtained sometime in February 2011 and the other obtained sometime in November 2011.

(ii) The first loan facility was for Kenya Shillings five Million (Kshs.5,000/-) and was secured by title No. L.R No. NTIMA/IGOKI/6029, registered in the name of George Murerwa Kirigia, the biological father to the applicant.

(iii) The second loan facility was for Kenya shillings one million six hundred and fifteen thousand (Kshs.1,615,000/-) secured by title No. NTIMA/IGOKI/6031 registered in the name of Joe Maingi Kirigia the plaintiff/applicant herein.

(iv) The plaintiff/applicant diligently and without fail honoured his monthly payments as at and when they fell due. However, sometime in the year 2013 the plaintiff/applicant experienced a minor setback when he lost his job, and due to the vagaries of life he fell a little behind on his monthly payments.

(v) The plaintiff/applicant immediately communicated his current situation to the 1<sup>st</sup> defendant/respondent.

(vi) Sometime in the year 2016 the plaintiff/applicant secured employment and was able to make monthly payments more regularly.

(vii) The 1<sup>st</sup> defendant/respondent sometime in January 2016, came up with new payment plan, requiring the plaintiff to pay Kenya Shillings one hundred and twenty seven thousand per month (127,000) to cater for the accrued arrears and accumulated interests.

(viii) The new payment plan was still too high and costly for the plaintiff/applicant and he made this known to the 1<sup>st</sup> defendant/respondent.

(ix) The plaintiff/applicant continued to make payments but due to the high cost of living coupled with the burden of taking care of his ailing father, he was unable to make regular payments.

(x) To the chagrin and dismay of the plaintiff/applicant he was served with a notification of sale of the suit properties by Valley Auctioneers, the 2<sup>nd</sup> defendant/respondent herein, who got instructions from the 1<sup>st</sup> defendant/respondent for recovery of Kenya Shillings Eight Million Two Hundred Thousand (Kshs.8,200,00/-).

(xi) The 2<sup>nd</sup> defendant/respondent intends to sell the suit properties by public auction on 7<sup>th</sup> September, 2017.

(xii) The plaintiff/Applicant contends that the valuation report by the 2<sup>nd</sup> defendant/respondent is grossly undervalued. It is incorrect, inaccurate and does not conform to the laws governing land transactions.

(xiii) The said suit property known as No. L.R NO. NTIMA/IGOKI/6029, Y is family land, being held in trust by the plaintiff/applicant's father on behalf of the entire family, hence allowing the 2<sup>nd</sup> defendant/Respondent to proceed with the auction will occasion grave and unprecedented injustice to the entire family.

(xiv) The plaintiff/applicant prays to be awarded some more time to actualize the sale and clear the debt.

(xv) The plaintiff/applicant seeks for injunctive orders as he has a meritorious case with high chances of success.

(xvi) The plaintiff/applicant is apprehensive that unless the orders sought herein are granted, they will suffer unprecedented and irreparable damage.

3. Applicant has filed two affidavits in support of his application. One is dated 5.9.2017 while the other is dated 15.9.2017. He avers that he has found a buyer for his other properties namely L.R Ntima/Igoki 6034 and 7883 in Meru and the sale will enable him to offset the loan.

4. In response to this application, the respondents filed another application dated 22.9.2017 under order 40 rule 7 of the Civil Procedure Rules, section 1 A, 3 and 3A of the Civil Procedure Act, and all the enabling provisions of the Law).

5. The respondents are seeking the orders that pending the hearing and determination of the plaintiff's application dated 5<sup>th</sup> September 2017, the interim orders issued on 18<sup>th</sup> September 2017 specifically stopping the sale of property TITLE NUMBER NTIMA/IGOKI/6031 be varied or set aside.

6. The grounds in support of this application are;

(a) The 1<sup>st</sup> defendant/applicant was served with the plaintiff's application and suit on 12<sup>th</sup> September together with the hearing notice and court orders issued in Embu on 6<sup>th</sup> September 2017.

(b) The application relates to two properties to wit Title No. NTIMA/IGOKI/6029 and Title NTIMA/IGOKI/6031.

(c) The orders issued by the court on 6<sup>th</sup> September 2017 did not stop the sale of any of the properties.

(d) By the time the application was served on the bank on 12<sup>th</sup> September 2017, property Title No. NTIMA/IGOKI/6031 had already been sold by public auction to a Mr. Nathaniel Kithinji Ikiugu for Kshs.2,300,000 who paid a deposit of Kshs.575,000.00 at the fall of the hammer. The purchaser has made a further payment of Kshs.1,000,000.00.

(e) However, there was miscommunication between counsel and the court on 18<sup>th</sup> September 2017 and it was not made known to court that the property Title Number NTIMA/IGOKI/6031 had already been sold by the time the court was issuing interim orders of injunction on 18.9.2017.

(f) The plaintiff/applicant was aware that the property Title No. NTIMA/IGOKI/6031 had been sold on 7<sup>th</sup> September 2017 as no orders were granted on 5<sup>th</sup> September 2017.

(g) A valid, legally binding and irreversible sale was entered into by the bank and the highest bidder on the fall of the hammer on 7<sup>th</sup> September 2017 long before the bank was even served with the application.

(h) It is therefore necessary that the Order stopping the sale of Title No. NTIMA/IGOKI/6031 be set aside as it has already been overtaken by events.

(i) It is thus in the interest of justice that the prayers sought in this application be allowed.

7. One Kajuju Marete, a senior Legal officer of the 1<sup>st</sup> defendant has sworn an affidavit dated 25.9.2017 and another one dated 27.9.2017. He is emphasizing that all legal procedures were followed by the 1<sup>st</sup> defendant in realization of the security. He confirms that for parcel No. NTIMA/IGOKI/6031 the land has been sold.

8. When this matter came before me on 18.9.2017, I granted temporary orders of injunction until the next court date. On 9.11.2017 I varied the orders given on 18.9.2017 to the effect that interim orders of injunction were not extended in respect of parcel No. 6031. This came about after it emerged that the parcel No. 6031 had already been sold by the time the court was issuing the interim orders of injunction on

18.9.2017.

9. The court also gave directions that the two applications be heard by way of written submissions. Both sides have duly filed their submissions.

10. On the side of the applicant it has been submitted that the 1<sup>st</sup> respondent acted in bad faith by invoking the statutory power of sale yet the applicant had moved to remedy the outstanding arrears. Applicant claims that the properties were undervalued. Finally, the applicant states that he has every intention to pay the loan.

11. In support of his case, applicant has relied on the following authorities **Jan Borden Nielsen versus Herman Steya & 2 others 2012 eKLR** and the case of **Pamly Company versus Consolidated Bank of Kenya High court civil case no. 527 of 2013 (Milimani commercial court)**.

12. For the respondent, it has been submitted that the application of 5.9.2017 has partially been overtaken by events as parcel No. 6031 had already been sold via public auction on 7.9.2017 and as such equity of redemption was extinguished by the fall of the hammer. On this point, respondents have relied on the case of **Mbuthia versus Jimba credit Corporation & another (1998) eKLR** and the case of **Simon Njoroge versus Consolidated Bank of Kenya (2014) eKLR**.

13. The respondents have also urged the court to dismiss the application of 5.9.2017 in view of the fact that the debt has been admitted. On this point, respondent have cited the cases of new **Age developers & construction Co. Ltd versus Jamii Bora Bank Ltd (2017) eKLR** and the case of **Benjami Kaburi Kamuruci versus Arabia Bank (2014) eKLR**.

14. On the issue of valuation, respondents aver that evidence on valuation can only be controverted by alternative evidence on valuation. On this point, respondents aver that applicant cannot be heard to cast aspersions on the reports as he is not a valuer, and neither has he annexed an alternative valuation report to counter that one by Acumen valuers. Respondent has relied on the following authorities; **John G. Kamuyu & another versus Sayari 'M' Park Motors (2013) eKLR** and the case of **Fina Bank Ltd & spares And Industries Ltd Civil appeal No. 51 of 200 IEA 52**.

15. On the claim by the applicant that property No. 6029 is family home, respondents aver that this is not true as applicant had tried to sell the land to one Makathimo who had even registered a caution on the property. On this point, the respondents have filed the case of **Maithya versus Housing Finance of Kenya Ltd & another (20030 EA)**.

16. Respondents also aver that as at 23.9.2017, applicant was in arrears to the tune of 8,351,588 and that no attempt has been made to pay this amount. Respondent avers that the balance of convenience does not favour the applicant. On this point, respondent have cited the case of **Peter Kamau Kiriba versus City council of Nairobi, & 3 others (2015) eKLR**.

17. Respondents contend that plaintiff's application weighed against the scales of **Giella versus Cassman Brown** falls inadequately short of merit and should be dismissed.

### **Determination**

18. This is a case where by plaintiff has admitted that he was advanced the sums mentioned in his pleadings. He also admits that the land parcels numbers Ntima/Igoki/6031 and 6029 were securities for the loan. In paragraph 8 and 9 of the plaint, applicant admits the default but he avers that 1<sup>st</sup> defendant is the one who came up with the payment plan of Shs.127,000 per month to cater for the accrued arrears and accumulated interests. He avers that this was too high for him, coupled with the high cost of living. This again is an admission of default in respect of the new payment plan.

19. The fact that applicant did not seek legal redress when the process of restructuring the loan facilities were underway can only mean that he accepted the terms and conditions therein. From annexures KJ 12 (a) and (b), it appears that the restructuring of the loans took place in January 2016. Why did the applicant wait for a period of almost two years to cry foul regarding the new payment plan?

20. In **National Bank of Kenya Ltd v. Pipelastik Samkolit (K) Ltd and another (2002 EA** as quoted in **Hassan Zubeidi v. Patrick Mwangangi Kibaiya and another (2014)eKLR**, it was held that **"a court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded"**.

21. Applicant is not clear as to whether he was coerced into the new payment plan. If indeed this did happen, then its an issue to be canvassed in a full trial . For now what is clear and admitted by the applicant is that he continued making payments as per the new payment plan.

22. From the materials so far presented to this court, it is clear that all the legally laid down procedures were followed by the respondent in their quest to realize the security. The Respondent even went further and alerted the applicant about the imminent statutory notice. This was done via the letters of 10.1.2017 KJ 12 a &b). The statutory Notice was then issued on 27.2.2017 (KK 13 (a) & (b). The 40 days' notice was then issued on 18.5.2017 (KJ 15 (a) & (b). The notification of sale is dated 5.7.2017 and it clearly indicates that the scheduled public auction was to take place on 5.9.2017.

23. For the parcel No. 6031, the land was sold as scheduled. A memorandum of sale has been availed as KJ (1). Indeed in applicant's affidavit of 7.11.2017, it emerges that applicant was aware of the sale. I am therefore in agreement with respondents contention that for parcel No. 6031, the application has been overtaken by events.

24. With regard to parcel No. 6029, i am in agreement with respondents submissions that a contest as to the value of the property on its own

cannot form a basis of stopping the sale where the debt is not disputed.

25. The valuation herein was apparently done in June 2017. Applicant has not demonstrated to this court the steps he undertook to counter the contents of the valuation report. There is even no evidence to indicate that he expressed his dissatisfaction with the valuation report before filing the suit. Even in his present application, there is no prayer for an alternative valuation report. His claim that the land was undervalued is therefore unfounded. Having admitted the debt and noting that all steps in realization of security were undertaken by the respondent I find that no prima facie case has been made by the applicant.

26. I make reference to the case of **Turbo Highway Eldoret Ltd and Another versus Bank of Africa Nakuru ELC No. 363 of 2015** where the court held that ***“I am not persuaded that the plaintiffs have demonstrated a prima facie case with a probability of success, they have failed to demonstrate that there has not been default or that the statutory power of sale has not arisen.....”***.

27. On the claim that applicant will be left landless as L.R 6029 is the family home, this is also not the true position. Applicant had tried to sell this land to another party one Peter Makathimo who even registered a caution on the land. Applicant is mute on this piece of information.

28. In **Daniel Ndege Ndirangu versus Barclays Bank of Kenya Limited & Another Nakuru High Court Suit NO. 8 of 2012B, Justice Emukule** referred to the case of **Samboi Kitir versus Standard Chartered Bank & 2 others Eldoret H.C.C No. 50 of 2002** where the court emphasized that ***“It must also be noted that when a chargor lets loose its property to a chargee as security for a loan..... on the basis that in the event of a default, it will be sold by a chargee, the damages are foreseeable. The security is hence a commodity for sale or possible sale without prior concurrence and consent of the charger. How can he having defaulted to pay loan arrears prompting a chargee to exercise its statutory power of sale claim that he is likely to suffer loss and injury in capable of compensation by an award of damages?. such an argument is definitely misplaced and has no merits.....”***

29. See also **Abel Maranga Ogwacho & another versus Standard Chartered Bank Ltd (2014) eKLR** (cited by respondents) where the court had stated that; ***“The securities are valued before lending and loss of properties by sale is clearly contemplated by the parties even before the security is formalized. Damages would therefore be an adequate remedy”***.

30. In the present case, I find that applicant has not demonstrated that he stands to suffer any irreparable damages if the prayers are not granted.

31. Finally, I find that though applicant has averred that he is ready and willing to pay whatever is due, there is no evidence of good faith to pay. In the letter KJ16 dated 8.6.2017 (availed by respondents on page 95 of their bundle), the applicants lawyer is informing respondents lawyer that the applicants ***“are committed to settling the debt, in fact they are in the process of disposing off some other properties to redeem the charged properties herein. This is already at an advanced stage”***. Almost a year down the line the story is the same, that applicant wants to dispose off a property. In his annexure JMK5 applicant’s father is saying that a church will buy the property while in the applicant’s affidavit dated 15.9.2017 he avers that he intends to sell parcels No. Ntima/Igoki/6034 and 7883 to offset the debt. If applicant was serious on this issue, then there would be tangible evidence to show that he indeed intends to settle the debt.

32. As the matter stands now, it is clear that the applicant has been aware of his default long before the respondent set in motion the process of realizing the security and he has done nothing about this situation save to file this suit and to get the injunction orders of 18.9.2017. Even by the time the court was giving a date for ruling, the applicant had not intimated to this court that the manner in which he is was paying the loan. The balance of inconvenience does not tilt in his favour.

33. An injunction is an equitable remedy. In **Daniel Ndege Ndirangu versus Barclays Bank of Kenya Limited & another Nakuru High court civil case No. 8 of 2012 (Supra) Emukule J.** stated that ***“Those who fail to service and persist in such failure do no equity. An injunction is an equitable remedy. Those who seek equity must therefore do equity. Failure to service the loan, or to pay the lender, or to pay into court what has been admitted takes an applicant outside the realm of exercise of the court’s discretion.....”***

34. In conclusion, I find that applicants/plaintiff’s application of 5.9.2017 is unmerited while defendant’s application of 22.9.2017 is merited. I proceed to give orders as follows;

**(i) Plaintiff’s application of 5.9.2017 is hereby dismissed with costs to respondents.**

**(ii) The injunctive orders given on 18.9.2017 are hereby discharged.**

**(iii) The application of 22.9.2017 by defendant is hereby marked as spent.**

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS DAY OF 25<sup>th</sup> APRIL, 2018**

**IN THE PRESENCE OF:-**

**Court Assistant:** Janet/Galgalo

Nyukwana holding brief for Swaka for applicant present

Marete for respondent present

**HON. LUCY. N. MBUGUA**

**ELC JUDGE**