



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

THIKA LAW COURTS

ELC.CASE NO.835 OF 2017

REYMARK INVESTMENTS LIMITED.....PLAINTIFF/APPLICANT

-VERSUS-

FAMILY BANK LIMITED.....1ST DEFENDANT/RESPONDENT

GEORGE NJOROGE MUIRURI T/A

LEAKEY'S AUCTIONEERS.....2ND DEFENDANT/RESPONDENT

RULING

The matter for determination is the Plaintiff/Applicant's *Notice of Motion* application dated **21st November 2017**, brought under various provisions of law and has sought for the following orders:-

1. Spent.

2. Spent.

3. That the 1st and 2nd Defendants/Respondents by themselves, their agents servants, and/or officers and or otherwise be restrained by an order of injunction from selling or proceedings with the proposed auction, alienation, transferring, disposing or in any way interfering with the suit property being Title No.Kiambu Municipality Block 11/43, pending the hearing and determination of this suit.

4. That the Public Auction by the 2nd Defendant/Respondent scheduled for the 22nd November 2017 be stayed and or suspended pending further orders of this Honourable Court.

5. Costs of this application be provided for.

This application is premised on the following grounds:-

1. That the Plaintiff/Applicant is the registered proprietor of all that parcel of land situated in Kiambu Town in Kiambu County and known as Title No.Kiambu Municipality Block 11/43.

2. That the 1st Defendant/Respondent has a duty of care to the Plaintiff/Applicant under Section 97(2) to obtain the best price reasonably obtainable at the time of sale.

3. That the 1st Defendant/Respondent did not discharge its mandate under the Land Act of ensuring they avail to the Plaintiff the particulars of any alleged valuation which amounts to failure to discharge their duty to the mortgagor before the proposed sale.

4. That notwithstanding the failure on the part of 1st and 2nd Defendant/Respondent to disclose to the Applicant the valuation and forces sale valuation prepared for the intended auction, the Applicant is aware that the valuation and forced sale valuation are Kshs.70,000,000/= and Kshs.52,50,000/= respectively way below those in the 1st Defendant's own valuation of 1st September 2015 of Kshs.110,000,000/= and Kshs.82,500,000/= respectively.

5. That in the month of September 2017, the Applicant had received a written offer for purchase of the suit property for an

amount of **Kshs.100,000,000/=** being twice the amount of the forced sale valuation determined by the 1st Defendant.

6. That the Defendants/Respondents failed to acknowledge the suit premises as going concern and give the Plaintiff sufficient notice to remove the movable property from the suit premises.

7. That the Plaintiff/Applicant is apprehensive that unless restrained by an order of this Honourable Court the 2nd Respondent may sell the suit premises at a throw away price as they have concealed to the Applicant whether or not a valuation has been carried out on the suit premises to determine the current market value of the suit premises.

8. It is therefore imperative and in the interest of justice that the orders sought be granted.

Further the application is supported by the **Affidavit** of **Lewis Kamau**, the Director of the Plaintiff/Applicant herein. He averred that the Plaintiff is the registered proprietor of all that parcel of land situated in **Kiambu Town** known as **Kiambu Municipality Block 11/43**, as per **annexure LK-1**. He also averred that the 1st Defendant agreed to disburse a loan of **Kshs.48,000,000/=** to the Plaintiff through a **Letter of Offer** dated **26th August 2015**. Further that through a **Valuation Report** dated **1st September 2015**, the said property was **valued at Kshs.88 Million, before completion, Kshs.110 Million upon completion and Forced Sale Value Kshs.82.5 Million** as per **annexure LK-3**. He also averred that the Applicant was scheduled to start repayment of the said loan in equal instalments of **Kshs.1,120,000/=** after a **grace period of 6 months**. He also stated that the Applicant and 1st Defendant subsequently **executed a charge** over the suit premises on **8th September 2015**, and the Charge was subsequently registered against the title as is evident from **LK-4A & LK-4B**.

He also averred that there was a delay in completion of the building with handover by the contractor being made in **June 2016**, instead of **December 2015**, but the Plaintiff informed the 1st Defendant of the foregoing. It was his contention that the Plaintiff/Applicant first made an initial deposit of **Kshs.8,000,000/=** towards repayment of the loan in **September 2015**. He also alleged that the projected performance of the Plaintiff's hotel did not materialize due to depleted working capital and the subsequent deterioration in the political situation in the County. He also contended that the Plaintiff offered the suit premises for sale by **private treaty** and he received several offers to the tune of over **Kshs.120,000,000/=** but the harsh political climate deterred potential buyers from completing the transactions.

The deponent averred that on **24th March 2017**, the Chargee, 1st Defendant issued a **90 days Statutory Notice**, to the Applicant for the sale of the suit property **LK-5**. He further deposed that on **16th August 2017**, the 1st Defendant appointed the 2nd Respondent herein who issued a **45 days Redemption Notice** with a **Notification of Sale** attached and marked **LK-6A and LK-6B**. Subsequently on **6th November 2017**, the 2nd Defendant advertised the suit premises for **Sale by Auction** on **22nd November 2017**, as is evident from **LK-7**. It was his contention that the Notification of Sale and the advertisement failed to clarify whether the movable properties are part of the auction. Further that the Respondents concealed the valuation of the suit premises and the forced sale value and this is aimed at depriving the Applicants of his hard earned money. He also contended that if the Respondents are allowed to proceed with the auction of the suit premises, then it is likely to sell the property to a throw away price.

The deponent also alleged that in the month of **September 2017**, the Applicant had received a **written offer for purchase** of the suit property for an amount of **Kshs.100 Million**, being twice the amount of the forced sale valuation determined by the 1st Defendant as per **annexure LK-9**. However, the said purchaser became apprehensive about proceeding with the transaction once they became aware of the 1st Defendant's intention to foreclose on the property. It was his further contention that the Respondents' actions are contrary to **Section 97** of the **Land Act** and he urged the Court to allow the instant application.

The application is contested by the 1st Defendant/Respondent herein who filed its **Replying Affidavit** through **Antony Ouma**, their **Senior Legal Counsel**, who averred that indeed in **August 2015**, the 1st Defendant offered the Plaintiff/Applicant a loan facility of **Kshs.48 Million**, which was disbursed to the Plaintiff's account as is evident from **AO-1**. Further that after the said disbursement, the Plaintiff/Applicant consistently failed to remit the monthly dues and effected payments haphazardly and in their own terms which was contrary to the **Letter of Offer** marked **LK-2** and the constitutive charge document executed between the parties. The said loan was secured by the charge over the suit property herein. He contended that the Plaintiffs loan has not been performing hence the reason why the 1st Defendant moved to exercise its **Statutory Power of Sale**.

He further stated that the 1st Defendant issued a **single Demand Notice** on **15th February 2017**, but the Plaintiff did not rectify the situation. It further issued a **3 months Statutory Demand** under **Section 90(1)** of the **Land Act**, to the Plaintiff on **20th February 2017**, but still the Plaintiff did not rectify. A **final Demand Notice** for **40 days** was issued to the Plaintiff on **30th June 2017**, in respect of the legal charge over the suit property and when it failed to repay the loan, the 1st Defendant instructed the 2nd Defendant to issue **45 days' Redemption Notice** on **16th August 2017** which was received by the Plaintiff. He further stated that 2nd Defendant had delivered the **45 days' Redemption Notice** and the **Notification of Sale** and **schedule of properties** to the Plaintiff but the Plaintiff still failed to rectify the default.

He therefore deposed that all due processes were followed to the latter with regard to the circumstances leading to the notification to sell the suit property. He also contended that before the sale the 1st Defendant instructed **Acumen Valuers** to conduct a valuation over the suit property for the recovery purposes. The said **Valuation Report** was marked **OO-3**. He also contended that the Plaintiff/Applicant allegations are mere lies calculated to invoke emotions and endear the Plaintiff's blatant default at the 1st Defendant expense. Further that the said allegation are meant to hoodwink the court as the Plaintiff has not denied that they owe the 1st Defendant the said loan amount and that it is in default which default continues to accrue interest. Further, the Plaintiff has not offered any evidence on how it intends to clear the loan and regularize the loan account. He averred that the total loan amount is due and continues to accrue interest. It was his contention that the instant application is meant to mislead the court and subvert justice and it is in the interest of justice that the instant application be rejected by the court.

The application was canvassed by way of **written submissions** which this Court has carefully read and considered. The Court has also considered the entire pleadings and the annexures thereto, the cited authorities and the relevant provisions of law and it renders itself as follows;

There is no doubt that the Plaintiff /Applicant herein was granted a loan facility of **Kshs.48 Million**, by the 1st Defendant vide a **Letter of Offer** dated **26th August 2015**. The Plaintiff/Applicant accepted the said offer and secured the loan facility vide a **legal charge** over the property known as **Kiambu Municipality Block 11/45**, the suit property herein. The said property is registered in the name of the Plaintiff/Applicant and was registered on **25th May 2015**. It is also evident that the Plaintiff/Applicant executed a legal charge over the suit property on **8th September 2015**, to secure the said loan facility of **Kshs.48,000,000/=**. The said charge documents contain terms and conditions. Further it is evident that the chargor (Applicant) and chargee (1st Defendant) had their duties and obligations spelt out in the charge document. The chargor (Applicant) had a duty to pay the **monthly instalment** of **Kshs.1,120,000/=** towards repayment of the loan facility. The chargee was obliged to disburse the said loan facility to the Applicant. The said charge also stipulated the Bank's remedies in the event of default by the chargor. The chargee (Bank) could among other remedies exercise its Statutory Power of Sale after complying with the provisions of the Land Act in relation to exercise of statutory power of sale.

It is also not in doubt that the Applicant herein defaulted in loan repayment and the Bank issued a single **Demand Notice, Statutory Demand Notice** of **3 months**, a final **Demand Notice** of **40 days** and later appointed the 2nd Defendant who issued a **45 days Redemption Notice and Notification of Sale**. The Applicant has admitted that the 1st Defendant did issue the above Notices to it. The suit property was scheduled to be sold by public auction on **22nd November 2017**. The Plaintiff/Applicant has alleged that the said schedule sale was irregular since the 1st Defendant failed to provide the Applicant with the **Valuation Report** as provided by Section 97(2) of the Land Act. Further that the attached Valuation Report to the 1st Respondent's Replying Affidavit shows a lower value of forced sale than what had been valued via the **Valuation Report** of **September 2015** just before the loan was disbursed.

However, the 1st Respondent has alleged that it followed all the due processes and procedures just before the scheduled Public Auction. That a valuation was done on **13th July 2017** and the same was attached as **AO-3**. Further that the Applicant is in default and the loan amount continues to accrue interest and the Applicant has not offered how it intends to regularize the loan account or pay up the loan. The above are the undisputed facts.

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

The Applicant has sought for injunctive orders which are equitable reliefs granted at the discretion of the court. However, this discretion must be exercised judicially. See the case of **David Kamau Gakuru...Vs...National Industrial Credit Bank Ltd, Civil Appeal No.84 of 2001:-**

“an injunction being a equitable remedy cannot be granted to a party who has demonstrated openly through his conduct that he is undeserving of the equitable relief.”

Further, the Court will warn itself that at this stage, it is not mandated to make conclusive findings of disputed issues but only to determine whether the Applicant is deserving of the injunctive orders sought. see the case of **Nahendra Chagahlal Solanki...Vs...Neepeu Auto Spares Ltd, Kisumu HCCC No.90 of 2003**, where the Court held that:-

“In an interlocutory application for injunction, the Court must warn itself of the gravity of danger of making conclusive findings that may prejudice the interest of the parties at the hearing of the suit and should as far as possible exercise some cautionary steps”.

As the Court embarks in determining whether the Applicant is deserving of the orders sought, it will be guided by the Principles set out in the case of **Giella...Vs....Cassman Brown & Company Ltd 1973 E.A 358**. These principles are:-

- 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 also be guided by the relevant provisions of law. The application is anchored under **Order 40 Rule 1(a)** of the **Civil Procedure Rules** which provides:-

Where in any suit it is proved by affidavit or otherwise—

a. that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or was wrongfully sold in execution of a decree.

b.

the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying

and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.

The application is also premised under the Overriding Objective of the Civil Procedure Act as elucidated in Sections 1A & 1B of the said Act and this overriding objective is to facilitate the **just, expeditious, proportionate** and **affordable** resolution of civil disputes.

Further the Court will be guided by Section 3A of the same Act which donates to court the inherent power to make such orders as **may be necessary** for the ends of justice or to prevent abuse of the process of the court. The Applicant also anchored its application under **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 the valuer”.

The Court will also be guided by **Section 104** of the said **Land Act** which stipulates the powers of the court in respect of remedies and reliefs relating realization of securities by the chargee.

The Court will now evaluate the available evidence and juxtapose it with the above conditions as well as the provisions of law to arrive at a finding of whether the Applicant is deserving of the orders sought.

First, the Applicant needed to establish that it has a *prima-facie* case with probability of success at the trial. In the case of **Mrao Ltd....Vs... First American Bank Ltd & 2 others (2003) eKLR 125**, the Court described **prima-facie** case to mean:-

“A prima facie case means more than arguable case. It means that the evidence must show an infringement of a right and the probability of success of the Applicant’s case at the trial”.

Further in the case of **Habib Bank Attorney General Zurich...Vs...Eugene Marion Yakub, Civil Appeal No.43 of 1982**, ‘probability of success’ was described as:-

“Probability of success means the Court is only to gauge the strength of the Plaintiff’s case and not to adjudge the main suit at that stage since proof is only required at the hearing stage”.

Has the Applicant herein shown that it has a *prima-facie* case with probability of success at the main trial?

The Applicant did acknowledge that it took the loan facility of **Kshs.48 Million**, from the 1st Defendant and charged the suit property as security. Further, the Applicant did acknowledge that it defaulted in repayment of the stipulated monthly instalments and did receive the Statutory demands and 45 days Redemption Notice as provided by the law. However the Applicant’s bone of contention is that the 1st Defendant did not avail to it a forced sale valuation before the advertisement of the sale of the suit property by public auction. However, the Applicant has not even offered any proposal of how it intends to clear the loan arrears and regularize its loan accounts. Further, the Court has noted that the 1st Defendant did obtain a forced sale valuation on **13th July 2017**. That was a few days after it issued a **final Demand Notice** to the Applicant. Even with the final Demand Notice, the Applicant did not offer any proposal on how the said loan arrears was to be cleared.

Though Section 97(2) provides that the chargee should undertake a forced sale valuation before exercising the right of sale, the said Section does not state that it is mandatory to serve the chargor with the said Valuation Report. Further the Applicant did allege that even if the said valuation was undertaken by **Acumen Valuer**, the suit property was undervalued. However, no comparable Valuation Report was availed to discredit the Valuation Report prepared by **Acumen Valuers**.

The Applicant is in loan arrears and has not regularized its loan account. It received all the relevant Statutory Notices and it cannot now hide behind the issue of failure to be served with the **Forced Sale Valuation Report**. The Applicant executed the charge document and it was well aware of its duties and obligations. One of such obligations was to repay the loan by monthly instalments as stipulated in the charge but not according to its terms and convenience. The Applicant was also well aware that the 1st Defendant has several remedies in the event of default on the part of the Applicant. One of such remedy was exercise of **Statutory Power of Sale** as provided by Section **Section 96(1)** of the **Land Act**, so long as the chargee (1st Defendant) issued the relevant Notices as provided by **Section 90(1)** of the **Land Act**. The 1st Defendant (Respondent) did its part and therefore the Applicant cannot fault it for exercising its right as provided by the charge document and the law.

It is trite that a mortgagee will not be restrained from exercising its power of sale because the amount is in dispute or because the mortgagor objects to the manner in which the sale is being arranged. See the case of **Yunis Rubi Abdul...Vs...Housing Finance Co. of Kenya Ltd & Others, Nairobi HCCC No.12 of 2002**.

The Applicant herein has admitted that it is in arrears. It is very clear that upto the date of prosecution of this application the Applicant had not deposited any amount towards settling the loan arrears. So if the injunction

is confirmed, when will the Applicant repay the admitted loan?

In the case of **Euro Bank Ltd...Vs...Dr. Julius Gikonyo Kiano, Civil Appeal No.125 of 1998**, the Court held that:-

“Injunction must be granted on reasons and not gratuitously and where default in repayment is admitted, injunction should not

be granted to the mortgagee”.

Equally in this matter, the Applicant has admitted being in default but has not offered any mode of payment. All that the Applicant is interested in is injunction to prevent the 1st Defendant from exercising its accrued right. Since the default is admitted no injunction should issue herein. Further, it is trite that a party's statutory right will not just be prevented except if said right is being exercised oppressively. See the case of *FINA Bank Ltd...Vs...Sparex and Industries Ltd, civil Appeal No.51 of 2000(2000) 1EA 52*, where the Court held that:-

“Where a party has statutory right of action, the court will not usually prevent that right being exercised except that the court may interfere if there is no basis on which the right could be exercised or it was being exercised oppressively”.

In the instant case, the 1st Defendant is exercising its statutory power of sale because the Applicant is in arrears and the court finds no reason to prevent it from exercising its right.

The Court finds that the Applicant had a duty to show that the 1st Respondent failed to discharge the duty of care as alleged by itself. It did not do so and the Court finds that the Applicant has failed to establish that

it has a *prima-facie* case with probability of success. See the case of *Palmy Company Ltd...Vs...Consolidated Bank of Kenya Ltd*, where the Court held that:-

“The onus of establishing on a prima-facie basis that the Applicant's right has been infringed by the Respondent by failing to discharge the duty of care under Section 97(1) of the Land Act lies on the Applicant”.

On the **second limb** of if injunction granted the Applicant will suffer irreparable harm or loss which cannot be compensated by an award of damages, it is evident that the Applicant did offer its suit property as security for the loan facility. Once the said property was offered as security, it became a commodity for sale and the Applicant who had admitted being in default cannot claim that it is its only source of income. See the case of *Paul Muhoro Kihara...Vs...Barclays Bank (K) Ltd, Milimani HCCC No.33 of 2002 (2001) 2EA 420*, where the Court held that:-

“Once land has been given as security for a loan, it becomes a commodity for sale by that very fact and any romanticism over it is unhelpful as there is no commodity for sale whose loss cannot be adequately compensated by an appropriate quantum of damages”.

It is evident that the suit property herein can be quantified and if the Court is to decide in favour of the Plaintiff/Applicant at the main trial, then the Applicant can be compensated by an award of damages. The 1st Defendant's right has crystallized and it should be allowed to exercise it. See the case of *Joseph Siro Mosioma...Vs...Housing Finance Corporation of Kenya & 3 Others, Nairobi HCCC No.265 of 2007 (4R)*, where the Court held that:-

“On my part let me restate that damages is not automatic remedy when deciding whether to grant an injunction or not. Damages is not and cannot be substituted for the loss which is occasioned by a clear breach of the law. In any case, the financial strength of a party is not always a factor to refuse an injunction more so a party cannot be condemned to take damages in lieu of his crystallized right which can be protected by an order of injunction”.

The Court finds and holds that there is no evidence herein that the Applicant will suffer irreparable loss which cannot be compensated by an award of damages if orders sought herein are not granted.

On the **3rd Limb** of if the Court is in doubt to decide on balance of convenience, the Court finds that it is not in doubt herein as the Applicant is in arrears and has not offered any proposal on the mode of payment. The 1st Defendant/Respondent also undertook the **Forced Sale Valuation** and a Report was prepared on **13th July 2017** and no evidence of comparable valuation report was availed by the applicant to confirm that the **Valuation Report** by **Acumen Valuer** was undervalued. However if the Court was to decide on a balance of convenience, it would find that the same tilts in favour of the 1st Defendant who granted the loan facility to the Applicant and the said loan remain unpaid and there is a danger of the same escalating to a level that the security given by the Applicant might not repay the said loan. See the case of *Andrew M. Wanjohi ...Vs....Equity Building Society & 7 Others (2006) eKLR*, where the Court held that:-

“In my considered view if the 1st and 2nd Defendants were restrained from selling off until the suit was heard and determined, 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 for more than three years. That fact, coupled with the status of the 1st and 2nd Defendants, persuades me that the balance of convenience is in favour of the said Defendants. If the property was sold, the Plaintiff can find other accommodation. And if it were finally held that the property should not have been sold, the 1st and 2nd Defendants would be able to compensate the Plaintiff. In contrast, the stoppage of the intended sale by the Chargor would result in the continued growth of debt and thus exposing them potentially substantial irrecoverable losses. I therefore find that provided the Chargee complies with all other legal requirements, he should be permitted to realize the security”.

Having now carefully considered the available evidence, the Court finds that the 1st Defendant issued the mandatory **Statutory Notices** and the 1st Defendant is rightly exercising its Statutory Power of Sale and therefore there is no evidence that the Applicant's right has been infringed in any way. The overriding objective of the Civil Procedure Act is to facilitate **just** and **proportionate** determination of disputes before courts. This Court finds and holds that this matter would be justly and proportionately determined if the Court would decline to allow the orders sought since Applicant is in arrears. Further, the court finds that the necessary orders herein is to disallow the instant application

and prevent abuse of the court process.

In conclusion, the ***Court finds that the Applicant's instant Notice of Motion dated 21st November 2017 is not merited. Consequently, the said application is dismissed entirely with costs to the 1st Defendant.***

For avoidance of doubt, ***the interim orders of injunction issued on 22nd November 2017 are hereby discharged and/or vacated.***

It is so ordered.

Dated, Signed and Delivered at Thika this **20th** day of ***April 2018.***

L. GACHERU

JUDGE

In the presence of

Mr. Mbugua for Plaintiff/Applicant

M/S Cheserek holding brief for M/S Onsare for 1st Defendant/Respondent

No appearance for 2nd Defendant/Respondent

Lucy - Court clerk.

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

L. GACHERU

JUDGE

20/4/2018