



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT THIKA
THIKA LAW COURTS
ELC CASE NO.3 OF 2018

ANGAZA REAL ESTATE LIMITED.....PLAINTIFF/APPLICANT

-VERSUS-

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

JAMES ONYANGO JOSIAH

T/A NYALUONYO AUCTIONEERS.....2ND DEFENDANT/RESPONDENT

RULING

By a *Notice of Motion* application dated **8th January 2018**, brought under various provisions of law, the Plaintiff/Applicant has sought for the following orders:-

1) Spent.

2) Spent.

3) That pending the hearing and determination of this suit, an order of injunction be issued restraining the 1st Defendant whether by itself, employees, servants and/or agents or otherwise assigns and/or any person whatsoever acting on its behalf and/or under its mandate and/or instructions from alienating, advertising for sale, offering for sale, selling, taking possession of, leasing, transferring, charging or otherwise in any manner whatsoever interfering with LR.No.13537/22 Thika Municipality.

4) That in the alternative to prayers 2 and 3 above, the time for compliance and/or for rectifying any default to redeem LR.13537/22 Thika Municipality be extended for a period of 24 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 in the alternative to prayers 2, 3 and 4 above, the 1st Defendant/Respondent's Statutory Power of Sale be suspended and/or postponed for a period of twenty-four (24) months or for such other period as the court may determine to enable the Plaintiff/Applicant redeem LR.13537/22 Thika Municipality.

6) *That further to prayers 2,3,4 &5 above the 2nd Defendant's Notice dated 6th December 2017, be declared null and void and be hereby revoked.*

7) *That the costs of this application be borne by the Defendants.*

This application is supported by the grounds stated on the face of the application and the **Supporting Affidavit** of **Martin Kamau Muriuki**. These grounds are:-

1) *That the Plaintiff purchased LR.No.13537/22 Thika Municipality situated at High Point – Juja along the Thika Superhighway partially with its own funds and through a loan facility offered by the 1st Defendant.*

2) *That the Plaintiff in compliance with its obligations under the Letter of Offer began servicing the loan diligently and without fail as it sought to develop the property.*

3) *That the Plaintiff has been servicing the loan until it ran into some financial difficulties partly caused by the 1st Defendant's actions/omissions.*

4) *That the Plaintiff has requested for the 1st Defendant's assistance in writing in accordance with the terms of the existing loan agreement but instead the 1st Defendant has elected the Statutory power of sale contrary to agreed terms and the provisions of section 90(1) of the Land Act, 2012.*

5) *That the 1st Defendant has never notified the Plaintiff of any default in writing. In fact, the Plaintiff has held the legitimate expectation that the 1st Defendant was working on its request for further assistance to construct a Petrol Station.*

6) *That the 2nd Defendant has no powers to issue the attempted Statutory power of sale in favour of the 1st Defendant/Respondent regarding the suit property as the same has not arisen and/or cannot arise at all.*

7) *That the 1st Defendant's actions of triggering the Statutory power of sale without serving the Plaintiff with any notice of default have been undertaken in bad faith, malice and in breach of the mutually agreed terms.*

8) *That if the illegal sale goes ahead there is a real risk of an illegal sale of the suit property which is now estimated to be worth Kshs.85,000,000/= whereupon the Plaintiff's losses shall be irreparable and not capable of compensation by way of award of damages as the suit property is held under the Plaintiff's members' funds.*

9) *That it is now desirable, fair and just that this court should intervene.*

In his **Supporting Affidavit**, **Martin Kamau Muriuki** reiterated the contents of the grounds in support of the application and further stated that he is committed to honour the terms of the loan and has paid an approximately **Kshs.20,000,000/=** as part of the loan repayment. He also alleged that if the illegal sale is allowed to go ahead, the Plaintiff's losses shall be irreparable and not capable of compensation by way of award of damages as the same is held under the Plaintiff's members' funds. He therefore sought the Court's protection against the 1st Defendant drastic actions that has been undertaken in bad faith and in breach of the mutually agreed terms of the parties.

The application is contested by the 1st Defendant who filed a **Replying Affidavit** via **Daniel Kimaiyu**, the **debt recovery officer** who averred that the Plaintiff has misrepresented the issues to this Court, blatantly misled it with the view to obtaining the orders sought and that it has withheld material facts from the Court which material would enable the Court reach a just decision. He confirmed that the 1st Defendant

offered a loan facility of **Kshs.48,000,000/=** to the Plaintiff/Applicant through a **letter of offer** dated **3rd August 2015** payable within a period of **96 months**. He also averred that the said loan facility was to be utilized for the purchase of a commercial building on property **LR.No.13537/22** in **Juja**. That the said loan facility was secured via first legal charge registered over the property **LR 13537/22**, registered in the name of the Plaintiff/Applicant.

He alleged that the said loan facility was disbursed to the Plaintiff's account held at the **Bank** on **17th December 2015**, as per **annexture DK-7**. However, the Plaintiff defaulted in repayment of the said loan facility and the Bank made several demands to the Plaintiff. However, the Plaintiff failed to make any effort to settle the outstanding amount and consequently the Bank sent a **Statutory Notice** to the Plaintiff on **11th July 2017**, as required by the law. The outstanding loan with interest was **Kshs.44,804,032/=**. The deponent further alleged that despite the said **Statutory Notice**, the Plaintiff never made any effort to settle the amount due. As a result thereof and upon expiry of three months on **17th October 2017**, the Bank issued a 2nd and **final Notice** to the Plaintiff demanding payment of the outstanding loan and interest which stood at **Kshs.44,860,660/=**. He alleged that the Plaintiff was advised that the Bank would sell the charged property at the expiry of **40 days** as is evident from **annexture DK-10**. It was also contended that due to the Plaintiff's failure to pay the outstanding amount, the Bank on expiry of **40 days** period instructed the 2nd Respondent to proceed with the sale of the charged property.

Therefore the 2nd Respondent issued a Notice to the Plaintiff informing it that they would sell the charged property by way of **Public Auction** at the expiry of **45 days** from the date of service **DK-11**. He denied that the Bank made an undertaking to the Plaintiff that it would disburse a further loan to the Plaintiff for construction of a Petrol Station. It was averred that it was evident that the Plaintiff had failed to regularize its accounts despite several reminders and demands and therefore the Plaintiff has come to Court with unclean hands. He contended that the Plaintiff's application has no merit and he urged the Court to dismiss it with costs.

This application was canvassed by way of written submissions which this Court has carefully read and considered. The Court has also considered the pleadings herein and the annexures thereto, the cited authorities and the relevant provisions of law and makes the following findings;-

There is no doubt that the Plaintiff herein was offered a loan facility

by the 1st Defendant vide its **Letter of Offer** dated **3rd August 2015**. The loan facility was for **Kshs.48,000,000/=** and was repayable over **96 months** at **Kshs.917,830/= per month**.

It is also evident that the purpose of the loan was to enable the Plaintiff purchase a commercial building **I.R No.13537/22**, in **Juja** from **Kenliq Ventures Ltd**. It is also not in doubt that the said loan facility was secured by among other things a first legal charge of **Kshs.48,000,000/=** over property **LR.No.13537/22**, which was registered in the name of the Plaintiff. It is also evident that the Plaintiff accepted the said offer and charged the suit property to 1st Defendant/Respondent as is evident from the **charge document** dated **5th October 2015**. The said charge is over **LR.No.13537/22**, which is registered in the name of the Plaintiff.

What is also clear is that the said charge has terms and conditions and the Chargor and Chargee had duties and obligations. From the charge document **Clause 7:2**, it is clear that the Plaintiff had agreed that in the event of default on its part:-

“The secured obligations shall immediately become due and payable.....”.

In **Clause 7:2:2** - **in the event of default, the Bank shall be entitled at its option to sue for the repayment of the secured obligation and/or exercise the Statutory powers to sell the charged property.**

It is also evident that the Bank did disburse the loan facility to the Plaintiff on **17th December 2015**, as is

reflected by the **Plaintiff's Bank Statement DK-7**. Therefore after the loan disbursement, the Plaintiff had the obligation to start paying the monthly instalments. The Plaintiff has alleged that he has been paying the monthly instalments until **October 2017** when it was unable to pay due to prevailing unfavourable political climate which affected businesses. He also averred that the 1st Defendant has attempted to sell the suit property without issuing the relevant **Notices** or following the laid down procedures as provided by the **Land Act**.

The 1st Defendant has alleged that the Plaintiff is in default and was served with the relevant **Statutory Notices** which it failed to act on and thus as provided by the charge document and **Section 96(1)** of the **Land Act**, it opted to exercise its Statutory power of sale and therefore Plaintiff has not come to court with clean hands.

The above are the undisputed facts. The issue now for determination is whether the Plaintiff/Applicant is entitled to the prayers sought.

The Plaintiff/Applicant has sought for injunctive orders which are equitable reliefs granted at the discretion of the court. However, the said discretion must be exercised judicially. See the case of **Nyutu & Others..Vs..Gatheru & Others (1990) KLR 554**, where the court held that:-

“Whether or not to grant an injunction is in the discretion of the Court and the discretion is a free one but must be judicially exercised. It must be based on common sense and legal principles.”

Further, the Court will take note that at this interlocutory stage, it is not called upon to determine the disputed facts with finality. All that the Court is called upon to do at this stage 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 the Court will base its determination on is the one laid down in the case of **Giella Vs Cassman Brown & Company Ltd 1973 E.A 358**. These criterias 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.***

Therefore, this Court will now juxtapose the above criteria with the available evidence and arrive at a finding as to whether the Applicant is deserving or not deserving of the orders sought.

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

“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 as to call for an explanation or rebuttal from the latter”

From the above description, it is clear that a *prima-facie* case means more than an arguable case. It

means that the available evidence must show an infringement of a right and probability of success of the Applicant's case at the trial. Therefore the Applicant herein has a duty to show infringement of its right and probability of success of its case at the trial.

As the Court pointed out earlier, the Plaintiff/Applicant was advanced a loan facility by the 1st Respondent. He secured the said loan using the suit property as security. When the Plaintiff offered the suit property as security, it was clear upon it that the said property became a commodity for sale in the event of default. Indeed **Clause 7:2:2** of the Charge document made it clear that upon default by the Chargor, the Bank had a right to exercise its power of sale.

The Plaintiff/Applicant has alleged that it was not served with the **Statutory Notice** as provided by **Section 90(1)** of the **Land Act**. However, the 1st Respondent has attached **annextures DK-8** and **DK-10** which are **Statutory Demand Notices** served upon **Nancy Thogori** and **Martin Kamau Muriuki**, the Directors of the Plaintiff herein using the last known address of **Box 632 Thika**, which was the same address used in the charge document. The said **Statutory Notices** were sent through **Registered Post** and there is no evidence that the said letters were returned to sender.

Consequently, the Court finds that the Plaintiff was duly served with the **Statutory Notices** but it continued to default in repayment of the loan advanced to it. Further, the Plaintiff has acknowledged that it is in loan arrears but has not offered proposals on how to clear the outstanding loan arrears. Instead the Applicant blames the 1st Respondent for failing to give it a second loan to construct a Petrol Station. How could the Plaintiff seek for an additional loan whereas it was in arrears on the first loan? Since the Plaintiff is seeking for equitable relief, it must come to Court with clean hands. However in the instant matter the Plaintiff has approached the Court with unclean hands as it even failed to meet the condition for grant of the interim orders and did not even offer any proposal on how and when it would deposit the remaining balance. See the case of **Jane Achieng Onyango...Vs...Giro Commercial Bank, Kisumu HCCC No.339 of 1999**, where the Court held that:-

“Injunction being an equitable remedy, the party seeking it must come to court with clean hands”.

Having considered the available evidence herein, it is evident that the Plaintiff/Applicant was served with the **Statutory Notice** but has decided to be economical with the truth. The Plaintiff/Applicant has not shown good faith and has not come to court with clean hands. Consequently, the **Court finds that the Plaintiff has not shown that it has a prima-facie case with probability of success at the trial.**

On the **second limb**, it is evident that the Plaintiff offered the suit property voluntarily as security for the loan advanced to it. The Plaintiff/Applicant is in default. The 1st Defendant has opted to exercise its Statutory power of sale as provided by **Section 96(1)** of the **Land Act**, which provides:-

“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 in the Notice served on the chargor under section 90 (1), a chargee may exercise the power to sell the charged land”.

The Applicant was well aware that once the suit property was offered as security for loan facility, it became a commodity for sale and he cannot now turn around and allege that it will suffer irreparable loss which cannot be compensated by an award of damages. See the case of **Olympic Sport House Ltd... Vs...School Equipment Centre Ltd HCC No. 190 of 2012**, where the court held that:

“Damages are not and cannot be substitute 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”.

See also the case of **Andrew M. Wanjohi ...Vs....Equity Building Society & 7 Others (2006) eKLR**,

where the Court held that:-

“By offering the suit property as security, the chargor was equating it to a commodity which the chargee may dispose off so as to recover his loan together with interest. Therefore if the chargee were to sell off the suit property, the chargor’s loss could be calculable on the basis of the real market value of the said property”.

Consequently, the Court finds that the Applicant has failed to demonstrate that it will suffer irreparable loss which cannot be compensated by an award of damages if orders sought are not granted.

On the balance of convenience, the Court finds that it is not in doubt. However even if the Court was in doubt the balance of convenience would tilt in favour of the 1st Respondent, the Bank who stands to suffer as the loan arrears and interest continuous to escalate and stopping the sale herein would escalate the said loss further. 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 Plaintiff/Applicant has failed to establish the threshold for grant of injunctive orders as was laid down in the **Giella...Vs... Cassman Brown case (supra)**. Consequently, the Court finds the Notice of Motion application dated **8th January 2018** is not merited. For the above reasons, the Court declines to allow any of the orders sought therein and proceeds to dismiss the said application entirely with costs to the 1st Respondent.

For the avoidance of doubt, the interim orders issued on **8th February 2018**, are hereby discharged and/or vacated.

It is so ordered.

Dated, Signed and Delivered at Thika this 13th day of April 2018.

L. GACHERU

JUDGE

In the presence of

Mr. Munene for Plaintiff/Applicant

M/S Okello holding brief for Mr. Kubai for 1st Defendant/Respondent

2nd Defendant/Respondent

Lucy - Court clerk.

L. GACHERU

JUDGE

Court – Ruling read in open Court.

L. GACHERU

JUDGE

13/4/2018