



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 762 OF 2017**

**ROSE CHEMUTAI.....PLAINTIFF**

**VERSUS**

**FAMILY BANK LIMITED.....1<sup>ST</sup> DEFENDANT**

**RACHAEL MUTAHI T/A TOPLINK AUCTIONEERS.....2<sup>ND</sup> DEFENDANT**

**RULING**

The application for determination is the Plaintiff's Notice of Motion dated the 9<sup>th</sup> June, 2017 brought pursuant to Order 40 rule 2(1) and 3 of the Civil Procedure Rules and Section 3A & 3B of the Civil Procedure Act and all the other enabling provisions of the Law.

The application is premised on the following grounds which in summary is that the Plaintiff is the registered proprietor of all that parcel of land known as KAJIADO/KAPUTIEI NORTH/50548 hereinafter referred to as the 'suit land'. That a Statutory Notice of Sale has been issued by the 2<sup>nd</sup> Defendant to the Plaintiff. The Defendants' have threatened to sell the suit land and yet the Plaintiff has repaid a substantial sum to the 1<sup>st</sup> Defendant. The 1<sup>st</sup> Defendant has declined to allow the Plaintiff dispose off two parcels of land excised from the suit land as earlier agreed despite having a ready and willing buyer whose proceeds are more than enough to settle the loan arrears. If the suit land is sold, being the Plaintiff's only property, she will be rendered destitute.

The application is supported by the affidavit of ROSE CHEMUTAI the Plaintiff herein where she deposes that in the year 2012 she ran into financial difficulties in educating her children who secured places in colleges, having lost her husband a few years ago. She confirms applying for a loan with the 1<sup>st</sup> Defendant, which she was granted and she offered the suit land as security for it. She admits defaulting in the loan repayment due to lack of tenants in her rental houses, and that she consulted the 1<sup>st</sup> Defendant over the same, and with the consent of its staff, she subdivided the suit land into several parcels which they agreed that she would sell two of the same to offset the loan. She insists contrary to the agreement, the 1<sup>st</sup> Defendant proceeded and advertised the suit land for sale and the 2<sup>nd</sup> Defendant issued her with a Notification of Sale. She claims the staff of the 1<sup>st</sup> Defendant had informed her to ignore the Statutory Notice while talks of subdivision were in place only to renege on the arrangement and the auctioneer scheduled the sale on 10<sup>th</sup> June, 2017. She contends that the value of the suit land has appreciated since 2012 and she has not been supplied with proper accounts of the loan payment. She reiterates that the 1<sup>st</sup> Defendant's action has overcharged her with illegal interest and penalties and in no way should it charge interest rate above 14% .

The application is opposed by the 1st Defendant who filed a replying affidavit sworn by ANTHONY OUMA its Senior Legal Officer who confirmed that the Plaintiff was extended credit facilities by the 1<sup>st</sup> Defendant vide a facility letter dated the 23<sup>rd</sup> May, 2013 and she took a cumulative principal sum of Kshs. 5, 100,000/=. Further that the sums advanced to the Plaintiff were secured by the 1<sup>st</sup> Defendant through a Charge of Kshs. 2.5 million over KAJIADO/KAPUTIEI NORTH/ 50548 vide a Charge Agreement dated the 14<sup>th</sup> February, 2013 and a further Charge for Kshs. 2.7 million over KAJIADO/ KAPUTIEI NORTH/50548 dated 20<sup>th</sup> June, 2013. He claims the Plaintiff defaulted in the settlement of instalments as agreed with the 1<sup>st</sup> Defendant, and as at 25<sup>th</sup> April, 2017 the balance stood at Kshs. 3,616, 516.51 which continues to accrue interest until the loan is paid in full. Further that the 1<sup>st</sup> Defendant notified the Plaintiff on several occasions to regularize the account but the requests were not honoured. He contends that on 12<sup>th</sup> March, 2015; 26<sup>th</sup> June, 2016 and 18<sup>th</sup> August, 2016 respectively, the 1<sup>st</sup> Defendant issued demand notices for the outstanding loan which notices did not elicit any responses from the Plaintiff. Further that on 11<sup>th</sup> November, 2016, the 1<sup>st</sup> Defendant issued a Statutory Notice to the Plaintiff under Section 90 of the Land Act which Notice was sent by Registered Mails Parcel Number RD109173709 and a Certificate of Posting issued, which fact is not disputed. He states that on 13<sup>th</sup> February, 2017, the 1<sup>st</sup> Defendant issued a Notice of Intent to sell and the same was sent by registered post on 24<sup>th</sup> February, 2017 and a Certificate of Posting issued. Further that due to the Plaintiff's failure to honour her commitment, the 1<sup>st</sup> Defendant had no alternative but to exercise its statutory power of sale pursuant to Section 90 of the Land Act, and instructed the 2<sup>nd</sup> Defendant herein. He insists the 2<sup>nd</sup> Defendant duly served a notification of sale and a Forty Five (45) days' redemption notice upon the Plaintiff, which she acknowledged receipt by signing on the face of the documents. He reiterates that the Plaintiff failed to make good the outstanding debt, and the sale of the Plaintiff's land, which was Charged to the bank is backed by law. He avers that the Plaintiff has not met the threshold set under the law for granting of the equitable remedy sought as she has admitted being in arrears which automatically disqualifies her entitlement to an

injunction. Further, on 9<sup>th</sup> March, 2017, the 1<sup>st</sup> Defendant instructed NileReal Appraisers (EA) Limited to carry out a valuation of the suit land.

The Plaintiff filed two further affidavits where she reiterated her claim and stated that on 10<sup>th</sup> July, 2017 she paid Kshs. 500,000 towards offsetting the loan leaving an outstanding balance of Kshs. 2, 791, 225. 80 and that the 1<sup>st</sup> Defendant's use of the outstanding loan for the month of 25<sup>th</sup> April, 2017 is meant only to create an insincere narrative that she has been in perpetual default since then. She denies being served with the Statutory Notice and insists it was posted to address P. O. Box No. 802 – 00242 KITENGELA whereas her postal address that they have corresponded with is P. O. Box No. 61619 – 00200 Nairobi. She insists no statutory notices were sent to her as required by law and that the Notice of Intention to sell was sent to an address unknown to her. She contends that she has never refused to repay the loan and has engaged the 1<sup>st</sup> Defendant to restructure her loan but it has been adamant and hell bent to dispose of her home. She states that 4<sup>th</sup> November, 2017, she made a further payment of Kshs. 500,000 towards settling the loan arrears and has secured a source of further payment of the sum of Kshs. 900,000 within the next two months towards offsetting the loan. She reiterates that she stands to suffer irreparable loss and harm as she is a widow and the charged property consists of her dwelling house while the 1<sup>st</sup> Defendant's interest is commercial in nature and can always be compensated by way of damages. She claims the valuation report prepared by NileReal Appraisers (EA) Limited does not indicate the value of the suit land and that the valuation of the said land is approximately Kshs. 20 million whereas the outstanding loan liability is Kshs. 2.5 million. Further that on 7<sup>th</sup> December, 2017 she wrote to the 1<sup>st</sup> Defendant seeking an out of court settlement which did not elicit a response. She states that on 19<sup>th</sup> December, 2017 she secured the payment of Kshs 500,000 and further Kshs. 100,000 towards offsetting the loan balance. She reiterates that since the commencement of the instant suit she has paid Kshs. 1.6 million to offset the loan, with the loan balance now standing at Kshs. 2, 016, 516 and she stands to suffer irreparable loss and harm if the intended sale is allowed to proceed.

All the parties filed their respective written submissions that I have considered.

### **Analysis and Determination**

Upon perusal of the materials presented by the Plaintiff and the Defendants in respect to the Notice of Motion the 9<sup>th</sup> June, 2017 including their written submissions, I find that the only issue for determination is whether the Plaintiff is entitled to the temporary injunction sought pending the outcome of the suit.

It is not disputed that the Plaintiff was granted a loan by the 1<sup>st</sup> Defendant. It is also not in dispute that the Plaintiff defaulted in loan repayment. What is in contention is the fact the Plaintiff disputes being served with the requisite statutory notices and that the valuation report does not indicate the value of the suit land.

The Plaintiff relied on the following authorities including **Giella Versus Casman Brown; Alice Awino Okello V Trust Bank Ltd & Another** and **Albert Mario Corderio & Another V Vishram Shamji (2015) eKLR** to support her claim. While the Defendants' relied on the cases of **Al – Jalal Enterprises V Gulf African Limited (2014) eKLR; Mrao Limited V First American Bank Limited & 2 Others (2003) eKLR and Palmy Company Limited V Consolidated Bank of Kenya Limited (2014) eKLR** to oppose the application for injunction.

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

As to whether the Plaintiff has established a prima facie case with a probability of success. I note the Plaintiff charged the suit land and has defaulted in repaying the loan. She denies being served with the statutory notices, but the 1<sup>st</sup> Defendant has furnished court with various notices it served the Plaintiff. I note the Notice under section 90 of the Land Act dated the 11<sup>th</sup> November, 2016 marked as annexure 'AO5' was sent to P. O. Box 61619 – 00200 Nairobi; while another Notice dated the 13<sup>th</sup> February, 2017 marked as annexure 'AO 6' was also sent to P. O. Box 61619 Nairobi. The Notice from the Auctioneer marked as annexure 'AO7' was further sent to P.O. Box 61619 – 00200 Nairobi. This is the same postal address indicated in the Charge document. Further, the 1<sup>st</sup> Defendant has even annexed the Certificates of Posting for the various notices. I hence find that the Plaintiff was indeed served with the requisite statutory notices before the sale of the suit land was scheduled.

The Plaintiff contends that the suit land has appreciated and the Valuation report dated the 9<sup>th</sup> March, 2017 by Nile Real Appraisers (EA ) Ltd marked as annexure 'AO9' does not indicate its value.

Section 97 (1) and (2) of the Land Act provides that:

**'(1) A chargee who exercises a power to sell the charged land, including the exercise of the power to sell in pursuance of an order of a court, owes a duty of care to the chargor, any guarantor of the whole or any part of the sums advanced to the chargor, any chargee under a subsequent charge or under a lien to obtain the best price reasonably obtainable at the time of sale.**

**(2) A chargee shall, before exercising the right of sale, ensure that a forced sale valuation is undertaken by a valuer.**

From a cursory look at the said Valuation Report, I concur with the Plaintiff that the report does not indicate the value of the suit land as required by section 97 of the Land Act. In so far as I find that the Plaintiff was indeed served with the requisite statutory notices, I note that she has continued to repay the loan to the tune of Kshs. 1.6 million since the suit was filed, a fact not controverted by the Defendant. The

Plaintiff contends that she has not been furnished with statements of account, but I note that this is not a ground for seeking an injunctive remedy.

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.*'

In relying on the judicial authorities cited above including the facts as presented, inasmuch as the Plaintiff has admitted her indebtedness to the 1<sup>st</sup> Defendant which has duly served the requisite statutory notice, I however find that the suit land has not been properly valued as required by the provisions of section 97 of the Land Act. It is against the foregoing that I find that the Plaintiff has indeed established a prima facie case with a probability of success.

On the issue as to whether the Plaintiff will suffer irreparable harm that cannot be compensated by way of damages. I note the Plaintiff has furnished court with various statements indicating she has been repaying the loan, despite the fact that she sought for injunctive orders. Further, I note that the 1<sup>st</sup> Defendant has not indicated the extent of the default since the Plaintiff has been repaying the loan. In the case of **Case of Nguruman Ltd. Vs. Jan Bonde Nielsen CA No. 77 of 2012**, it was held that '*...the applicant must establish that he 'might otherwise' suffer irreparable injury which cannot be adequately compensated remedied by damages in the absence of an injunction, this is a threshold requirement and the burden is on the applicant to demonstrate, prima facie, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot 'adequately' be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy.*'

In relying on the case above and based on the circumstances at hand, I find that the Plaintiff alleged injuries are not speculative, as she has demonstrated the harm she will suffer if the injunctive orders are denied.

On the question of balance of convenience, from the evidence presented by the parties, I am not in doubt that the balance tilts in favour of the Plaintiff as the Defendants' have infringed on her rights by failing to properly value the charged suit land before advertising it for auction.

From the above, it is clear that Plaintiff has established a prima facie case to meet the threshold for the grant of orders of injunction.

I find the Plaintiffs' Notice of Motion dated the 9<sup>th</sup> June, 2017 merited and allow it.

**Dated signed and delivered in open court at Ngong this 10th day of April, 2018**

**CHRISTINE OCHIENG**

**JUDGE**