



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAJIADO**

**ELC CASE NO. 510 OF 2017**

**KAIRU NG'ANGA.....PLAINTIFF**

**VERSUS**

**SPIRE BANK LIMITED.....1ST DEFENDANT**

**JOSEPH M. GIKONYO T/A**

**GARAM INVESTMENT AUCTIONEERS.....2ND DEFENDANT**

**WALLACE MWAURA KAIRU.....3RD DEFENDANT**

**RULING**

The application before this court is a notice of motion application dated the 6th March, 2017 brought pursuant to Order 40 Rules 2(1), 3(3), 4(1) of the Civil Procedure Rules, and Section 1, 1A, 3, 3A of the Civil Procedure Act, and all the other enabling provisions of the Law. The Plaintiff seeks the following prayers:

1. Spent
2. That this Honourable Court be pleased to issue a temporary injunction against the 1st and 2nd Defendants/Respondents by themselves, their agents and/or representatives from selling by public auction and/or transferring or dealing in any way with all that parcel of land known as Land Reference Ngong/Ngong/18708 pending the hearing and determination of this Application.
3. That this Honourable Court be pleased to issue a temporary injunction against the 1st and 2nd Defendants/Respondents by themselves, their agents and/or representatives from selling by public auction and/or transferring or dealing in any way with all that parcel of land known as Land Reference Ngong/Ngong/18708 pending the hearing and determination of this Suit.
4. That the costs of this Application be provided for.

The application is based on the following grounds, which in summary are that the Plaintiff is the registered proprietor of land parcel number Ngong/ Ngong/18708 (suit parcel). In 2015, the Plaintiff/Applicant charged the suit property to the 1st Defendant/Respondent for an advancement of a loan of Kshs. 1, 300,000 in favour of the 3rd Defendant/Respondent. The 3rd Defendant/Respondent has repaid a total sum of Kshs. 400,000 and defaulted, leaving an outstanding balance of Kshs. 1,476,114.60. As a result of the default, the 2nd Defendant being an agent of the 1st Defendant/Respondent vide Notification letter and Notification of Sale dated 3rd January, 2017 gave their intention to sell the property through public auction on 7th, March, 2017 to recover the outstanding balance. Further that the notification of sale was illegal and improper. That the Plaintiff is merely a guarantor and yet no proper efforts were made by the 1st Defendant to recover money from the 3rd Defendant.

The application is supported by the affidavit of KAIRU NGANGA who is the Plaintiff herein where he deposes that he is the proprietor of the suit land situated in Matasia Ngong Area and that in 2015 he charged the said property with the 1st Defendant for an advancement of loan of Kshs. 1,300,000 in favour of the 3rd Defendant who is a close relative. He avers that he is aware that the 3rd Defendant has paid Kshs. 400,000 towards the loan but has defaulted leaving an outstanding balance of Kshs. 1,476,114.60. Following the default, the 2nd Defendant issued a Notification letter and Notification of Sale dated 3rd January, 2017 giving their intention to sell the property through public auction on 7th, March, 2017 to recover the outstanding balance of Kshs. 1,476,114.60. He avers that he is aware the 3rd Defendant used part of the loan proceeds to purchase a motor vehicle. He states that there was no proper notification of sale of the property, thereby any auction is illegal and/or irregular. He avers that he is merely a guarantor and yet no efforts have been made by the 1st Defendant to recover the loan from the 3rd Defendant. Further the proposed auction was in contravention of Section 90 of the Land Act.

The 1st Defendants/Respondents filed a replying affidavit sworn by one POWLEEN BUSENA who is a Debt Recoveries Officer for the 1st Defendant herein where she avers that the 3rd Defendant is the son to the Plaintiff and further that on 1st October, 2015 the said 3rd Defendant was granted a term loan facility of Kshs. 1,300,000 by the 1st Defendant/Respondent (then known as Equatorial Commercial Bank) through his account no. 0304810801. She states that the Plaintiff/Applicant signed the facility letter and part of the conditions precedent to the 1st Defendant/Respondent lending money to the 3rd Defendant/Respondent was a personal guarantee form the Plaintiff/Applicant for Kshs. 1,300,000; Legal Charge over the suit land and Consent by the Plaintiff/Applicant to charge the suit land. She further states that the Plaintiff/Applicant also furnished the 1st Defendant with a Deed of Guarantee and Indemnity. She denies that the 3rd Defendant/Respondent has repaid the loan to the tune of Kshs. 400,000 but that he has only paid Kshs. 247, 713.00 despite agreeing to the terms of the loan to repay in 36 months through a monthly instalment of Kshs. 48, 313 per month. She states that after default, the 1st Defendant issued the 3rd Defendant with a 1st reminder letter on 6th April, 2016 and a 2nd reminder letter on 10th May, 2016 respectively. Further that, on 22nd June, 2016 the 1st Defendant issued a Notice of Statutory Powers of Sale as provided in Section 90 of the Land Act. She further stated that on 4th October, 2016 the 1st Defendant in compliance with Section 96(2) of the Land Act issued to the Plaintiff/Applicant and 3rd Defendant/Respondent a further 40 days Notice to Sell the suit property if the outstanding loan of Kshs. 1,387,777.35 was not paid. She stated that despite sending out the requisite notices the 3rd Defendant/Respondent has failed to repay the loan and that the 2nd Defendant/Respondent gave the Plaintiff/Applicant an additional 45 days notice to redeem the property and informed Plaintiff/Applicant that property would be sold upon expiry of the said 45 days. She avers that the Plaintiff/Applicant has failed to establish a prima facie case to warrant the granting of an interlocutory injunction.

Both parties filed written submissions.

On the 19th April 2017, the parties highlighted their submissions. Ms Obel who is the Counsel for the Plaintiff highlighted the facts of the case and submitted that that the Memorandum of Acceptance and Deed of Guarantee & Indemnity are not dated or properly witnessed. She further stated that the replying affidavit was defective as there was no authority to plead, and the pleadings are not sealed. She further submitted that the Statutory Notices required by Section 90 and 96 of the Land Act were not adhered to. Further that there was no forced sale valuation as required by Section 97 of the Land Act and that the 1st Defendant/Respondent had contravened Section 96(3) of Land Act in relation to service of a spouse. She stated that they do not challenge the issue of default in repayment of loan but are challenging issues of equity of redemption. She relied on the case of **Lameck Mbaka Motegi vs Bank of Baroda (Kenya) Ltd & Anor** where Justice J N Mulwa in citing **Turbo Highway Eldoret Ltd & 2 others Vs. Bank of Africa Ltd** which established that service by registered mail is defective. She further relied on the case of **State of Karnataka & Others Vs. M. Muniraju , where V. Gowda J opined that: ' .....this Court has to hold that mere dispatch of notices to the address of the persons is not sufficient, but it must be actually either delivered or tendered to the person/s to whom they are required to be given under Section 80 (1) of the CPC.....'** She urged the court to borrow this authority from a different jurisdiction. She submitted that they had established that service by the 1st Respondent to the Applicant was defective. She stated that they had demonstrated a prima facie case to warrant the grant of an interlocutory injunction pending the outcome of the suit. Further that damages will not be a sufficient remedy where the suit land is sold. She submitted that the Plaintiff/Applicant should be allowed to exercise his right of redemption.

The 1st Defendant through its Counsel Mr. Odera opposed the application and submitted that the Plaintiff/ Applicant by alleging that there was no authority to swear an affidavit and also authority to plead is asking the court to disregard the replying affidavit, and this is alien procedure. He stated that it seems the Plaintiff/Applicant was trying to raise a preliminary objection through the back door. He referred the court to the case of **Mukhisa Biscuit Manufacturing Ltd Vs. West End Distributors (1969) E.A. 696** where the Court held that a preliminary objection should be raised through a substantive application to enable the court determine it first and not through submissions.

On the issue of authority to plead, He submitted that Justice Ogola in the Case of **Presbyterian Foundation and Anor. Vs East Africa Partnerships Limited (2012) eKLR** at page 45 he held that nowhere is it stated that such authority to swear a resolution of the board must be filed. This does not invalidate a suit and can be filed any time before a suit is set down for hearing. He submitted that the affidavit of Powleen Busena is not defective and should be allowed to remain. He stated that the Plaintiff/Applicant has raised an issue that the 1st Respondent is none suited and yet it is the applicant who filed the suit. The 1st Respondent changed its name from Equatorial Commercial Bank to Spire Bank vide Gazette Notice No. 4624 and Certificate of Change of Name No. 14 of 2000 was issued. He referred the Court to Section 66 (2)(3) of the Company Act of 2015 where it provides that a body can continue to commence proceedings in its former name or continue with suits under its new name, which is the current position in the instant case. He submitted that the confusion of interchanging terms as raised by the Plaintiff/Applicant does not exist because the Chargor is the Applicant and borrower. Further that in all the bank documents, the borrower remains WALLACE MWAURA and guarantor KAIRU NGANGA. He submitted that there is a signature verification stamp. He stated that the 1st Defendant has complied with Section 90 and 96 of the Land Act and issued requisite statutory notices. Further that service by registered mail is duly recognized in Kenya and that the authority from India is not applicable in Kenya. he further submitted that the applicant has not provided particulars of loss to be able to claim he will suffer from irreparable loss. On a balance of convenience, the applicant admitted the debt owed which continues to accrue interest, hence the 1st Defendant/Respondent is allowed to realize security.

### Issues and determination

The court has considered the materials presented and arguments canvassed by the respective parties in respect to the Notice of Motion dated 6th March, 2017 and analyzed that the following are the issues for determination:

- whether statutory notices were issued to the Plaintiff before Defendant exercised its statutory power of sale
- Whether the interlocutory injunction sought by the Plaintiff is warranted.

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 -
- sue the chargor for any money due and owing under the charge;
- appoint a receiver of the income of the charge land;
- lease the charged land, or if the charge is of a lease, sublease the land;
- enter into possession of the charged land; or
- sell the charged land.

Further section 96 (3) (c) stipulates as follows:

- “(3) A copy of the notice to sell served in accordance with Subsection (2) shall be served on-
- (c) a spouse of the chargor who had given the consent;

The principles for granting of temporary injunctions were settled in the case of **Giella Vs. Cassman Brown & Co. Ltd (1973) EA 358** as follows:

**"First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."**

Bearing this principle in mind, it behoves this honourable court to interrogate whether the applicant has made out a prima facie case with a probability of success at the trial. The question we need to ask is whether the 1st Defendant/Respondent failed to serve statutory notices upon the Plaintiff/Applicant as required by Sections 90 and 96 of the Land Act. From the annexures within the 1st Defendant's replying affidavit the answer is in the affirmative. It is worth noting that the Plaintiff's and 3rd Defendant's address on the charge document is the same address where the said notices were posted. 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. In the case at hand, the 1<sup>st</sup> Defendant served all the requisite notices via registered mail to the plaintiff/Applicant and 3rd Defendant/Respondent as proven in annexures 'PB 5', 'PB6', 'PB7', 'PB8', 'PB10', 'PB11', 'PB12' and 'PB 13' . Further, the Plaintiff/Applicant is the father to the 3rd Defendant/Respondent and the two had been sent for several notices before the suit property was advertised for sale by public auction. Service of notices by registered mail is an accepted mode of service under the Kenyan Law and the Court will disagree with the Plaintiff/Applicant and decline concur with the ruling from the **State of Karnataka & Others Vs. M. Muniraju**.

The Court notes that the Plaintiff/Applicant is not disputing the loan and has even confirmed the outstanding balance.

It is a long established legal rule that **“ . . . when part of amount claimed is admitted or proved to be due, a Chargee cannot be restrained by an injunction.”** This position has clearly been stated in the case of **LABELLE INTERNATIONAL LTD. AND ANOTHER –VS– FIDELITY COMMERCIAL BANK & ANOTHER, CIVIL CASE NO. 786 OF 2002.**

On the issue of technicality that the replying affidavit sworn by a POWLEEN BUSENA, Debt Recoveries Officer with the 1st Defendant does not contain a written authority to swear affidavit attached to the affidavit, it is the court's finding that the Plaintiff seeks to rely on technicalities. According to section 19(1) of the Environment and Land Court Act it is clear that in any proceedings to which this Act applies, the Court shall act expeditiously, without undue regard to technicalities of procedure and shall not be strictly bound by rules of evidence. Further article 159 (2) (d) of the Constitution stipulates that ' in exercising judicial authority, the courts and tribunals shall be guided by the following principles .....(d) justice shall be administered without undue regard to procedural technicalities.

This position is affirmed in the case of **Republic Vs. District Land Registrar, Uasin Gishu & Anor (2014) eKLR** where Justice Ochieng held that **.. to my mind, Justice is not dependent on Rules of Technical procedures. Justice is about doing the right thing. Pursuant to article 159 (2) (d) .....in exercising Judicial Authority, the courts ' in exercising judicial authority, the courts and tribunals shall be guided by the following principles .....(d) justice shall be administered without undue regard to procedural technicalities. '**

On the question of irreparable loss and damage, the Court notes that the Plaintiff/Applicant has not demonstrated what loss he will suffer if the suit land is sold.

From the above, it is clear that Plaintiff has not established a prima facie case to meet the threshold for the grant of orders of interlocutory injunction. I consequently dismiss the Plaintiff's Notice of Motion dated the 6th March, 2017 with costs.

**Dated signed and delivered in open court at Kajiado this 28th day of June, 2017.**

**CHRISTINE OCHIENG**

**JUDGE**

**REPRESENTATION.**

Miss. Obel for plaintiff

No appearance for defendants

Court Assistant - Mpoye