



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 148 OF 2017

TABITHA WANGECHI.....PLAINTIFF/APPLICANT

VERSUS

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

JOMUKI AUCTIONEERS.....2ND DEFENDANT/RESPONDENT

RULING

Tabitha Wangechi has come to court against **Paramount Bank Limited** and **Jomuki Auctioneers** praying for a temporary injunction be and is hereby issued restraining the defendants either acting by themselves, servants and or agents from alienating advertising for sale, offering for sale, selling, taking possession of, leasing transferring and or otherwise disposing off the whole of that parcel of land known as **SOUTH TESO/ANGOROMO/6191** pending the hearing and determination of the main suit and In the alternative, the time for compliance and/or rectifying any default to redeem that parcel of land known as SOUTH TESO/ANGOROMO/6191 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 or the defendants/respondents statutory power of sale be suspended and/or postponed for a period of 24 months or for such other period as the court may determine to enable the plaintiff/applicant redeem that parcel of land known as SOUTH TESO/ANGOROMO/6191. The application is based on grounds that:

- i. The plaintiff is the registered owner of land parcel number SOUTH TESO/ANGOROMO/6191.**
- ii. The plaintiff has a prima facie case within probability of success.**
- iii. The plaintiff will suffer irreparable loss and damages unless an order of injunction is issued.**
- iv. That the balance of convenience tilts in favour of the plaintiff.**
- v. That the defendant shall not suffer any prejudice.**

The applicant states that the respondent intends to sell her property in exercise of the statutory power of sale albeit the 1st defendant has never supplied her with any loan statement to reflect her loan progress and status. That the sale of the land is improper for the following reasons:

- a. No statutory notice of sale was issued to the plaintiff pursuant to section 96(2) of the Land Act, 2012.**
- b. The alleged realization process commenced by the defendants/respondents is a nullity in law.**
- c. The respondents have not issued her with a proper statutory notice that complies with section 90(1) of the Land Act, 2012.**
- d. No advertisement of the property has been done by the instructed Auctioneers.**
- e. No valuation of the property has been carried out.**
- f. The equity of the redemption is being clogged.**
- g. The defendant has not exhausted alternative remedies available before resorting to sale of the collaterals.**

The plaintiff states that she is ready and willing to pay the loan but she requires more time and the indulgence of the 1st defendant due to the financial hardship they are experiencing at the moment due to high competition from importers of maize from neighbouring countries. The chargee ought to have exercised another remedy before resorting to the power of sale. That based on the above reasons, she has a prima facie case with a high probability of success. That she will suffer irreparable damages should the suit parcel of land be sold by public auction. That the balance of convenience tilts in her favour.

The respondent on their part state through Charity Koech, the Branch Manager, Eldoret that the plaintiff was duly served with statutory notice dated 14.10.2016. Moreover, the plaintiff was duly served with statutory notice to sell dated 14.10.2016. The notice to sell dated 6.7.2017 was also served. Despite service, the plaintiff did not make the outstanding payments. The 1st respondent confirms having initially made a mistake by sending the auctioneers redemption notice before issuing the 40 days' redemption notice but the same was corrected and a 40 days' redemption notice dated 6.2.2017 was issued. Upon the expiry of the 40 days' redemption notice, the 1st respondent instructed auctioneers to issue fresh redemption notice dated 28.4.2017 together with the notification of sale. The plaintiff is indebted to the 1st defendant and therefore, she does not deserve the orders sought.

The plaintiff has responded to the replying affidavit by stating that she was called by the branch manager upon filing and serving this case who asked her why she had gone to court and yet the matter was being negotiated. She states that the manager called her and informed her that they would issue fresh instructions to the auctioneer to proceed and sell the property and that truly she did the same and proceeded to value the property.

The plaintiff submits that he has a prima facie case with a likelihood of success due to the fact that the process of sale was not adhered to. Moreover, that the property was not valued as required by section 97(2) of the Land Act No. 6 of 2012. The plaintiff further submits that if the sale is allowed, the plaintiff will suffer irreparable harm or damage. The plaintiff has made mesne investment. On balance of convenience, the plaintiff argues that the order should be issued to pre-empt an injustice on the plaintiff.

The defendant/respondent submits that the plaintiff/applicant has neglected to pay the outstanding amount that continues to accrue interest. The defendant has therefore served the plaintiff with a statutory notice of sale dated 14.10.2016 as per **section 90(1)(2)(3)(e) of the Land Act, 2012**. The plaintiff has neglected to pay. The defendant admits having agreed by initiating the auctioneers to issue a 45 days' notice before issued the 40 days' redemption notice, however, the same was rectified. There is a valuation report on record. The defendant submits that the applicant has not demonstrated that he is likely to suffer irreparable harm and that the respondent will not be able to compensate him in case they succeed in the suit.

I have considered the application and the replying affidavit with the rival submissions and do find that this application for injunction is premised on the process of realization of security charged to a bank by virtue of section 90 of the Land Registration Act No. 6 of 2012. There is no dispute that the plaintiff is indebted to the defendant and that the parcel of land in dispute was used as security for the debt. I do find that the defendant issued the plaintiff with notice as per section 90(1)(2)(3)(e) of the Land Act, 2012. The plaintiff did not pay. The 40 days redemption notice was given by the defendant followed by the 45 days' redemption notice by the Auctioneers but no payment was made.

The property was thereafter valued as required by law. I do find that the plaintiff has not demonstrated that the defendant is exercising the power of sale unprocedurally and therefore, has failed to demonstrate a prima facie case with a likelihood of success.

On irreparable harm that is not likely to be compensated with damages, I do find that by offering the property as security was equating it to a commodity of sale which the chargee may dispose of, so as to recover his loan together with interest thereon.

Even if I were to consider the balance of convenience, I would find that it tilts towards not granting the injunction as the debt is likely to outstrip the value of the property and that the chargee's business is to give loans and therefore, if the money is not repaid, he is likely to be inconvenienced more than the chargor. Ultimately, the application for injunction is dismissed with costs.

Dated and delivered at Eldoret this 21st June of June, 2018.

A. OMBWAYO

JUDGE