REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

THIKA LAW COURTS

ELC CASE NO.715 OF 2017

BETRUDA WAIRIMU MIGWI.....1ST PLAINTIFF/APPLICANT

NJOROGE GUITATI.....2ND PLAINTIFF/APPLICANT

-VERSUS-

U&I MICROFINANCE BANK LIMITED.....1ST DEFENDANT/RESPONDENT

STANSLEY T. MUGACHA

T/A GALAXY AUCTIONEERS.....2ND DEFENDNT/RESPONDENT

RULING

The Plaintiffs/Applicants herein filed an ***Originating Summons*** dated ***21st August 2017*** and sought for determination of the following questions:-

> ***1) Whether the 1st and 2nd Defendants should be restrained from selling Land Title No.Kabete/Karura/2806 while the 1st Plaintiff continues paying loan.***
>
> ***2) Whether the 1st Defendant should be compelled to adjust the interest loan charged on the land to comply with the law.***
>
> ***3) Costs of the suit.***

The Plaintiffs averred that on ***18th January 2016***, the 1st Plaintiff entered into a loan agreement with the 1st Defendant wherein she was advanced ***Kshs.1,890,000/=*** at the rate of ***22% per annum***. However, she fell into arrears from ***October 2016*** as her business went down significantly after she fell ill. However in ***June 2017***, she deposited ***Kshs.250,000***/= towards payment of the loan account and further ***Kshs.50,000/=*** on ***August 2017,*** making a total of ***Kshs.300,000/=.*** It was also alleged that even with the above payments, the 2nd Plaintiff was served with a ***Redemption Notice*** by the 2nd Defendant threatening to sell the suit property ***Kabete/Karura/2806,*** which was used a security. Further that true to the said threat, the 2nd Defendant with instructions from the 1st Defendant advertised the property for sale by ***Public Auction*** on ***4th September 2017*** through the ***Daily Nation*** of ***14th August 2017***, ***BWM-10.***

It was further alleged that though the 1st Plaintiff had paid a total sum of over ***Kshs.1,000,000/=*** , the ***Redemption Notice*** showed the amount owing was ***Kshs.1,740,247.76*** which was variance with what was reflected in the ***Statement BWM-3*** being ***Kshs.1,614,815.21***. Further that she was being charged interest at the rate of ***22%*** though she had been informed by her advocate on record that from ***September 2016***, the interest rate on loans by the banks and financial institutions was capped at not more than ***4%*** above the base rate set by Central Bank of Kenya. She therefore urged the Court to stop the 1st Defendant from carrying on with the intended sale as it will vest grave injustice and prejudice to her and her family.

Simultaneously, the Plaintiffs/Applicants filed a ***Notice of Motion*** application even dated and sought for the following orders:-

> ***1) Spent.***
>
> ***2) Spent.***

3) That a temporary injunction be issued restraining the 1st and 2nd Defendant/Respondent, their servants, agents, or any other person claiming through them from interfering with the Plaintiff's/Applicant's quiet possession of Land title No.Kabete/Karura/2806 or alienating, transferring, disposing and/or dealing with the property in any manner adverse to the proprietary interests of the Plaintiff/Applicant pending the hearing and determination of this suit.

4) That costs of this application be provided for.

The said application was supported by the grounds stated on the face of the application and ***Supporting Affidavit*** of ***Betruda Wairimu Migwi***, the 1st Applicant herein. Among the grounds in support is that though the 1st Plaintiff/Applicant has already paid a total sum ***Kshs.300,000/=*** to defray the loan arrears, the 1st Defendant has already instructed the 2nd Defendant to sell the suit property ***LR.No.Kabete/Karura/2806*** by ***Public Auction*** and the 2nd Defendant has already advertised the said sale thereof set for ***4th September 2017***.

The application is vehemently opposed by the Defendants/Respondents herein ***Philip Gitau***, the ***Credit Manager*** of the 1st Defendant/Respondent swore a ***Replying Affidavit*** and averred that a ***legal charge*** was registered at ***Kiambu Lands Registry*** on ***22nd February 2016***, wherein the 2nd Plaintiff/Applicant charged his land parcel known as ***Kabete/Karura/2806,*** with the 1st Defendant for a loan facility of ***Kshs.1,890,000/=*** which sum was duly disbursed to the 2nd Plaintiff as the borrower. That it was the term of the said agreement that the said loan of ***Kshs.1,890,000/=*** was to be repaid vide ***36 monthly instalments*** of ***Kshs.72,180/=.***

However, the 1st Plaintiff defaulted in the loan repayment and subsequently, the 1st Defendant issued her with various requests to service the said loan and/or regularize the account which she failed to do. Thereafter, the 1st Defendant issued her with ***Ninety (90) days Statutory Notice*** which was send to the 2nd Plaintiff on ***20th January 2017*** as is evident from ***annexture PG-5*** and ***PG–6***. However, the Plaintiffs failed to honour the ***Statutory Notice*** and subsequently, the 1st Defendant instructed the 2nd Defendant to commence the process of realization of the charged security pursuant to which the 2nd Defendant issued the 2nd Plaintiff with ***45 days Redemption Notice (PG-7), Notification of Sale (PG-8***) and advertised the sale in the ***Daily Newspaper (PG-9).*** He further averred that since the Plaintiffs had breached the terms of the subject loan and therefore the 1st Defendant was justified in exercising its ***Statutory Power of Sale***.

Further, that the 1st Defendant is registered under ***"The Microfinance (Amendment) Act 2013*** and is not subject to the capping of the interests rates subjected to the institutions registered under the ***Banking Act (Cap 488***). He also averred that since the Plaintiffs/Applicants have admitted default in servicing the subject loan facility and the 1st Defendant was within its right to exercise its remedies availed in the ***charge document annexture PG-1***, then the Plaintiffs/Applicants are not deserving of the orders sought.

The 1st Plaintiff/Applicant ***Betruda Wairimu Migwi*** filed a further affidavit and reiterated the contents of the ***Supporting Affidavit*** and further stated that the Defendants demand of ***Kshs.1,740,247.76*** was the basis upon which it wants to exercise its ***Statutory Power of Sale***. However, the 1st Plaintiff/Applicant has already paid a sum of ***Kshs.1,045,204/=*** out of the principal of ***Kshs.1,890,000/=*** and yet the Defendant is still demanding ***Kshs.1.7 Million*** instead of *Kshs.800,000/=*. Further, that she is committed to servicing the loan and should the Defendant/Respondent be allowed to dispose off the said property, which is her only matrimonial property, then she will suffer irreparable loss which cannot be compensated by an award of damages. It was her contention that the suit property has a ***forced value of Kshs.800,000/=***, whereas the Defendant is purporting to sell it for recovery of ***Kshs.1.7 Million***. She urged the Court to allow her application.

This application was canvassed by way of ***written submissions*** which this Court has carefully read and considered. The Court has also considered the pleadings in general and the annextures thereto. Further, the Court has considered the relevant provisions of law and it renders itself as follows:-

The application herein is anchored under ***Order 40 Rule 1 &*** 2 of the ***Civil Procedure Act***. The said ***Order 40 Rule 1*** grants the court discretion to issue temporary injunction where a property in dispute is in danger of being ***alienated, damaged, wasted, removed, sold*** and/or being ***disposed***. As usual the said discretion must be exercised judicially. See the case of ***David Kamau Gakuru…Vs..National Industrial Credit Bank Ltd, Civil Appeal No.84 of 2001***, where the Court held that"-

"It is trite that the granting of interim injunction is an exercise of judicial discretion and an Appellate Court will not interfere unless it is shown that the discretion has not been exercised judicially".

The Court will also take into account that at this stage interlocutory juncture, it is not called upon to decide the disputed issues with a finality. All that the court is supposed to determine now is whether the Applicants are deserving of the injunctive orders sought based on the usual criteria that was laid down in the case of ***Giella…Vs…Cassman Brown & Co. Ltd 1973, EA 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.

The Court is therefore called to determine whether the Applicant herein has established the above stated criteria to qualify for injunctive orders. Firstly, the Applicants had a duty to establish that they have a *prima-facie* case with probability of success at the trial. *Prima-facie* case was described in the case of ***Mrao Ltd… Vs… First American Bank of Kenya Ltd & 2 Others (2003) KLR 125***, to mean;-

> ***"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 a explanation or rebuttal from the latter"***

Has the Applicants herein been able to demonstrate that the Defendants herein have infringed on their rights and that their case has probability of success at the trial?

There is no doubt that the Plaintiffs and the 1st Defendant signed loan agreement on ***18th January 2016***, wherein the 1st Plaintiff borrowed a sum of ***Kshs.1,890,000/=*** from the 1st Defendant. The said loan was secured by title deed ***No.Kabete/Karura/2806***, which title deed was in the name of ***Njoroge Guitati***. It is also not in doubt that the said loan facility was repayable by ***36 monthly instalments*** of ***Kshs.72,180/=***. The said loan was guaranteed by ***Njoroge Guitati*** who signed a letter of guarantee and indemnity on ***18th January 2016***. Subsequent thereto, a legal charge was drawn over the suit property and ***Njoroge Guitati*** was the Chargor and ***Betruda Wairimu Migwi***, the borrower. It is also evident from the loan agreement that the rate of interest was ***22% per annum*** or such terms to be determined by the lender from time to time. Therefore, it is clear that the parties herein are bound by the terms of their agreement (contract) and this Court cannot rewrite the contract for them. See the case of ***Emo Investment Ltd...Vs...Stephanus Petrus Kiinge (2010) eKLR***, which quoted the case of ***National Oil...VS...Pipeplastic Samkolit (K) Ltd & Prof Samson K. Ongeri (CA No.95 of 1999***, where the Court held that:-

> ***"A court of law cannot rewrite a contract between the parties. The parties are bound by their contract, unless coercion, fraud or undue influence are pleaded and proved".***

It is evident that the Plaintiffs herein entered into the said loan agreement with the 1st Defendant with the understanding that the interest rate was ***22%*** and they cannot now turn around and dispute the same.

Further in the said loan agreement, the borrower had a duty and obligation to pay the monthly instalments and she consented to the said terms of the loan agreement. It is also evident that once the Chargor secured the loan by charging his land parcel ***No. Kabete/Karura/2806***, he was made aware that in default of payment of the loan, the Chargee was at liberty to exercise its rights as provided by the law. Indeed the Chargor or the Borrower was made aware of the effect of ***Section 90*** of the ***Land Act*** and the Chargee's remedies under the said charge. Section 90 of the Land Act indeed provides for remedies that are available to a Chargee and one of such remedy is selling of the charged land. It is apparent that once the suit property was charged, it became a commodity for sale. See the case of ***Abuldirahim....Vs...Eco Bank Kenya Ltd & Another (2012) eKLR***, where the Court held that:-

> ***"Once a property has been charged to secure financial accommodation it ipso facto becomes a commodity for sale in the event of default in payment of the debt secured".***

The Plaintiffs/Applicants admit that from ***October 2016***, she ran behind in repayment of the monthly instalments. The 1st Defendant/Respondent on its part alleged that after the Plaintiffs failed on their loan obligations, it issued a ***Statutory Notice*** as provided by the law. Thereafter, 1st Defendant issued a ***45 days Redemption Notice*** and ***Advertisement for Sale*** of the suit property. Therefore the 1st Defendant acted within the law in exercising its rights as provided under the law specifically ***Sections 90*** and ***96*** of the ***Land Act***.

Though the Plaintiffs/Applicants are in default, they have not offered any schedule of how they would pay the loan amount. The Plaintiffs/Applicants are now disputing the amount claimed by the 1st Defendant. They have not disputed that they are in default and the Court cannot restrain the 1st Defendant/Respondent from exercising its Power of Sale on account of the amount due. See the case of ***Palming Company Ltd...Vs...Consolidated Bank of Kenya Ltd (2014) eKLR***, where the Court held that:-

> ***"The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute..."***

Therefore, this Court finds that the Plaintiffs/Applicants are in default. They were bound by the terms of the charge document signed by the parties herein. The 1st Defendant is rightfully exercising its remedies under the charge and exercise of Statutory Power of Sale ***under Section 96(1)*** of the ***Land Act*** as one of such remedies.

Consequently, the Court finds that the Plaintiffs/Applicants have not established that they have a *prima-facie* case with probability of success at the trial and that their rights have been infringed by the Defendants herein.

On the second limb, on whether the Applicants would suffer irreparable loss which cannot be compensated by an award of damages, the Court finds that the Plaintiffs have alleged that the suit property herein is their matrimonial property and if sold, they would be rendered destitute and thus would suffer irreparable loss which cannot be compensated by any damages. It is not in doubt that the Plaintiffs did charge the suit property while knowing very well that it is their matrimonial property and in the event of default, it was bound to be sold.

They cannot now ask the court to halt the intended sale while they themselves are in default. See the case of ***Daniel Ndonge Ndirangu...Vs...Barclays Bank of Kenya Ltd & Another, Nakuru HCCC No.8 of 2012, (B)***, where the Court held that:-

> ***"It must also be noted that when a Chargor lets loose its property to a Chargee as security for a loan or any other commercial facility on the basis that in the event of a default, it be sold by the Chargee, the damages are forseable. The security is henceforth a commodity for sale or possible sale without prior concurrence and consent of the Chargor. How can he having defaulted to pay loan arrears prompting a Chargee to exercise its Statutory Power of Sale claim that he is likely to suffer loss and injury incapable of compensation by an award of damages".***

The suit property herein is ascertainable and any loss that the Plaintiffs would suffer is capable of being remedied or compensated by an award of damages. Further the Plaintiffs/Applicants can also have remedy as provided by ***Section 99(4)*** of the ***Land Act*** which provides:-

> ***"A person prejudiced by an unauthorised, improper or irregular exercise of the power of sale shall have a remedy in damages against the person exercising that power".***

Consequently, the Court finds that the Applicants have not established that they will suffer irreparable loss which cannot be compensated by an award of damages.

On the third limb, the Court finds that it is not in doubt. However, even if the court was to decide on balance of convenience, the same would tilt in favour of the 1st Defendant who lent out money to the Plaintiffs/Applicants and if it is not allowed to exercise its remedy under the charge, the loan amount might outstrip the value of the land charged. See the case of ***Andrew M. Wanjohi...Vs...Equity Building Society & 7 Others (2006) eKLR***, where the Court held that:-

> ***"….if the 1st and 2nd Defendants were restrained from selling off the suit property, 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. …… the stoppage of the intended sale by the chargee would result in the continued growth of the debt and thus exposing them to potentially substantial irrecoverable loss"***.

Being persuaded by the above holding of the court, this Court equally finds that the balance of convenience tilts in favour of the Defendants herein.

On the issue of the charged interest rates, that is an issue that cannot be adequately delt with at this juncture but would require calling of evidence at the main trial. The Court would therefore not make any determination on whether the interest charged on the Plaintiff is the correct percentage or not. However, as the Court held earlier, parties are bound by the terms of their contract and the Court cannot rewrite the said contract at all.

Having now carefully considered the instant ***Notice of Motion*** dated ***21st August 2017***, the ***Court finds it not merited*** and ***the same is consequently dismissed entirely with costs to the Defendants/Respondents.***

It is so ordered.

Dated, Signed and ***Delivered*** at ***Thika*** this ***19th day*** of ***June 2018***.

L. GACHERU

JUDGE

In the presence of

2nd Plaintiff present in persons

No appearance for 1st Defendant/Respondent

No appearance for 2nd Defendant/Respondent

Lucy - Court clerk.

L. GACHERU

JUDGE

Court – Ruling read in open court in the presence of 2nd Plaintiff and absence of the other parties.

ii) This matter is forthwith transferred to Kikuyu SPM Court for hearing and determination.

L. GACHERU

JUDGE

19/6/2018