



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA IN BUSIA**

**ENVIRONMENT AND LAND COURT**

**ELC NO. 5 OF 2018**

**ZEKI WANJALA WANYAMA**

**T/A ZEKI MOTORS AGENCIES .....APPLICANT**

**VERSUS**

**NIC BANK KENYA LIMITED .....1<sup>ST</sup> RESPONDENT**

**GARAM INVESTMENTS AUCTIONEERS.....2<sup>ND</sup> RESPONDENT**

**R U L I N G**

1. I am called upon to determine a Notice of Motion dated 24/1/2018 filed here on 25/1/2018, contemporaneously with a suit of even date. The applicant – **ZEKI WANJALA WANYAMA T/A ZEKI MOTORS AGENCIES** – is the Plaintiff in the suit while the Respondents – **NIC BANK KENYA LIMITED** and **GARAM INVESTMENTS AUCTIONEERS** – are sued as Defendants. The application is brought under Sections 1A, 1B, 3, 3A and 63 of Civil Procedure Act (cap 21), Order 40 rules 1 and 2, Order 51 rule 1 of Civil Procedure Rules 2010, and all other enabling law.

2. The application came with five (5) prayers, three, (3) of which were handled at the exparte stage, leaving two – prayers (d) and (e) - for consideration at this stage. The prayers for consideration are as follows:

Prayer (d): That this honourable court be pleased to

grant an order of injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/Respondents either by themselves, agents or servants from proceeding with execution pending the hearing of the suit.

Prayer (e): That costs of this application be provided for.

3. The grounds advanced in support of the application show the Respondents being blamed in various ways. The 1<sup>st</sup> Respondent is faulted for not coming clear on the amount owed and failing to issue a statutory notice of sale as by law required. The Respondents are blamed also for not conducting a forced sale valuation of the property intended to be sold.

4. Some background is necessary: The Applicant charged his property – E. BUKUSU/S. KANDUYI/2018 – to the 1<sup>st</sup> Respondent for a loan sometimes in the year 2013. The loan was meant for improvement of the Applicant’s hotel business and was actually expended on the purpose but things did not work out as expected. There was an agreed mode of repayment and the Applicant defaulted. The problem he faces now is related to his indebtedness to the 1<sup>st</sup> Respondent.

5. The mounting arrears in repayment and the Applicant’s continued inability to honour his obligations impelled the 1<sup>st</sup> Respondent to initiate the process of selling the charged property in order to realise its monies. The Applicant is faulting the process and is alleging that it is fraught with irregularities. To him, the amount owed is not clear and the requisite notices – the 90 days Statutory Notice of Sale and the 40 days notification of sale – were not issued. And the property, the Applicant fears, may be sold below its market value as the forced – sale valuation required by law was allegedly not conducted.

6. The Respondents replied vide a replying affidavit filed on 5/2/2018. The Applicant was accused of gross distortion of facts and the grounds he advanced to support his application were said to be a sham. It was pointed out that the applicants indebtedness to the 1<sup>st</sup> Respondent was admitted and the 1<sup>st</sup> respondent averred it has an accrued right to exercise its statutory power of sale of the charged property.

7. The response also contains some history, background, and antecedents relating to dealings leading to and/or surrounding the loan given. The Applicant is said to have defaulted in repayment. And as a rebuttal to the Applicant's averment that the requisite notices were not issued to him, two notices – 90 days Statutory Notice of Sale and a 40 days Notice of Sale (marked "KM-5"), with copies to Applicant's spouse – were availed and shown to have been served through the address given by the Applicant himself.

8. The Applicant filed a supplementary affidavit responding to the averments made by the Respondents in the replying affidavit. The supplementary affidavit reiterates the averments earlier made by the Applicant.

9. The application was argued before me on 12/2/2018. Maloba for the Applicant repeated the assertions made in the application while Mugisha for the Respondents weighed in with rebuttals generally contained in the replying affidavit.

10. I have considered the application, the responses made, rival arguments, and the suit generally. To my mind, the Applicant is saying that forced – sale valuation was not done and that the requisite notices were not issued. He is saying too that what he owes is not clear. And it is because of all this that he wants a temporary injunction. It is crucial to realise that the Applicant admits that he has defaulted in payment. The law has spoken to all these situations several times in clear and unequivocal language. And here we go.

11. In **JOSEPH OKOTH WAUDI Vs NATIONAL BANK OF KENYA: CA Civil Appeal No. 77/2004, MOMBASA** (unreported), it was held, *inter alia*, that a court will not restrain a mortgagee from exercising its power of sale because the amount due is in dispute or because the mortgagor has begun a redemption action or because the mortgagor objects to the manner the sale is being arranged. According to the court, an injunction can only be issued if the mortgagor pays the amount claimed in court or if it is demonstrated that what is claimed is excessive. This same position emerged in the decided cases of **LAVUNA & Others Vs CIVIL SERVANTS HOUSING CO. LTD & Another: CIVIL APPEAL No. 14/1995, NAIROBI**, (unreported) and **MIDDLE EASE BANK (K) LTD Vs MILLIGAN PROPERTIES LTD: CIVIL APPEAL No. 194/1998** (unreported).

12. In **HALSBURY'S LAWS OF ENGLAND, 4<sup>th</sup> edition, Vol. 32, para 725**, the same point is succinctly made in the following terms:

**“The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has begun redemption action, or because the mortgagor objects to the manner in which the sale is being arranged. He will be restrained however if the mortgagor pays the amount in court, that is the amount which the mortgagee claims is due to him, unless on the terms of the mortgage, the claim is excessive”.**

13. In the past, the courts used to be very rigid and/or strict where errors or irregularities were noticed in the process of sale. The new Land Act, 2012, somewhat relaxes this by acknowledging that errors can be made. At Section 104(2) it is provided as follows:

**Section 104(2): A court may refuse to authorise an order or may grant any relief against the operation of a remedy that the circumstances of the case require and without limiting the generality of powers, may**

(a) .....

(b) .....

(c) .....

**(d) authorise or approve the remedy applied for or proposed by the chargee, notwithstanding that some procedural errors took place during the making of any notices served in connection with that remedy if the court is satisfied that:**

**(i) The chargor or other person applying for relief was made fully aware of the action required to be taken under or in connection with the remedy; and**

**(ii) no justice will be done by authorising or approving the remedy, and may authorise or approve that remedy on any conditions as to expenses, damages, compensation or any other relevant matter as it thinks fit.**

14. The import of all this is that errors or mistakes can be disregarded or overlooked if the justice of the case so requires. All what is required is that the Applicant for a remedy like the one sought in this case is fully made aware of the action required to be taken to obviate the action that the lender intends to take. A look at paragraphs 15 and 16 of the Respondents replying affidavit shows that the Applicant was fully made aware of what needed to be done. This court itself is satisfied that no injustice will be done to the Applicant bearing in mind that he has acknowledged his indebtedness to the 1<sup>st</sup> Respondent. It seems to me that in the circumstances of this case, it is the 1<sup>st</sup> Respondent, not the Applicant, who may end up suffering an injustice.

15. And in matters of this nature, it is important for the applicant to undertake to pay damages. The Applicant here has not done so. In **GATI Vs BARCLYAS BANK (K) LTD (2001) KLR 525**, the court held, *inter alia*, that an undertaking as to damages is one of the criteria for granting an injunction and where none has been given an injunction cannot issue.

16. Further, in **HELGA Vs CHARLES MUMBA MWAGANDI [2008] eKLR**, Njagi J (as he then was) cited with approval the reasoning of the court of appeal in **MUREITH Vs CITY COUNCIL OF NAIROBI [1976 – 1985] EA 331** where Madan JA (as he then was) observed as follows:

**“the object of interlocutory injunction is to protect the Plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial ..... if damages in the measure recoverable at common law would be an adequate remedy and the Defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the Plaintiff’s claim appeared to be at that stage”.**

17. Yes, it is clear that the Applicant has not undertaken to pay damages. It is clear too that the 1<sup>st</sup> Respondent in this case is capable to pay damages should the Applicant ultimately get a decision in his favour. I make this observation here because the 1<sup>st</sup> Respondent as a bank is a going concern.

18. When all is considered therefore, it is clear that the law does not favour the grant of temporary injunction in this matter. In making my final decision, I bear in mind the words of Ojwang J (as he then was) in **KOMBE and Another Vs DIAMOND TRUST BANK LTD & Another; HCC No. 15 of 2010, MOMBASA** where he remarked as follows:

**“To offer a property as security for a mortgage loan, or any other kind of banking facility, is to place that property on the market allowing for its monetary valuation, and is to commit the proprietor to a cash – recompense, if need be. Generally therefore, the person who gives such property as security should not be seeking injunctive relief save where there is some very weighty cause justifying a contrary inference”.**

19. The Applicant here admits he owes. What he owes continues to increase. He has not demonstrated genuine commitment to make payment. It would not be fair to grant injunctive relief in this matter.

20. The upshot is that the application herein is found unmeritorious and the same is hereby dismissed with costs.

**Dated, signed and delivered at Busia this 30<sup>th</sup> day of October, 2018.**

**A. K. KANIARU**

**JUDGE**

**In the Presence of:**

Applicant: Present

1<sup>st</sup> Respondent: Absent

2<sup>nd</sup> Respondent: Absent

Counsel of Applicant: Present

Counsel of 1<sup>st</sup> Respondent: Present

Counsel of 2<sup>nd</sup> Respondent: Present