



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. CASE NO. 451 OF 2017

MUKAVI WAYS COMPANY LIMITED.....PLAINTIFF

VERSUS

FAMILY BANK LIMITEDDEFENDANT

RULING

1. In the Application dated 14th November, 2017, the Plaintiff is seeking for the following orders:

a. That there be a stay of the Redemption Notice dated 4th October, 2017 issued by Antique Auctions Agencies pending hearing and determination of this Application.

b. That the Redemption Notice dated 4th October, 2017 issued by Antique Auctions Agencies be set aside and quashed.

c. That the Defendant/Respondent herein by themselves, their agents, servants, employees or anyone acting on their direction be restrained from advertising for sale, selling, disposing, alienating or in any other way adversely dealing with Land Parcel No. L.R 337/2351 (I.R 85431) Athi River, Machakos County pending hearing and determination of the instant Application and the main suit.

d. That the costs of the instant Application be borne by the Defendant/Respondent.

2. The Application is supported by the Affidavit of the Plaintiff's Director who has deponed that the Plaintiff entered into a financial arrangement with the Defendant; that the Defendant offered to the Plaintiff a revolving LPO Financing Facility amounting to Kshs. 22,000,000 which was secured by a charge over L.R No. 337/2351 and that they were given an additional financing to the tune of Kshs. 3,000,000.

3. The Applicant deponed that the monies that the Defendant advanced to the Plaintiff were being utilized to undertake projects within the Kitui County; that although they completed undertaking projects in the County, they are yet to be paid by the County and that they are in arrears to the tune of Kshs. 22,779,777.

4. The Plaintiff's Director deponed that his efforts to discuss the issue of extending the period within which to defray the outstanding amount have not yielded much; that from the statement of account, their account is not overdrawn and that parties ought to take accounts before the scheduled auction can take place.

5. The Director of Mutomo Commercial Enterprises deponed that owing to the cash crisis within Counties due to non-disbursement of funds from the National Treasury, the County Government of Kitui has been unable to honour its obligations; that the bank has never served him with the notice pursuant to the provisions of Section 90(1) of the Land Act and that the service of a Redemption Notice on them is an ambush.

6. The Defendant's Senior Legal Counsel deponed that the Defendant disbursed Kshs. 22,000,000 on the Plaintiff's account; that a further sum of Kshs. 19,000,000 was credited on the Plaintiff's account by the Defendant and that the Plaintiff is in arrears of Kshs. 22,503,777 as at 7th November, 2017.

7. The Defendant's Senior Legal Officer deponed that the Defendant issued the three (3) months statutory demand notice under Section 90(1) of the Land Act which was addressed to Michael Kivoto and copied to the Plaintiff; that another notice dated 23rd August, 2017 was issued to Michael Kivoto and copied to the Plaintiff and that Messrs Antique Auctions Agencies served on the Plaintiff a forty five (45) days Redemption Notice which was duly received by the Plaintiff.

8. The Director of Mutomo Commercial Enterprises filed a Supplementary Affidavit in which he deponed that he was never served with the statutory notices; that the certificates of posting are not clear on when they were posted and that they have continued to pay the amount due to the bank.

9. In his submissions, the Plaintiff's advocate submitted that by design, the certificate of posting annexed on the Defendant's Affidavit was obfuscated so that it was practically impossible to tell when the alleged notice was served; that non-compliance with Section 90 of the Land Act rules the subsequent actions by the Defendant's worthless and that the instant Application should be allowed.

10. In his submissions, the Defendant's advocate submitted that the Defendant served the Plaintiff with the Statutory Notices pursuant to Section 90 of the Land Act; the forty (40) days notice was also served on the Plaintiff pursuant to the provisions of Section 96 of the Act and that the Plaintiff was also served with the forty five (45) days Redemption Notice.

11. The Defendant's advocate submitted that the Plaintiff is not disputing the fact that the loan account is in arrears and that the Plaintiff must come up with a viable solution that will make the Defendant to be inclined to award them a grace period.

12. It is not in dispute that the Defendant granted to the Plaintiff a Revolving Fund Facility of Kshs. 22,000,000, with a further sum of Kshs. 19,000,000 being granted vide a letter dated 23rd February 2016. According to the Plaintiff's Director, the monies were utilized to carry out some development activities in Kitui County by the Plaintiff. However, the Kitui County Government has not been able to pay them for the work done.

13. The Plaintiff has not denied that Michael Blad Ford Kivoto charged L.R. No. 337/2351-Machakos in respect to the facilities that were offered to the Plaintiff by the Defendant. Indeed, the Plaintiff's Director acknowledged in his Affidavit that by the time the suit was filed, the Plaintiff was owing the Defendant a sum of Kshs. 22,503,777. Having admitted that the Plaintiff owes the Defendant a sum in excess of Kshs. 20,000,000, it follows that the Defendant had a right to exercise its statutory power of sale. In the case of *Mrao Limited vs. First American Bank of Kenya Ltd & 2 others, (2003) eKLR*, the court held as follows:

“The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has began a redemption action, or because the mortgagor objects to the manner in which the sale is being arranged.”

14. The Plaintiff having admitted that he owes the Defendant the loaned amount, the only issue that I am to determine is whether the chargee and the borrower were served with the statutory notices under Section 90 and 96 of the Land Act. Section 90(1) of the Land Act provides as follows:

“If a chargor is in default of any obligation, 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 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.”

15. After the notice under Section 90 of the Land Act is served, the chargor is required to serve on the chargee and the borrower another notice under Section 96(2) of the Land Act. The said Section provides as follows:

“(2) the notice required by subsection (1) shall adequately inform the recipient of the following matters-

a) the nature and extent of the default by the chargor;

b) if the default consists of the non-payment of any money due under the charge, the amount that must be paid to rectify the default and the time, being not less than three months, by the end of which the payment in default must have been completed;

c) if the default consists of the failure to perform or observe any covenant, express or implied, in the charge, the thing the chargor must do or desist from doing so as to rectify the default and the time, being not less than two months, by the end of which the default must have been rectified;

d) the consequence that if the default is not rectified within the time specified in the notice, the chargee will proceed to exercise any of the remedies referred to in this section in accordance with the procedures provided for in the sub-part; and

e) the right of the chargor in respect of certain remedies to apply to the court for relief against those remedies.”

16. The chargee has deponed that he was never served with the said statutory notices and that in any event, the copies of certificates of posting annexed on the Defendant's Affidavit are not clear on the date that the alleged notices were posted.

17. The Defendant's Legal Officer has annexed on his Affidavit a copy of the letter dated 23rd May, 2017 addressed to the chargee. Indeed, the chargee has not denied that the postal address indicated in the said notice is his.

18. In the said notice, the chargee and the borrower were required to pay to the Defendant a sum of Kshs. 23,465,997 at the rate of 14% per annum until settlement in full. The notice showed that it was issued pursuant to the provisions of Section 90(2) (e) and 103 of the Land Act.

The annexed copy of the certificate of posting has a stamp of the Postal Corporation of Kenya showing that the letter was posted on 15th June, 2017. The issue of the date of 15th June, 2017 not being clear does not therefore arise.

19. The Defendant again issued a notice dated 23rd August, 2017 to the Plaintiff and the chargee pursuant to Section 90 of the Land Act. In the said notice, the Plaintiff and the chargee were required to pay the sum of Kshs. 21,845, 790.56 together with interest at the rate of 14% per annum within forty (40) days. The certificate of posting was attached on both the Defendant's Legal Officer's Supporting Affidavit and his Further Affidavit. Although the date of postage on the certificate of posting is not clear, I am clear in mind that the said notice was sent by registered post to the Plaintiff and the chargee on or immediately after 23rd August, 2017.

20. Both the Plaintiff and the chargee have admitted that they received the Redemption Notice. Indeed, one of the prayers that the Plaintiff is seeking is for the setting aside of the Redemption Notice dated 4th October, 2017 issued by Antique Auctions Agencies.

21. Having been satisfied that the Plaintiff and the chargee were served with the statutory notices as per the law, and the Plaintiff having admitted that it owes the Defendant the money that it borrowed, I find and hold that the Plaintiff has not established a prima facie case with chances of success. The Defendant's statutory power of sale having crystallized, the issue of the Plaintiff suffering irreparable damages that cannot be compensated by way of damages does not arise. For those reasons, the Plaintiff's Application dated 14th November, 2017 is dismissed with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 26TH DAY OF OCTOBER, 2018.

O.A. ANGOTE

JUDGE