



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CASE NO.655 OF 2017

LUCY WAMBUI KARANJA.....1ST PLAINTIFF/APPLICANT

CONNECT TRAVEL LIMITED.....2ND PLAINTIFF/APPLICANT

-VERSUS-

CHASE BANK KENYA LIMITED (In Receivership)....1ST DEFENDANT/RESPONDENT

ROBERT WAWERU MAINA T/A ANTIQUE

AUCTIONS AGENCIES.....2ND DEFENDANT/RESPONDENT

RULING

The matter for determination is the Plaintiffs/Applicants *Notice of Motion* application dated **12th July 2017** wherein the Applicants have sought for the following orders against the Defendants/Respondents:-

1) That the Honourable Court be pleased to issue an interim order of injunction restraining the Defendants/

Respondents by themselves, their employees, servants and/or agents from selling and/or disposing of, entering upon, interfering with or in any other manner whatsoever dealing with the parcels of land known as Title No. Sigona/1466, Title No.Sigona/1467, Title No.Sigona/1468 and Title No.1469 until the final hearing and determination of the suit herein.

2) Accounts to be taken to determine the actual amount owing by the 2nd Plaintiff to the 1st Defendant.

3) The cost of this application be provided for.

The said application is supported by the grounds set on the face of the application and the **Supporting Affidavit** of **Lucy Wambui Karanja**. These grounds are:-

i. The 1st Plaintiff is the bonafide owner of all that those parcels of land known as Title No. Sigona/1466, Title No.Sigona/1467, Title No.Sigona/1468 and Title No.1469, which were charged to the 1st Respondent to secure the borrowing of the 2nd Plaintiff.

ii. The 1st Defendant/Respondent in breach of the terms of the charge, instructed the 2nd Defendant/Respondent to proceed to advertise the 1st Plaintiff's properties for sale without issuing the requisite Statutory Notices.

iii. The 2nd Defendant/Respondent has gone ahead to advertise the 1st Plaintiff's properties for sale in the Daily Nation Newspaper of Tuesday 4th July 2017 which sale was to take place on Wednesday 19th July 2017 at 11am, in breach of Section 70 of the Registered Land Act Cap 300 (repealed) and Section 96(2) of the Land Act 2012.

iv. The Plaintiffs have been frustrated by the 1st Defendant in that copies of the security documents including the legal charges have been released to them as late as 30th June 2017, giving them little time to peruse the same and instruct their lawyers.

v. The 1st Defendant/Respondent has by itself, its servants and/or agents failed to account for an excess payment of Kshs.1,430,000/= made on the short term loan account, which ought to have been considered when the 2nd Plaintiff's debt with

the 1st Defendant was been restructured, as a result of which actual principal amount used by the 1st Defendant and its calculations on interest payments is wrong as can be gleaned from the Bank Statements.

vi. *That unless the court grants the said orders of injunction, the 2nd Plaintiff stands to suffer irreparable loss and damage.*

In her **Supporting Affidavit** the deponent **Lucy Wambui Karanja** averred that she is a Director of the 2nd Plaintiff herein and that vide a **Letter of Offer** dated **24th January 2012**, the 2nd Plaintiff took a term loan of **Kshs.6,000,000/=** from the 1st Defendant which loan was payable over a period of **36 months** after disbursement. The said legal charge was secured by the four properties being **LR.No.Sigona/1466,1467,14698 and 1469**. Further that the 2nd Plaintiff fell into arrears and in the year 2014 and after negotiations, the term loan was restructured and amalgamated with an overdraft facility which had been extended to 2nd Plaintiff and the new loan was **Kshs.10,722,000/=** payable over a period of **84 months** after disbursement. The said new facility was also secured by a further legal charge over the four properties above mentioned.

She further averred that she learnt about the auction of the charged properties on **20th April 2017** when a **Mr. Mucheru** called her to seek for directions to the suit properties for purpose of valuation. The said **Mr. Mucheru** gave her the number of one **Jacqueline** whom she called and Jacqueline referred her to a **Mr. Samuel Murimi**. The said **Samuel Murimi** informed her that Notices from the Bank were sent to her in the **year 2016** but she averred that she did not receive any of the said Notices.

Further, that on **21st April 2017**, she received an email from a **Mr. Murimi** who informed her that a Valuer had been appointed by the Bank to value the charged properties for purposes of sale through **Public Auction**. The appointed Valuers were **Acumen Valuers Ltd**. She denied ever having received any Notice from the Bank of the intention to auction the charged properties. She further alleged that though the suit properties had been valued, the said valuation was an under value and she had even requested the Bank to allow her sell the properties by way of private treaty to fetch a better price but the Bank was non-committal.

It was her further allegations that even before the issue of Notices was cleared, the Bank issued the Plaintiffs with a **45 days Redemption Notice** on **16th May 2017**, to pay up **Kshs.20,806,717/26** in order to redeem the charged properties as is evident from **LWK-6**. It was her contention that she has received advice from her advocate that due to the inadequate Notice given to her as a Chargor, the Bank cannot exercise its Statutory Power of sale and it would be in the interest of justice for the Court to allow the instant application.

Further that the Bank provided her with copies of the statement which statement shows an outstanding amount of **Kshs.5,515,562/16** against the principle interest and penalties which is unacceptable.

It was her further contention that if the Bank was allowed to proceed with the sale of the suit properties on **19th July 2017**, then the Plaintiffs would suffer irreparable damages as the suit properties may be alienated.

The said **Notice of Motion** application is vehemently opposed by the 1st and 2nd Defendants/Respondents. **Kelvin Kimani**, a **Senior Legal Officer** swore a **Replying Affidavit** dated **12th October 2017** and confirmed that the Bank did grant the Plaintiffs a loan of **Kshs.6,000,000/=** on **24th January 2012**, which was payable within a period of **36 months**. Further that a legal charge was registered over the suit properties which were owned by the 1st Plaintiff. However, the said loan account fell into arrears and in a bid to remedy the situation, the Director of 2nd Plaintiff/Applicant approached the Bank for a loan and vide a letter dated **23rd May 2014**, the Bank (1st Defendant) advanced another loan of **Kshs.10,771,000/=**, which was payable within a period of **84 months**.

Again the 2nd Plaintiff failed to make the necessary payments and consequently the 1st Defendant recalled the loan facility advanced to the 2nd Plaintiff as is evident from annexures **KK-2(a) and KK-2(l)**. Despite the said recall, the Plaintiffs continued with the default and on **25th November 2016**, the 2nd Defendant issued a **90 days Notice** of intention to sell in accordance with **Section 90** of the **Land Act 2012**. There was no reaction from the Plaintiffs and a **40 days Notice** to sell was issued in accordance with **Section 96(2)** of the **Land Act** vide a letter dated **17th March 2017**. That the said Statutory Notices were sent vide **Registered Postal Address No.19096-00100** which was the address provided by the **1st Plaintiff herein**. Further that the suit properties were valued by **Acumen Valuers Ltd** and a **Valuation Report** was issued dated **22nd April 2017** with a value of **Kshs.14,400,000/=** and forced sale value of **Kshs.10,800,000/=**

and that is a true reflection of the market value and no under value at all. He further averred that a **45 days Redemption Notice** was issued by **Antique Auctioneers** on **16th May 2017** and the same were served upon the Plaintiffs. The suit properties were advertised for sale on **4th July 2017** and the sale was to take place on **19th July 2017**.

The deponent further averred that the application was made in bad faith and is an abuse of the court process and he urged the Court to dismiss the instant application.

The Plaintiffs/Applicants filed a **Supplementary Affidavit** on **1st November 2017**, and reiterated that they were never served with the alleged Statutory Notices.

The 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 annexures thereto and the Court makes the following findings;

There is no doubt that the Plaintiffs/Applicants herein did obtain a loan facility from the 1st Defendant herein. The said loan facility was secured by a first charge registered over the following suit properties which are owned by the 1st Plaintiff;- **LR.No.Sigona/1465,1467,1468**

and 1469. There is also no doubt that the Plaintiffs did fall into arrears on the first loan facility and were advanced a second loan to meet their obligations. It is also evident that the Plaintiffs still fell into arrears even with the 2nd loan.

Further it is evident that the 1st Defendant did instruct the 2nd Defendant to advertise the suit properties for sale through Public Auction. The said Public Auction was slotted for **19th July 2017**. However, the Plaintiffs/Applicants came to court and obtained conditional injunction and the Defendants were restrained from carrying on with the said sale by Public Auction pending the hearing and determination of the instant application.

The Applicants have alleged that they were never served with the **Statutory Notices** and were not even aware that the 1st Defendant had recalled the loan. The Applicants urged the Court to allow the instant application based on the fact that they were never served with the mandatory **Statutory Notices** as required by the law. The Respondents have contended that indeed the Applicants were duly served with the relevant Statutory Notices and that the instant application is not brought in good faith and is an abuse of the court process. The Respondents have urged the Court to disallow the application in totality.

The issue for determination is whether the Applicants are deserving of the orders sought.

The Applicants have sought for injunctive orders which are equitable reliefs granted at the discretion of the court. However, the said discretion must be exercised judicially. See the case of **Nyutu & Others...Vs...Gatheru & Others (1990) KLR 554**, where the Court held that:-

“Whether or not to grant an injunction is in the discretion of the Court and the discretion is a free one but must be judicially exercised”.

Further, the Court will also take into account that at this stage, it is not supposed to decide the disputed facts with finality. The court is only allowed to determine whether the Applicants are deserving of the sought orders based on the usual criteria. See the case of **Edwin Kamau Muniu..Vs..Barclays Bank of Kenya Ltd Nairobi HCCC No. 1118 of 2002**, where the court held that:

“In an Interlocutory application, the Court is not required to determine the very issues which will be canvassed at the trial with finality. All the Court is entitled at that stage is whether the Applicant is entitled to an Injunction sought on the usual criteria....”

The criteria to be used is the one stated 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.***

Have the Applicants herein satisfied the above criterias?

It is not in doubt that the Applicants had an obligation to repay the loan facility as per the terms of the charge. The Chargee (1st Defendant) had an obligation to disburse the said loan and issue Notices in the event of default by the Chargors. The 1st Defendant(Chargor) too had rights or remedies provided in the said charge document. One of such remedy was sale of the charged properties through exercise of the Chargee’s right of sale through Public Auction. However, before exercising such right or remedy, the chargee had an obligation to notify the Chargors or the Applicants of such default. **Section 90(1)** of the **Land Act 2012** provides:-

“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 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.

It was therefore the duty of the 1st Defendant herein to serve the Chargors (Applicants) with a Notice of any default.

The Applicants have alleged that though they acknowledged that they were in arrears, they were never served with any Notice of recall of the loan or notice of intention to sell.

Though the 1st Respondent alleged that they served the Applicants with the first Notice of intention to sell on **25th November 2016**, the certificate of postage marked **KK(3)b** is not clear whether it is a certificate from the Postal Office or a document typed by the 1st Respondent herein.

This Court would therefore not be very certain that such Statutory Notice was served on the Applicants herein. Further, the Applicants stated that they were also not served with Notice to sell as provided by **Section 96(2)** of the **Land Act** which provides:-

“Before exercising the power to sell the charged land, the chargee shall serve on the Chargor a notice to sell in the prescribed form and shall not proceed to complete any contract for the sale of the charged land until at least forty days have elapsed from the date of the service of that notice to sell.”

The 1st Respondent in its part has alleged that it issued the Statutory Notice to sell under **Section 96(2)** of the **Land Act** on **17th March 2017** and gave a **40 days period**. However, the certificate of Postage **KK-4(b)** is also a typed copy of various names but is not a clear certificate of Postage from the Post Office confirming that indeed the said Statutory Notice was served on the Applicants herein using their last known address. The requirements under **Section 96(2)** of the **Land Act** are mandatory. The Court will concur with the findings of Gikonyo J. in the case of **David Nguji Ngaari...Vs...Kenya Commercial Bank Ltd (2015) eKLR**, where the Court held that:-

“But I should state that the requirements under Section 96(2) of the Land Act are mandatory and quite separable from the requirements under the Auctioneers Act. The Redemption Notice under the Auctioneers Act is also mandatory but is issued separately from and after the one under Section 96(2) of the Land Act”.

Having found that it is doubtful whether the Applicants were served with the relevant Statutory Notices as provided by **Sections 90 and 96(2)** of the **Land Act** as defaulters, the Court finds that the Applicants have established that they have a prima-facie case with probability of success at the trial.

On the second limb of irreparable loss, if the Applicants’ rights have been infringed or violated by failure to serve the relevant Statutory Notices, it is not enough to state that payment of damages would suffice. See the case of **Joseph Siro Mosioma...Vs...Housing Finance Corporation of Kenya & 3 Others, Nairobi HCCC No.265 of 2007 (4R)**, where the Court held that:-

“On my part let me restate that damages is not automatic remedy when deciding whether to grant an injunction or not. Damages is not and cannot be substituted for the loss which is occasioned by a clear breach of the law. In any case, the financial strength of a party is not always a factor to refuse an injunction more so a party cannot be condemned to take damages in lieu of his crystallized right which can be protected by an order of injunction”.

Therefore, the Court cannot find and hold that the loss that the Applicants herein would incur can be adequately compensated by an award of damages.

On the balance of convenience, the Court finds that it is not in doubt.

However, even if the court was to be in doubt, the balance of convenience would tilt in favour of maintaining the status quo and the status quo herein is what existed before the disputed Statutory Notices to sell were alleged issued and the sale advertised for sale by Public Auction. See the case of **Agnes Adhiambo Ojwang...Vs...Wycliffe Odhiambo Ojijo, Kisumu HCCC No.205 of 2000**, where the Court held that:-

“the purpose of injunction is to preserve the status quo and the status quo to be preserved is the one that existed before the wrongful act”.

The balance of convenience shifts in favour of maintaining the status quo and the status quo herein is to halt the sale by Public Auction until the suit is heard and determined.

Having now carefully considered the instant **Notice of Motion** dated **12th July 2017**, the Court finds it merited and it is allowed wholly in terms of prayer No.3. However, prayer No.4 is available after at the calling of evidence.

Further the Court finds that this is a matter that involves realization of security. As was held by the Court of Appeal in the case of **Co-operative Bank of Kenya..Vs.. Patrick Kangethe Njuguna & Others, Civil Appeal No.83 of 2016 at Mombasa**, realization of security is a matter reserved for hearing by the **High Court**.

For the above reasons, the Court directs that this matter be **transferred** to **Kiambu High Court** for hearing and final determination forthwith.

It is so ordered.

Dated, Signed and Delivered at Thika this 26th day of October 2018.

L. GACHERU

JUDGE

In the presence of

Mrs Wachira for the Plaintiffs/Applicants

Mr. Madegwa h/b for M/S Khadambi for 1st Defendant/ Respondent

2nd Defendant/Respondent

Lucy - Court clerk

L. GACHERU

JUDGE

Court – Ruling read in open court in the presence of the above stated advocates.

L. GACHERU

JUDGE

26/10/2018