



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

E.L.C CASE NO. 96 OF 2017

SAMUEL KAMAU KAIRU.....1ST PLAINTIFF/APPLICANT

SAMMY MAINA KANGANGI T/A

SAKAMA ENTERPRISES.....2ND PLAINTIFF/APPLICANT

VERSUS

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

PETER N. GICHUKA T/A SPOTLIGHT

INTERCEPTS AUCTIONEERS.....2ND DEFENDANT/RESPONDENT

RULING

1. The Court has noticed an anomaly in the pleadings as filed and prosecuted by the parties. The 1st Respondent is named as “National Bank Limited”. In all the pleadings filed on behalf of the 1st Respondent the correct party appears to be “National Bank of Kenya Limited”. The Court will proceed in its determination of the application as though the National Bank of Kenya Limited is the 2nd Respondent.

2. On the 11th October 2016, the Applicants filed a suit against the Respondents challenging the 1st Respondents Notification of sale by public auction in respect to Land Reference **No. Loc.9/Kanyenyaini/1417**, which sale was scheduled to take place on the 28th October 2016 at Shankardass House, 2nd Floor Nairobi. In 1994 the 2nd Applicant obtained a loan facility with the 1st Respondent in the sum of Kenya Shillings 150,000/- which facility was secured by a charge over title no. No. LOC9/Kanyenyaini/1417 registered in the name of the 1st applicant who guaranteed the loan facility. Subsequently and to finance their businesses, the applicants continued enjoying additional loan facilities in the sum of Kes. 250,000/- in 1995 and a similar amount in 1997 which were secured by further charges over title No. **Loc.9/Kanyenyaini/1417**. In 2003 the 2nd Applicant alleges that his business collapsed and consequently he faced difficulties in repaying the loan leading to accumulation of unpaid arrears. The 1st Respondent demanded payment leading to the notification of sale alluded above.

3. Simultaneously the applicants filed a notice of Motion on the same date seeking the following orders; -

a) That pending the hearing and determination of this application interpartes, the 1st Respondent by itself, its agents, servants, or employees or anybody acting in that behalf be restrained by means of a temporary injunction from advertising for sale, offering for sale or

even concluding a sale over the 1st applicant's property known as Title No over title no. No. Loc.9/Kanyenyaini/1417.

b) That the honourable court be pleased to issue orders of temporary injunction restraining the respondents by itself, its agents, servants, or employees from advertising for sale or offering for sale the 1st applicant's parcel of land known as Title No.Loc.9/Kanyenyaini/1417 pending the hearing and determination of this suit.

c) That the cost of this application be provided for and be borne by the Respondents in any event.

4. The application is supported by an affidavit sworn by Samuel Kamau Kairu, the 1st Applicant and the grounds stated in the affidavit.

5. He deponed that the 2nd applicant has fully redeemed the loan that he took in 1997 and even surpassed the sum borrowed plus costs and interests and was shocked when he received notification of sale of his land to recover Kes. 505,035.55. He states the amount paid to the bank to date stood at Kes Kes. 702,000/- against the initial disbursement of 250,000/-. He contends that notification was taken out in error as the 1st Respondent had invited the 2nd Applicant on the 30th August 2012 to collect the title from the bank which was lying unclaimed in their credit department. He avers that the additional Kes 505,000/- demanded by the 1st respondent is immoral, unlawful and unconscionable. He avers that the arrears demanded by the bank is attributable to illegal levies and unaccountable interest charged by the bank against the Banking Act. He offers to indemnify the bank from any loss that may result from the grant of the orders sought above. He avers that if the bank disposes the property his family will suffer trauma and displacement.

6. The 1st respondent opposed the application and filed a replying affidavit sworn by Paul Chelanga on the 21st November 2016. He deponed that the 2nd applicant had been enjoying loan facilities with the bank culminating in the restructuring of the loan in the sum of Kes. 355,026/- secured by a cumulative legal Charge(s) of Kes 250,000/- over Title No. LOC9/Kanyenyaini/1417 repayable in monthly installments of Kes 14,792.80 for a period of 24 months. The Applicants defaulted and the 1st respondent demanded the arrears severally in vain. On the 18th June 2003, the 1st applicant wrote to the bank acknowledging the debt and proposed to repay in monthly installments of Kes 5000/- until settlement in full. On 24th March 2004, whilst the account was still in arrears, 1st applicant again wrote to the bank seeking for more time to enable him dispose another property to honour the debt. Several letters have been exchanged between the 1st Applicant and the bank seeking accommodation and the bank indulging the 1st Applicant leading to the notification of sale which crystalized this application by the Applicants.

7. The 2nd Respondent did not oppose the application and did not file any replying affidavit. Perhaps rightly so because the application did not seek any orders against the 2nd Respondent.

8. On the 16th February 2016 when the learned Counsel for the parties appeared before me in Court, they agreed to canvass this application by way of written submissions. The 2nd Applicant as well as the 2nd Respondent did not file any written submissions.

9. In their submissions, the Learned Counsel for the applicants rehashed the contents of the 1st Applicants replying affidavit which have been alluded to above. He added that the 1st respondent has refused and or neglected to supply the applicants with the statement of the loan account. That it has also failed to show how the interest was arrived at and that in the overall the 1st respondent is keen in demanding Kshs. 1,207,020/- for a loan of Kshs. 250,000/-, a demand that is unjust and illegal and contrary to S.44 of the Banking Act. He relied on the case of **Margaret Njeri Muiruri Vs Bank of Baroda (Kenya) Limited CA, 2014 KLR** to advance the point that the 1st respondent has acted in an illegal, immoral and unconscionable manner.

10. The learned Counsel for the 1st Respondent submitted that the 2nd Applicant defaulted in paying the loan as evidenced through several demands and correspondences between the applicants and the 1st respondent. That the applicants have come to court with unclean hands contrary to the principle of equity that he who comes to equity must come with clean hands. That the applicants are undeserving of the equitable remedy of injunction and that the application should be dismissed with costs. He relied on the celebrated case of **Giella Vs Cassman Brown & Co Ltd (1973) EA 358**.

11. The issue before this court for determination is whether the applicants are entitled to the temporary injunction restraining the respondents from disposing of the suit property pending the hearing and determination of the suit.

12. The principles of granting injunction are well settled in the decision in **Giella Vs Cassman Brown & Co Ltd (1973) EA 358**. Firstly, that the applicant must demonstrate that there is a *prima facie* case with a probability of success. Secondly, that if the injunction is not granted the applicant will suffer irreparable injury that cannot be compensated by an award of damages. Thirdly, that if it is in doubt the Court shall decide the application on a balance of convenience. Before I arrive at a determination based on these guidelines, an analysis of the facts is important.

13. From the affidavit evidence on record, though the business relation between the applicants and the bank date back to 1994, on the 9th May 2002 the bank on request of the 2nd applicant in a letter dated 2nd April 2002 applied for a loan restructuring of the irregular overdraft into a term loan. The bank accepted to restructure the facility as follows;

“ irregular overdraft converted into a term loan - Kshs. 309,767.05

Existing loan balance - Kshs.45,259.90

Total - Kshs. 355,026.95”.

The purpose of the facility was to service the applicants’ liabilities and was to be repaid at Kshs. 14,792.80 plus interests over a period of 24 months. From the paying slips annexed by the applicants, it is apparent that the applicants did not comply with this term because the payments are below the agreed amount and are far in between. Interest was agreed as follows;

“interest will be charged at 26% p.a for the time being and will be calculated on daily balances and debited monthly by way of compound interest. The bank reserves the right to charge such rate or rates as it may in its sole discretion from time to time decide”.

The 1st applicant’s sworn statement that the bank has surcharged unaccountable interest may not be entirely true because the 2nd applicant, the borrower herein, accepted the interest rate in the letter dated 9th May 2002 by appending his signature. Neither the Applicants nor the 1st respondent presented a copy of the charge document to support their positions in the application. It is such charge document that would address the 1st Respondent right of foreclosure and the applicants right of redemption. In the absence of the charge document, it is not clear to the Court where the right of the Applicants or those of the 1st Respondent stem from.

14. Although the parties do not appear to dispute that the 2nd applicant sought and obtained a loan facility from the 1st respondent, which facility was guaranteed by the 1st applicant, the parties did not exhibit to the Court any document evidencing such guarantee. Nevertheless, it is not in dispute that the 2nd applicant defaulted and both applicants have on several occasions written to the bank requesting for more time to repay the loan facility, which the bank granted indulgence as evidenced by the correspondences between them. For example, on the 11th April 2003 the bank, without giving any particulars as to how the sum was arrived at, demanded Kshs. 442,294.55. The 2nd applicant, without requesting any particulars on the sum claimed, responded with a proposal to be allowed to repay Kshs. 5,000/- per month until payment in full.

He also requested that the bank waive or stop interest on the account immediately because it was making the loan accumulate faster than the repayments. He cited the poor economic hardship his business was facing as well as his ill health which led to his hospitalization. This request was also revisited in his letter dated the 16th November 2012. The issue of interest was not addressed by the bank. Instead on 18th June 2003, the bank issued a statutory notice of intention to sell the land/security by public auction unless the 1st applicant paid Kshs. 450,210.55 which was in arrears at this time. A similar notice was also issued by the bank on 19th November 2004, this time, again without giving any particulars as to how the sum claimed is arrived at, demanding Kshs. 515,599.55. On the 21st April 2004 and 27th May 2004 the 1st applicant, without seeking any particulars on the sum claimed, pleaded with the bank to give him one month to allow him dispose of a plot which the bank indulged and when the plan fell through, the bank wrote to him again on the 21st July 2004 demanding the arrears. The bank issued another statutory notice on the 22nd January 2013 and on request of the 1st applicant proposal to repay the amount at Kshs. 10,000/- the same was not acted on. It is apparent from the evidence on record that due to the non-performing status of this facility, the bank issued the notification of sale and the notice to redeem dated the 26th August 2016 to the 1st applicant and which notices led the applicants filing this application.

15. Section 96(2) of the Land Act, No. 6 of 2012 provides that: -

“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”.

As pointed out above, the charge document is not exhibited by any of the parties in this case. In the circumstances, therefore, the Court is unable to ascertain the applicants and the 2nd Respondents rival assertions in respect of the claim relating to the suit land. It must be noted that the process of realization of the security was still premature as stated by the banks representative on para 14 of his affidavit where he clarifies that the bank had not advertised the sale of the property hence the present application for injunction is premature. I can only understand the anxiety to the applicants brought by the notification and it would have been imprudent for them to sit on their laurels until too late. Though notice is not in issue, this court is satisfied that the bank has owned up that proper notice had not been issued. It is, however, noticeable that the bank has continued to lay a claim against the Applicants in relation to the suit land, thereby making it apparent that they may pursue their claim in the manner intimated before, albeit wrongly.

16. There is no evidence that the applicants requested for the bank statements for their account and were denied. At the same time, the bank has not offered or given any evidence of their having delivered any statements of the transaction with the applicants in respect to the suit land. The bank has clarified that the letter to the applicants to collect the title deed was a ploy to draw them back to the bank because they were unresponsive due to the non-performance of the loan facility. I must admit that this is a strange and queer way of dealing with customers. Indeed, a close look at the wording of the letter did not intimate that the loan had been repaid in full, however the applicants could have relied on this letter to believe that indeed they had redeemed their security.

17. The Applicants' contention that they have repaid the loan in full is not supported by full disclosure of all evidence supporting payments of the monies advanced by the bank. This sits at the heart of the dispute of the case. It shall be reserved for the trial of the suit. Default is not denied. However even if this court was to form an opinion that there is a dispute as to the amount owed, in law, that cannot constitute sufficient ground for this court to grant the interlocutory injunction. Rudd, J in **Bharmal Kanji Shah & Anor V Shah Depar Devji (1965) EA, 91** stated that:

“...the court should not grant an injunction restraining a mortgagee from exercising his statutory power of sale solely on the ground that there is a dispute as to the amount due under a mortgage...”.

The Court of Appeal in the case of **Fina Bank Ltd v Ronak Ltd [2001] 1 EA 54** stated that dispute on accounts was no basis for granting of an injunction. The learned Counsel for the applicants accused the bank of acting in breach of section 44 of the Banking Act and the new Central Bank of Kenya Rules. The party did not annex or produce the statutory instruments referred to in the submissions to the Court. In view of the finding of the Court stated below, I do not wish to say anything more except that it is necessary for a party before the Court to set out their case with precision with the support of the documents referred to or relied.

18. Even if the bank exercised its statutory power of sale (which I have not found the necessary documentation to support) the applicants if prejudiced, their loss is quantifiable. Section 99 (4) of the Land Act, 2012 reads:

“A person prejudiced by unauthorized, improper or irregular exercise of the power of sale shall have a remedy in damages against the person exercising that power”.

19. In the interest of justice, balancing one thing with another in this application and doing the best I can, I make the following orders; -

a. The 1st Respondent shall render to the Applicants a complete statement of accounts showing all the financial transactions relating to the suit land with debits and credits shown against respective dates item-wise within the next 30 days from the date of this order.

b. In the detailed statement of account referred to in b) above, the 1st Respondent must make a disclosure on the rate of interest applied on the account of the applicants with dates shown item-wise.

c. The application dated the 11th October 2016 is hereby dismissed.

d. There shall be liberty for either party to apply.

e. Subject to compliance with the requirements of Order 11 of the Civil Procedure Rules, the parties are at liberty to set the suit for hearing.

f. There shall be no order as to costs.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 28TH APRIL 2017.

J. G. KEMEI

JUDGE

Ruling Delivered in open Court in the presence of:

Plaintiffs/Applicants – Ms. Kimotho

1st Defendant/Respondent – N A

2nd Defendant/Respondent – N/A

Susan/Kuiyaki – C/A

J. G. KEMEI

JUDGE