



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CAUSE NO. 566 OF 2017

ERIC KINUTHIA WAKABA1ST PLAINTIFF

FAITH WAIRIMU NDEGWA2ND PLAINTIFF

VERSUS

FAMILY BANK LIMITEDDEFENDANT

RULING

The application before this court is a notice of motion dated the 23rd March, 2017 brought pursuant to section 1A, 1B, 3A and 63 of the Civil Procedure Act and Order 40 Rules 1, 2 and 4 of the Civil Procedure Rules and all the other enabling provisions of the law. The Plaintiff is seeking for the following prayers:

- 1. THAT** for reasons to be recorded, this Application be Certified Urgent and the same heard *ex parte* in the first instance.
- 2. THAT** pending the hearing and determination of this Application *inter partes* or until further orders, this Honourable Court be pleased to issue an Order of temporary injunction to restrain the Defendant, either through itself, servant or agents or anyone claiming under them from advertising for sale, disposing of, selling by Public Auction or private treaty or otherwise interfering with the Plaintiffs' ownership and/or interest of and ALL THAT property known as LR No. NGONG/NGONG/59915
- 3. THAT** pending the hearing and determination of this suit or until further orders, this Honourable Court be pleased to issue an Order of temporary injunction to restrain the Defendant, either through itself, servant or agents or anyone claiming under them from advertising for sale, disposing of, selling by Public Auction or private treaty or otherwise interfering with the Plaintiffs' ownership and/or interest of and ALL THAT property know as LR. No. NGONG/ NGONG/59915.
- 4. THAT** the Applicants be at liberty to apply for such other or further orders as the circumstances of this case may permit.
- 5. THAT** the costs of this application be provided for.

The application is premised on the following grounds:

- a.** The property LR. No. NGONG/NGONG/59915 is charged to the Defendant to secure a loan facility of Kenya Shillings Ten Million (Kshs. 10,000,000 only)

- b.** The suit property is a residential/matrimonial property in which the 1st and 2nd Plaintiffs and their children reside.
- c.** The Plaintiffs and their children do not have any other alternative accommodation
- d.** The Defendant, on allegations of default on the part of the 1st Plaintiff has advertised the property for sale on 29th March 2017 unless otherwise restrained.
- e.** The 2nd Plaintiff as a spouse has not been served with the Notice to sell in any event, contrary to the Mandatory provisions of the Land Act 2012.
- f.** The Defendant is yet to value the property, is yet to set the forced sale value in breach of the mandatory provisions of the Land Act, 2012
- g.** The Defendant has not demonstrated that the threatened sale is the most deserved or suitable remedy in the circumstances of this case
- h.** The damage that the Plaintiffs jointly and severally, together with the children stand to suffer in the event that the sale proceeds cannot be compensated monetarily.
- i.** The Defendant despite repeated requests by the 1st Plaintiff, has refused and/or declined to furnish the 1st Plaintiff with the statements of the loan account giving rise to the amount claimed.
- j.** In the absence of the requested statements of accounts, the Plaintiffs are apprehensive that the Defendant's claim is exaggerated and clearly in breach of the provisions of the Banking Act and the Central Bank of Kenya Act as to applicable interest rates.
- k.** The threatened sale shall clearly deprive the Plaintiff of their matrimonial property on which they have great sentimental attachment. The Plaintiffs shall clearly suffer immense losses that cannot be compensated in damages.
- l.** The Plaintiffs are ready and willing to redeem the loan account but for the Defendant's refusal to render a just and true accounts.
- m.** The balance of convenience in the circumstances tilt in favour of granting injunction sought.

The application is supported by the affidavit of ERICK KINUTHIA WAKABA who is the 1st Plaintiff. He admits that sometimes in 2014 he obtained a loan facility from the Defendant and secured the same by way of a charge on the suit property. The suit property is owned by himself and the 2nd Plaintiff together with their children. He avers that on 18th January, 2017, the Defendant through Antique Auctioneers advertised the suit property for sale by way of public auction demanding payment of Kshs. 10, 473, 296.73 only. He states that the Defendant advertised the suit property for sale by public auction on the 29th March, 2017. Further, that the Defendant is yet to furnish the Plaintiffs with the accounts to explain how the demanded amounts has been arrived at. He deposes that the 2nd Plaintiff is yet to be served with the notice to sell in any event, despite being a spouse who gave consent, contrary to the mandatory provisions of the Land Act 2012. He states that the intention to sell the property is calculated at clogging the 1st Plaintiff's equity of redemption and that the power to sell the property has not crystallized. Further that the Defendant has not valued the property prior to the threatened sale , has not set the forced market value and that he and his family will suffer losses and damages that cannot be compensated. He reiterates that the balance of convenience lies in his favour and undertakes to pay any such damages that the Defendant may suffer as a result of any temporary injunction that the court may grant.

The Defendant opposes the application and has filed a replying affidavit sworn by its Senior Legal Counsel ANTHONY OUMA on the 28th March, 2017. The Defendant's case is that the Plaintiffs' have not come to court with clean hands and that they have come to court to avoid settling the liabilities they have with the Defendant. The Deponent avers that the application is a misplaced attempt by the Plaintiffs

to stop the Defendant from recovering what is owed to it by the defaulting borrowers and hence must be thwarted. They confirm that the 1st Plaintiff is the registered proprietor of the suit property LR No. NGONG/NGONG/59915 and that they offered a loan facility of Kenya Shillings Ten Million to the 1st Plaintiff through a letter of offer dated 28th July, 2014 which the Plaintiff duly executed and there was a first legal charge registered over the suit property NGONG/NGONG/59915 to cover the loan. The Deponent avers that the loan facility is currently in arrears and at 28th February, 2017 the said arrears stood at Kshs. 10, 737,121.43. He avers that via a letter dated 1st December, 2015 the Defendant issued a 30 days notice demanding settlement of arrears on the 1st Plaintiff account which notice was not responded to by the 1st Plaintiff. Vide a letter dated 15th February, 2016 which was sent by registered post, the Defendant issued to the 1st Plaintiff the three (3) months statutory notice under section 90(1) of the Land Act and Section 56(2) of the Land Registration Act, of their intention to sell under section 90 of the said Land Act. That as a result of the demand letter, the 1st Plaintiff caused a letter dated 19th April, 2016 to be written by his lawyers Messrs Mokono Ondieki & Co. Advocates acknowledging the arrears and requesting for thirty five (35) days within which to clear the arrears. The Defendant granted the 1st Plaintiff request of thirty five (35) days but the 1st Plaintiff failed to clear the arrears. Further that the Defendant issued the 1st Plaintiff vide a letter dated the 2nd August, 2016, which was sent by registered post, a 40 day notice as required by section 90 of the Land Act. The Defendant thereafter instructed Messrs ProLand Realtors Limited to carry out an evaluation over the suit land. On 18th January, 2017 the Defendant instructed Messrs Antique Auctions Agencies to sell by public auction suit land parcel number NGONG/NGONG/59915. The said Messrs Antique Agencies served the Plaintiff with the 45 days notice and notification of sale via registered post. The Deponent avers that the 1st Plaintiff's account statements shows that the 1st Plaintiff last full installment payment was made on 23rd December 2015 and this compelled the Defendant to exercise its statutory power of sale.

The Plaintiff was represented by Mr. Odera while the Defendant was represented by Mr. Onsare.

Mr. Odera submitted that even though the Plaintiffs owed the Defendant monies, the Defendant had failed to furnish him with loan account statements and further failed to issue the statutory notices as required by section 90 of the Land Act. Further, that the 2nd Plaintiff as a spouse to the 1st Plaintiff, who issued her consent to charge the suit property, was never served with any of the statutory notices as required by section 104 of the Land Act. Further that the replying affidavit is fatally defective as it offends the provisions of the Oaths and Statutory Declarations Act since the stamp of the Commissioner of Oaths is not in any of the annexures but on the top pages of each annexure.

Issues and determination

The court has considered the materials presented and arguments canvassed by the respective parties in respect to the Notice of Motion dated 23rd March, 2017 and analyzed that the following are the issues for determination:

- whether statutory notices were issued to the Plaintiffs before Defendant exercised its statutory power of sale
- Whether the Defendant furnished the Plaintiffs with statement of accounts

From the Applicant's opening and closing arguments, it is not in dispute that the 1st Plaintiff charged his property NGONG/NGONG/ 59915 to secure a loan of Kshs. 10 million with the Defendant. The Plaintiffs/Applicants are not denying in principle that they owe a debt to the Defendant/Respondent. They are seeking for a temporary injunction claiming that the Defendant did not serve them with the requisite notices as stipulated under section 90 of the Land Act; that the 2nd Plaintiff did not receive any notices as a spouse who issued spousal consent when the said property was being charged. Further, that the Defendant has not furnished the Plaintiffs with the statement of accounts.

On the Plaintiffs allegation that no statutory notices were issued to them in accordance with the provisions of sections 90 (1) and 90 (1) (3) and 96 of the Land Act, the Defendant submitted various notices it issued to the Plaintiffs. According to the said annexures, the 1st Plaintiff/Applicant was sent for a demand letter dated 1st December, 2015 indicating the 1st Plaintiff was in arrears of Kshs. 535,468.83

of his loan repayment as at 1st December, 2015. The Defendant thereafter issued the first statutory notice dated 15th February, 2016 which notice indicated the outstanding arrears amounting to Kshs.577,870.62; which notice was copied to the 2nd Applicant and sent via registered mail. Upon receipt of the said notice, the 1st Plaintiff/Applicant instructed Messrs Mokono Ondieki & Company Advocates who sent a letter dated 19th April, 2016 to the Defendant acknowledging the statutory notice, the outstanding debt of Kshs. 7 million and providing a proposal of repaying the said debt within 35 days. The 1st Plaintiff's offer of repaying the outstanding debt was accepted by the defendant vide their letter dated 20th April, 2016. The Defendant later sent a second Statutory Notice to the 1st Plaintiff and copied the 2nd Plaintiff on the 2nd August, 2016 where it indicated the outstanding debt was Kshs. 9, 758, 335.84.

The Defendant further conducted a valuation of the said property and there is a report from Messrs. ProLand Realtors Limited where it indicated the current market value of the charged property to be Kshs. 34 million and the forced market value Kshs. 25.5 million. Another notice was later issued by Antique Auctioneers on 18th January, 2017 which was served upon the 1st Plaintiff on 19th January, 2017, in which he personally acknowledged receipt.

Section 90 (1) stipulates that ' **If a chargor is in default of any obligations, 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. '**

Section 90 (3) stipulates that ' **if the chargor does not comply within two months after the date of the service of the notice under, subsection (1), the chargee may -**

- (a) sue the chargor for any money due and owing under the charge;**
- (b) appoint a receiver of the income of the charge land;**
- (c) lease the charged land, or if the charge is of a lease, sublease the land;**
- (d) enter into possession of the charged land; or**
- (e) sell the charged land.**

Further section 96 (3) (c) stipulates as follows:

- “(3) A copy of the notice to sell served in accordance with Subsection (2) shall be served on-**
- (c) a spouse of the chargor who had given the consent;**

The principles for granting of temporary injunctions were settled in the case of **Giella Vs. Cassman Brown & Co. Ltd (1973) EA 358** as follows:

"First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."

Bearing this principle in mind, it behoves this honourable court to interrogate whether the applicant has made out a prima facie case with a probability of success at the trial.

The question we need to ask is whether the defendant failed to serve statutory notices upon the Plaintiffs as required by the Land Act. From the annexures within the Defendant's replying affidavit the answer is in the affirmative. It is worth noting that the address Plaintiff's address on the charge document is the

same address where the said notices were posted. Section 96(1) is further clear that a chargee shall proceed to exercise its statutory power of sale where a chargor is in default of the obligations under a charge and remains in default at the expiry of the time provided for the rectification of that default. Further section 96(3) (c) expects a notice to sell the charged property to be issued to the spouse of the chargor who had given consent. In the case at hand, the Defendant served all the requisite notices via registered mail to the plaintiffs as proven in annexure 'AO 4' and 'AO7' . Further, the 1st Plaintiff has averred that he severally requested for loan statements from the defendant but he never received the same. The 1st Plaintiff did not annex any copies of correspondence from him to the Defendant seeking for the loan statements.

The court notes that it is exactly one year since the Plaintiffs admitted their indebtedness to the Defendant amounting to Kshs. 7 million vide a letter from Messrs Mokono Ondieki & Company Advocates dated 19th April, 2016 and indicated that the same would be repaid within 35 days. The Plaintiffs do not come to court with clean hands where they purport that they were never furnished with their statement of accounts. It is a long established legal rule that **“ . . . when part of amount claimed is admitted or proved to be due, a Chargee cannot be restrained by an injunction.”** This position has clearly been stated in the case of **LABELLE INTERNATIONAL LTD. AND ANOTHER – VS – FIDELITY COMMERCIAL BANK & ANOTHER, CIVIL CASE NO. 786 OF 2002.**

On the issue of technicality that the replying affidavit sworn by Anthony Ouma a Senior legal officer with the Defendant offends the provisions of the Oaths and Statutory Declarations Act that the stamp on the annexures is on the cover page and not on the body of each annexure, it is the court's finding that the Plaintiffs' seek to rely on technicalities. According to section 19(1) of the Environment and Land Court Act it is clear that in any proceedings to which this Act applies, the Court shall act expeditiously, without undue regard to technicalities of procedure and shall not be strictly bound by rules of evidence. Further article 159 (2) (d) of the Constitution stipulates that ' in exercising judicial authority, the courts and tribunals shall be guided by the following principles(d) justice shall be administered without undue regard to procedural technicalities.

This position is affirmed in the case of Republic Vs. District Land Registrar, Uasin Gishu & Anor (2014) eKLR where Justice Ochieng held that **.. to my mind, Justice is not dependent on Rules of Technical procedures. Justice is about doing the right thing. Pursuant to article 159 (2) (d)in exercising Judicial Authority, the courts ' in exercising judicial authority, the courts and tribunals shall be guided by the following principles(d) justice shall be administered without undue regard to procedural technicalities. '**

From the above, it is clear that Plaintiffs' have not established a prima facie case to meet the threshold for the grant of orders of injunction. I consequently dismiss the Plaintiffs' Notice of Motion dated the 23rd March, 2017 with costs.

Dated signed and delivered in open court at Kajiado this 27th day of April, 2017.

CHRISTINE OCHIENG

JUDGE

REPRESENTATION.

Court clerk -Mpoye

Mr. Onsare for defendants.

No attendance for plaintiffs