



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU

CIVIL CASE NO. 124 OF 2016

HELLEN KARINTHONI NJAU.....PLAINTIFF/APPLICANT

VERSUS

REMU DTM LIMITED.....1ST DEFENDANT/1ST RESPONDENT

VIEWLINE AUCTIONEERS.....2ND DEFENDANT/2ND RESPONDENT

RULING

1. The Notice of Motion dated 2nd August, 2016 seeks the following orders:-

i. THAT the Honourable Court be pleased to issue an order of inhibition over parcel of land No. KIAMURI 'A' 756, pending the hearing and determination of this application or further orders of court.

ii. THAT the Honourable Court be pleased to issue an order of inhibition over parcel of land No. KIAMURI 'A' 756, pending the hearing and determination of this suit.

iii. THAT the Honourable Court be pleased to issue an order of temporary injunction restraining the Defendants/Respondents whether by themselves, their agents, servants, assigns and/or any other persons acting at their behest from alienating and/or interfering with the Plaintiff/Applicant's title, user, occupation and/or enjoyment of parcel of land No. KIAMURI 'A' 756 and/or selling the same through Public Auction or private treaty pending the hearing and determination of this application or further orders of Court.

iv. THAT the Honourable Court be pleased to issue an order of temporary injunction restraining the Defendants/Respondents whether by themselves, their agents, servants, assigns and/or any other persons acting at their behest from alienating and/or interfering with the Plaintiff/Applicant's title, user, occupation and/or enjoyment of parcel of land No. KIAMURI 'A' 756 and/or selling the same through Public Auction or private treaty pending the hearing and determination of this suit.

v. THAT costs be borne in the cause.

2. Grounds in support of the application are;

1. THAT the Respondents have begun the process of realizing security without following due process.

2. THAT the Plaintiff/Applicant has not been served with a statutory notice.

3. THAT the Plaintiff/Applicant's home shall be sold in contravention of the law.

4. THAT it is only fair, just and equitable that this application be allowed in the interest of justice.

3. Applicant has also filed a Supporting Affidavit where she has deponed as follows:-

i. THAT in the year 2012, she took a financial facility with the 1st defendant of Kshs. 700,000/= payable by a monthly installment of Kshs. 17,500/= as per the annexure "HKN I".

ii. THAT the facility hereabove was secured by a legal charge over her title deed of parcel No. KIAMURI 'A' 756.

iii. THAT she began to liquidate the facility but due to unforeseen financial difficulties she fell into arrears.

iv. THAT she has now been served with a Notification of Sale of her property on 23/08/2016 by the 2nd defendant. See annexure "HNK 2".

v. THAT she has not been served with any statutory notice to redeem her property preceding the Notification of Sale.

vi. THAT the defendants are out to irregularly and uprocedurally auction her property without due legal process.

vii. THAT on the property lies her home and that is where she lives with her family, and Its sale shall occasion her irreparable loss and damage.

4. The application is opposed via the Replying Affidavit of DENNIS MUGENDI for 1st Defendant where he states;

1. THAT the Applicant did apply for a loan of Kshs. 700,000/= only from the 1st Respondent which was granted and secured by a charge over the Applicant's land parcel No. KIAMURI 'A' 756.

2. THAT the Applicant readily concedes that the loan is in arrears and infact the Applicant is simply not re-paying her loan and the arrears are a colossal Kshs. 701,328.41/=. See DMI, a certified statement of the current status of her loan.

3. THAT the Applicant is being dishonest by alleging that she was not served with the statutory notice. She was apparently personally served by MR. JOSEPH KITHINJI M'KIAMBATI a process server. See annexure DM2(a) and (b) the said statutory notice dated 26th January, 2016 and an affidavit of service showing that the Applicant was served with statutory notice on 2nd February, 2016.

4. THAT the 1st Respondent is a secured creditor under the law and the Applicant cannot seek to inhibit her own parcel of land just to prejudice the 1st Respondent's statutory right to realize the security she offered before being granted the loan, yet she is not servicing her loan.

5. THAT what is deponed to hereinabove is true to the best of my knowledge, information and belief.

5. The 2nd Respondent has opposed the application via the replying affidavit of JOSEPH KITHINJI M'KIAMBATI a process server and he states thus;

i. THAT he is a licenced process server under licence No. 0195 issued to him by the High Court of Kenya on 4th February, 2016 and duly authorized by the High Court of Kenya to serve all the court processes.

ii. THAT on 29th January, 2016, he received the statutory legal notice dated 26th January, 2016 from M/S KIAUTHA ARITHI & CO. ADVOCATES for the chargor for service on the chargee herein.

iii. THAT on 2nd February, 2016 at around 9:30am, he served the said statutory notice in this matter on the chargor at her shop at Gatimbi market by tendering the original thereof to her and requiring her signature whereby she accepted service, she took her original notice but she declined to sign.

iv. THAT at the time of service the said shop of the charger was pointed out to him by one MR. NJIYA who is also a business man in that market.

6. Directions were taken for the application to be canvassed by way of written submissions.

7. Submissions of the applicant are that plaintiff's property has been advertised for sale yet the requisite notice has not been served. Failure to serve the notice has allegedly denied her an opportunity to redeem her property. To this end applicant has cited section 90 of **the land** act in addition to the following cases;

i. Jimmy Wafula Simiyu vs. Fidelity Commercial Bank LTD (2013) eKLR.

ii. David Ngugi Ngaari vs. KCB 2015 (eKLR)

iii. Giella vs. Cassman Brown.

8. The Respondents have submitted that Applicant has reneged on her obligations to repay the loan and hence the Respondents have a right to realize the security. The Respondents state that they have followed all the legal procedures in realizing the security and that applicant has been served with several notices. In support of their averments, the Respondents have submitted the following authorities;

i. Marlo Ltd, vs. First American Bank of Kenya Ltd & 2 others, Civil Appeal No. 39 of 2002.

ii. Muriithi vs. Nairobi City Council.

iii. Jopa Villas LLC vs. Private Investment Corporation.

iv. E.A. Industries vs. Tripods (1972) 420

9. After considering the arguments advanced by both sides of the coin, it has emerged that there was a contract between the Plaintiff and 1st Defendant where by the latter advanced a loan facility to the Plaintiff. Going by paragraph 4 of the applicant's affidavit dated 02/08/2016, I find that applicant has admitted the fact of default.

10. The issue for determination at this stage is hence only one.

Whether defendants have followed the right procedure in the process of realizing the security.

11. The submissions of the Respondents indicate that several notices have been issued to the applicant. The once traceable in these proceedings are;

i. The statutory notice dated 26/01/2016 which is annexure DM2(a) from 1st defendant to plaintiff.

ii. Notification of sale from the 2nd defendant. This document is not an annexure to the

Respondent's response to the application, but it is in the defendants bundle of document.

iiii. Notice via public auction. This is a Daily Nation newspaper advertisement that is also part of defendants list of documents.

12. Section 90 and section 96 of the Land Act sets out the steps to be followed when default occurs in respect of Charges.

The first notice is the one under *section 90(I)* **“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.”**

13. The particulars of the contents of the aforementioned notice are set out in subsection (2) of section 90 and are;

a. The nature and extent of 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 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 this sub-part.

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

(3) If the chargor does not comply within ninety days after the date of service of the notice under, subsection (i) the chargee may-

a.

b.

c.

d.

e. SELL THE CHARGED LAND;

14. Where a Chargee has followed all the aforementioned steps and desires to realize the security by adopting clause (e) of sec. 90 (3), which is the option of selling. The property, the second notice must be issued. The chargee proceeds under **section 96** of the act, which states;

“(1) 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 in the notice served on the chargor under section 90(I), a chargee may exercise the power to sell the charged land.

(2) 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.

15. The first notice under section 90 acts like an alert. The defaulter is prompted to be aware of his or her obligations. The amount is tabulated. The defaulter also gets a chance to rectify the situation. That is why the time lines have been set out in the act.

16. The second notice under section 96 is no longer an alert. It is a warning of the imminent sale of the property.

17. Interpretation of Notice to Sell under the Land Act was aptly captured by Judge F. Gikonyo in **ALBERT MARIO CORDEIRO & ANOTHER VS. VISHRAM SHAMJI High Court at Nairobi Civil Suit No. 329 of 2014**. Where the learned Judge stated;

“In the absence of a Notice to Sell under Section 96(2) of the Land Act, the Statutory Power of Sale could not be exercised even if the Statutory Notice, the Notification of Sale and the Redemption Notice had been issued. That was a strong ground for an injunction.”

18. Have the Respondents followed the law and procedures as set out in the act? Not all. The Notice to sell as provided under section 96 is missing and the notice by the auctioneer would not suffice, see **David Ngugi Ngaari vs. KBC** (supra) and **Albert Mario Cordeiro & Another vs. Vishram Shamji High** (supra)

19. It follows then that the proposed sale of the applicant's property at this stage is completely regular.

20. Having perused the record, I have no doubts that the applicant was served with the statutory notice, annexure DM2 a.

21. The issue at hand however is one where the 1st Respondent omitted a crucial step in its attempt to recover its monies which is failure to issue the **NOTICE TO SELL UNDER SECTION 96 (2) OF THE ACT**. The situation can be rectified if the proper procedures are followed.

22. I have taken note of the fact that applicant is still a defaulter. She has not demonstrated in any way as to how she intends to pay the amount due to the 1st respondent. If the court was to grant the prayer of inhibition it would deny the Chargee an opportunity to get his dues yet the Changor is in default. The application therefore partially succeeds and I proceed to grant the following orders;

i. Temporary order of injunction is issued restraining the defendants by themselves, their servants and or agents from alienating selling and or interfering with plaintiff's title user and occupation or parcel No. KIAMURI 'A' 756 for a period of **3 MONTHS ONLY** from the date of delivery of this ruling.

ii. The defendant is at liberty to proceed with the process of realization of the security after 3 months from the date of delivery of this ruling, by issuing the notice to sell under section 96(2) of the Land Act.

iii. Applicant (who is still a defaulter), is to pay costs of this application.

DELIVERED IN OPEN COURT AT MERU THIS 5TH DAY OF APRIL, 2017 IN PRESENCE OF:-

C:A Janet

Miss Njenga for Petitioner

HON. L.N. MBUGUA

JUDGE