



**REPUBLIC OF KENYA**

**IN THE LAND AND ENVIRONMENT COURT OF KENYA AT KAKAMEGA**

**ELC CASE NO. 135 OF 2017**

**BILLY AMUGUNE AMENDI .....PLAINTIFF/APPLICANT**

**VERSUS**

**FAMILY BANK OF KENYA LTD.....DEFENDANT/RESPONDENT**

**RULING**

This application is dated 3<sup>rd</sup> may 2017 and is brought under Order 40 Rules 1, 2 and 4 of the Civil Procedure Rules, 2010 and Section 63 (c ) and (e) of the Civil Procedure Act, Cap 21 Laws of Kenya. And the plaintiff/applicant seeks the following orders:

1. THAT this application be certified urgent and be heard ex-parte in the first instance.
2. THAT, a temporary injunction do issue restraining the defendant/respondent, its employees, agents, appointees and/or in any person acting under instructions/authority/direction or at the behest of the said defendant/respondent from realizing the security in L.R. Nos. N.MARAGOLI/CHAVAKALI 1140 and KAKAMEGA/CHAVAKALI 11084 and/or from selling by public auction or otherwise and/or in any other manner dealing/interfering with any or both of the 2 aforesaid parcels of land until the inter-parties hearing and determination of this application.
3. THAT the defendant/respondent in the meantime be ordered by this Hon. Court to furnish the plaintiff/applicant with all relevant statements, particulars and details relating to the borrowers loan account to enable the plaintiff/applicant ascertain his obligations under the charge to the defendant/respondent with a view to meeting such obligations.
4. THAT the costs of this application be provided for.

The application is supported by the grounds therein and the annexed affidavit of Billy Amugune Amendi. That one Jennifer Gasare Miheso (hereinafter referred to as the borrower) obtained credit facilities from the defendant/respondent and the applicant charged his properties L.R. Nos. N.MARAGOLI/CHAVAKALI 1140 and KAKAMEGA/CHAVAKALI 11084 in favour of the respondent/defendant bank as security for the said loan. That the defendant/respondent has now moved to realize the security without giving statutory notice to the registered proprietor of the properties. That even the notification from the auctioneer was apparently served on a stranger who pushed it through the space between the floor and the door of the plaintiff's/applicant's house as no one stays on the premises where the notification as allegedly served. That if the orders sought are not granted the plaintiff/ applicant stands to suffer irreparable loss and damage.

The plaintiff/applicant submitted that he is the registered proprietor of properties L.R. Nos. N.MARAGOLI/CHAVAKALI 1140 and KAKAMEGA/CHAVAKALI 11084 situated within Vihiga

County. That by an instrument dated 10<sup>th</sup> August, 2015, he charged his said properties in favour of the respondent to secure a loan for one JENNEFER GASARE MIHESO (hereinafter referred to as the “Borrower”) (Annexed hereto and marked “BAA<sub>1</sub>” is a copy of the charge). That by a letter dated 2<sup>nd</sup> of March, 2017, the respondent purported to instruct pavement Auctioneers to issue to him a Notice of sale by public of L.R. No. N.MARAGOLI/CHAVAKALI 1140 belonging to him, ostensibly as a result of failure by the borrower to service the loan. The plaintiff/applicant has no way of ascertaining his liability to the respondent as he has written a letter to and also verbally requested of the respondent to know the status of the borrowers loan account but the respondent has failed to respond to any of the letter or verbal inquiries. That in January, 2017 he learnt that the borrower had left the country for the USA whereupon he immediately, in a letter dated 20<sup>th</sup> March, 2017, wrote to notify the defendant and to request to know the status of the borrower’s loan account (annexed hereto and marked “BAA<sub>2</sub>” is a true copy of the letter). On the 28<sup>th</sup> April, 2017, he visited his rural home in Vihiga County (from Nairobi where he ordinarily reside and carry on business) and a he opened the door he found on the floor of the sitting room under the door of his house, a Notification for Sale from Pavement Auctioneers in respect of my L.R. Nos. N.MARAGOLI/CHAVAKALI 1140 (annexed hereto and marked “BAA<sub>4</sub>” is a true copy of the Notification for Sale). The said notification for sale is dated 13/3/2017 and states that his property shall be sold upon expiry of 45 days unless he pay a sum of Ksh. 1,211,845.73 together with costs before the expiry of the notice. That soon after retrieving the notification for sale, at the earliest opportunity, on the 2<sup>nd</sup> May, 2017, he visited the respondent’s Kilimani Branch where he spoke to the Credit Manager one Joshua Gitau, who declined to give him details of the borrower’s account or to state the extend of his liability to the respondent or even to discuss the intended sale as he argued that he can only discuss all that with the account holder. That at no time whatsoever has the respondent served him with a statutory notice despite his letter and verbal inquiry from an official of the respondent. that in his oral inquiry, he specifically pointed out to the defendant/respondent’s credit manager that he got to know of the intended sale for the first time on 28<sup>th</sup> April, 2017 and brought it to his attention that he had not been served with a statutory notice. That he is advised by his advocates on record that the intended sale is illegal for want of a statutory notice. That before the respondent can move to realize its security, he is entitled to all such information, particulars and details as would enable me to know his actual liability to the defendant/respondent. If the charged property is sold as intended, he will suffer irreparable loss and damage as the respondent has never to-date informed him of the failure of the borrower to service her loan or the amount outstanding on her loan account with the respondent. That from the foregoing, it is only just that the orders sought herein be granted to safeguard the interests of justice. The defendant/respondent was served but failed to attend court and the matter proceeded exparte. The application was not opposed.

This court has considered the plaintiff’s/applicant’s submissions and the supporting affidavits therein. The application being one that seeks injunctions, has to be considered within the principles set out in the case of GIELLA VS CASSMAN BROWN & CO. LTD 1973 E.A 358 and which are:-

- 1. The applicant must show a prima facie case with a probability of success at the trial**
- 2. The applicant must show that unless the order is granted, he will suffer loss which cannot be adequately compensated in damages and,**
- 3. If in doubt, the Court will decide the application on a balance of convenience.**

It must also be added that an interlocutory injunction is an equitable relief and the Court may decline to grant it if it can be shown that the applicant’s conduct pertinent to the subject matter of the suit does not meet the approval of a Court of equity.

This court has considered the plaintiff/applicant’s submissions and the pleadings therein. The plaintiff/applicant does not dispute that he is the registered proprietor of properties L.R. Nos. N.MARAGOLI/CHAVAKALI 1140 and KAKAMEGA/CHAVAKALI 11084 situated within Vihiga County. That by an instrument dated 10<sup>th</sup> August, 2015, he charged his said properties in favour of the respondent to secure a loan for one JENNEFER GASARE MIHESO (hereinafter referred to as the

“Borrower”) (Annexed hereto and marked “BAA<sub>1</sub>” is a copy of the charge). That by a letter dated 2<sup>nd</sup> of March, 2017, the respondent purported to instruct pavement Auctioneers to issue to him a Notice of sale by public of L.R. No. N.MARAGOLI/CHAVAKALI 1140 belonging to him, ostensibly as a result of failure by the borrower to service the loan. That the defendant has now moved to realize the security without giving statutory notice to the registered proprietor of the properties. That even the notification from the auctioneer was apparently served on a stranger who pushed it through the space between the floor and the door of the plaintiff’s house as no one stays on the premises where the notification as allegedly served. That if the orders sought are not granted the plaintiff stands to suffer irreparable loss and damage. I have perused that pleadings and indeed do not see any valid statutory notice in this matter. I wish to refer to section 90 of the Land, Act 2012 which lays down the requirements for **a valid** statutory notice. Section 90(1) provides that:-

“if the 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 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 the chargor a notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be.

According to 90(2) of the said Act, the notice to be served shall adequately advise the chargor of:

- 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 (3) 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 charger 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; and***
- e. The right of the chargor in respect of certain remedies to apply to the court for relief against those remedies.***

It is not disputed that the plaintiff/applicant owes the defendant/respondent some money but in recovering the same due legal process needs to be followed. In order for a statutory notice of sale to be valid it ought to conform to the provisions of section 90(1) and (2) of the Land Act 2012 as stated above a valid statutory notice of sale ought to inform the charger of their rights and extent of the default. See Patrick Maguta Mwangi & Another v Consolidated Bank Ltd (2012) eKLR and Zumzum Investments Ltd v Altam Group International (K) Ltd and another civil case No 130 of 2012. From perusal of the pleadings before me and I find no valid statutory notice issued to the plaintiff/applicant. I find that the plaintiff/applicant has established a prima facie case with a probability of success. I order a limited injunction to the defendant/respondents from realizing its security of parcel numbers N.MARAGOLI/CHAVAKALI 1140 and KAKAMEGA/CHAVAKALI 11084. For the avoidance of doubt the defendant/respondent may serve a fresh statutory notice of sale which complies with the law and thereafter may proceed to exercise their statutory power of sale. There will be no order as to costs in respect of this Application.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 11<sup>TH</sup> MAY 2017.**

**N.A. MATHEKA**

**JUDGE**