



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT ELDORET**

**E&L 104 OF 2017**

**BENSON OTIENO AYAGO.....PLAINTIFF/APPLICANT**

**VERSUS**

**BARCLAYS BANK OF KENYA LTD.....1<sup>ST</sup> DEFENDANT**

**MUGANDA WASULWA T/A KEYSIAN AUCTIONEERS...2<sup>ND</sup> DEFENDANT**

**RULING**

This is a ruling in respect of an application brought by way of Notice of Motion dated 9<sup>th</sup> March 2017 where the plaintiff/applicants are seeking for the following orders:

- a. That this application be certified as urgent and the same be heard ex-parte in the first instance.
- b. THAT pending the hearing and determination of the application inter-partes, this honourable court be pleased to issue an order of temporary injunction restraining the defendants whether by themselves, their agents, representatives, servants and/or employees from selling, offering for sale, alienating or otherwise interfering and /or dealing in any way with the plaintiff/applicant's parcel of land known as UASIN/GISHU/KIMUMU/2442.
- c. THAT pending the hearing and determination of this suit, this honourable court be pleased to issue an order of temporary injunction restraining the defendants whether by themselves, their agents, representatives, servants and /or employees from selling, offering for sale, alienating or otherwise interfering and/or dealing in any way with the plaintiff 's parcel of land known as UASIN GISHU/KIMUMU/2442.
- d. THAT costs of this Application be borne by the Defendant/Respondent

This matter was brought under certificate of urgency on 13<sup>th</sup> March 2017 when the court granted interim orders for injunction and directed that the application be served for inter partes hearing on 20<sup>th</sup> March 2017. On 30<sup>th</sup> May 2017 Counsels for the parties agreed to canvass the application by way of written submissions. The same were filed and a ruling date given.

**Plaintiff's Counsel's Submissions**

The plaintiff's Counsel Mr. Ojuro filed his submissions in respect of the application on 11<sup>th</sup> July 2017. He relied on the supporting affidavit together with the grounds on the face of the application. He

submitted that at all material times the plaintiff has been the registered owner of Land parcel known as LR NO. UASIN/GISHU/KIMUMU/2442, having mortgaged the same as security for the loan from the 1<sup>st</sup> defendant.

He stated that the plaintiff/applicant was employed by the 1<sup>st</sup> defendant/respondent until 2015 when the 1<sup>st</sup> defendant/respondent summarily dismissed him from employment without justification which matter is pending before the Employment and Labour Relations court. It was Counsel's submission that the plaintiff was granted financial facilities by the 1<sup>st</sup> defendant to purchase property described as UASIN GISHU /KIMUMU/2442 which was mortgaged as security by way of a legal charge. He further stated that the plaintiff /applicant was surprised to receive a letter from the 2<sup>nd</sup> defendant dated 16/12/16 giving him a redemption notice of 45 days and stating that the plaintiff/applicant was in arrears amounting to Kshs.4, 148,415.10.

Mr Ojuro Counsel for the applicant submitted that the plaintiff was forced to proceed to the 1<sup>st</sup> defendant/respondent's offices to find out the position since the plaintiff/applicant was yet to receive his benefits from the 1<sup>st</sup> defendant /respondent which he expected to use to offset the said loan. Counsel also stated that the plaintiff filed a suit in the Employment and Labour Relations court to fast track the payment of his dues and sought for a statement of his loan with the 1<sup>st</sup> defendant/respondent which showed that the balance as at 30/1/17 was Kshs. 2,835,824.60.

Counsel therefore submitted that the plaintiff/applicant has a prima facie case and as such should be granted temporary injunction. He quoted the principles laid down in the Giella case on granting temporary injunctions.

### **Defendant's Counsel's Submission**

Defendant/Respondent's Counsel submitted that the Plaintiffs application is not sustainable in law and the same does not reveal a sustainable cause of action. Counsel relied on the replying affidavit of the respondent which highlighted the following points:

That the Defendant granted loan facilities to the Plaintiff which facilities were secured by the following charge documents over UASIN GISHU/KIMUMU/2442.:

- a. Charge dated 12<sup>th</sup> March, 2001 for Kshs. 400,000/=
- b. Further Charge dated 16<sup>th</sup> October, 2001 for Kshs. 1,000,000/=
- c. 2<sup>nd</sup> Further Charge dated 29<sup>th</sup> June, 2005 for Kshs. 100,000/=
- d. 3<sup>rd</sup> Further Charge dated 14<sup>th</sup> June 2010 for Kshs. 1,000,000/=
- e. Plaintiff Mortgage loan A/C no. 2498430 owes Kshs.2,498,430.00. Fu
- f. Plaintiff has an unsecured loan A/C No. 2034047335 that owes Kshs. 1,613,120.15
- g. Barclay card loan A/C No. 100900037436 owing Ksh 36,864.95 to the Bank.

Counsel submitted that it was an express term of the said Charge documents that the charged property was to secure the payments to the Defendant. Further it was an express term of the charge documents that the Plaintiff herein shall on written demand pay to the Bank such sum as may be due and owing to the Defendant in respect of the monies advanced or paid to or for the use of the Plaintiff and in default the Defendant would exercise its statutory power of sale on the charged property.

It was Counsel's submission that the Plaintiff defaulted in making payments and the bank instructed its

advocates on record to pursue the debt. The Plaintiff was served with the Statutory Notice dated 20<sup>th</sup> July, 2016 as listed on page 21 in Defendant's bundle of documents, a 40-day Notice to sell dated 31<sup>st</sup> October, 2016 as listed on page 23 in and 45 day Auctioneers Notice dated 6<sup>th</sup> December, 2016 as listed on page 25 and 26 of the Defendant's bundle of Documents

Counsel stated that the Bank had every right to instruct its Advocates to pursue the Bank's Statutory power of Sale duly served on the Plaintiff and the Plaintiff has to date not made any proposal of payments. He relied on **the Court of Appeal at Nairobi case No. 194 of 1998 Nathalal Monii Rai & 5 Others-vs-Standard Chartered Bank** in Page 3 to 4 where the Honourable Court observed that, *What the Plaintiff is trying to do was to restrain a mortgagee from, exercising its statutory power of sale in a case where default and indebtedness were not denied and the necessary notices had been served. There was clearly no legal basis for any injunction.*

It was also submitted by counsel that the Plaintiff in his Supporting Affidavit has not denied that he is indebted to the Defendant Bank, neither has he denied being in breach of his duty as outlined in the Charge Documents. The Rules of Equity demand that he who seeks equity must come with clean hands.

Counsel further submitted that the Plaintiff has not satisfied the conditions for the grant of a temporary injunctive relief which are;

- a. The Plaintiff must show a prima facie case with a probability of success
- b. an injunction should not to be granted unless Applicant show would suffer irreparable damage
- c. if the Court is in doubt should decide application on a balance of convenience

He cited the case of ***Moses Ngenye Kahindo-vs-Agricultural Finance Corporation HCCC No. 1044 of 2001 Nairobi*** where the Court observed that if the applicant's conduct in relation to the subject matter of the suit is shown not to meet the approval of a court of equity, the relief may not be granted however meritorious the case may otherwise have been. It was also submitted by Counsel that a person who charges his property to secure a loan does so knowing only too well that upon default, the property could be sold to recover the loan. The applicant's loss, if any, can adequately be compensated in damages and that the Respondent being a lender of repute would in a position to meet any such award of damages. He cited the case of Henry ***Wanyama Khaemba V Standard Chartered Bank Ltd & 3 others [2005] eKLR***

Counsel for the defendant submitted that the Plaintiff's claim that he was ambushed with a statutory notice dated 20<sup>th</sup> July 2016 does not hold any water as the Defendant had already issued a demand letter dated 6<sup>th</sup> July 2016 via registered post hence the compliance with section 90 of the Land Act 2012 in its entirety.

He further stated that the charge document created was premised upon the Plaintiffs land as the security and the terms of the charge were not dependent on the Plaintiffs salary.

The law as established by judicial precedent is that even if a borrower has a dispute with the interest and charges levied by the lender, he should not stop repayments until a court of law makes pronouncement as to the illegality or otherwise of the interest and the charges. Counsel relied on the case of ***DANIEL KAMAU MUGAMBI v HOUSING FINANCE COMPANY OF KENYA LTD [2006] eKLR*** Honorable Justice Ochieng made the following observation:

*“From the foregoing, it is abundantly clear that the plaintiff is hopelessly in arrears. Of course, he is blaming the arrears on the charges which he deems as unlawful or illegal. However, until and unless a court of law was to make a ruling to the effect that the said charges were unlawful, illegal or unreasonable, it would be presumptuous of the plaintiff to make any presumptions. It is not for a borrower to choose to stop making payments because he had reason to believe that his account had been debited with unwarranted charges. He ought to continue remitting payments*

*whilst prosecuting his case. And it is only when the court makes an adjudication on the issues that the borrower would know whether or not his beliefs had gained judicial recognition.*

Counsel also submitted that the amount owed is ascertainable as availed in the statement of accounts since they are clear and unambiguous and that the Court should resist being used to re-write the contract but instead enforce the contract. He stated that the statement of accounts was availed to the Plaintiff who never raised the issue of reconciliation of accounts during the debt collection process to the Defendant advocates.

On the issue suffering irreparable damages, Counsel submitted that it was within the Plaintiffs knowledge that Charged properties are intended to acquire or are supposed to have a commercial value, otherwise lenders would not accept them as securities. He relied on the case of **Maithya V. Housing Finance co. of Kenya & Another 120031 1 EA 133** at 139 where Honourable Nyamu, J. stated as follows:

*“Charged properties are intended to acquire or are supposed to have a commercial value otherwise lenders would not accept them as securities. The sentiment of ownership which has been greatly treasured in this country over the years has in many situations given way to commercial considerations. Before lending, many lender banks and mortgage houses are increasingly insisting on valuations being done so as to establish forced sale values and market values of the properties to constitute the securities for the borrowings or credit facilities... loss of the properties by sale is clearly contemplated by the parties even before the security is formalized”*

Counsel further submitted that the Plaintiff has admitted liability to the bank and that bank is a stable financial institution that would adequately compensate him for the same. It was also stated by Counsel that the Plaintiff has not established a prima facie case and that the suit does not warrant any special circumstances for the grant of a temporary injunction. He urged the court to dismiss the Plaintiff's application dated 9<sup>th</sup> March, 2017 with costs to the defendant as it lacks merit.

### **Analysis and determination**

I have considered the submissions from both counsels for the Plaintiff/ applicant and the Defendant/ respondent together with the supporting documentation. I have also looked at the list of various judicial authorities and have come to the conclusion that the main issue for the court's determination is whether the Plaintiff has met the requisite conditions to warrant the granting of a temporary injunction. The other issues that the court also considers is as to:

1. Whether the applicant was served with a valid statutory notice of sale.
2. Whether disputes in accounts is a basis for granting an injunction and
3. Whether the Defendant has breached the law by failure to undertake a forced sale valuation of the Plaintiff's land in accordance with section 97 (2) of the Land Act

The principles of interlocutory injunction are now well settled. As earlier stated that the main issue is whether the plaintiff has met the threshold of granting temporary injunctions. The principles are as laid down in the case of **GIELLA v. CASSMAN BROWN & CO. LTD[1973] EA 358 at page 360** where Spry J. held that:-

*“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. 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.”*

I will now handle the issue as to whether the plaintiff has established a prima facie case by addressing the issues relied on in the affidavit and the submissions one by one.

## **Notices**

I have perused the notices issued herein by the defendant. The first is a Demand letter dated 6<sup>th</sup> July 2016 and a Statutory Notice dated 20<sup>th</sup> July 2016 was issued pursuant to section 90 of the Land Act, 2012 and section 108 of the Land Registration Act 2012 requiring the plaintiff to pay within a period of three months the amount in arrears to rectify the default. The particulars of the nature and extent of the default were detailed in that demand notice.

I have also seen a postal receipt of the statutory notice and a notification for sale dated 31<sup>st</sup> October 2016 which was issued pursuant to Section 96 of the land Act and was served upon the plaintiff applicant via registered post as per the postal receipt attached to the replying affidavit. The plaintiff has not denied that he did receive the notices. A 45 days notification of sale by the Auctioneers dated 16<sup>th</sup> December 2016 was also served on the plaintiff and this is also not denied.

I therefore find that the notices have complied with the law as provided for. The mandatory days provided for and the particularization of the amount owing were followed by the defendant in respect of the statutory notices as earlier stated above.

## **Dispute on accounts**

On the issue of dispute on statement of accounts, the plaintiff applicant has admitted it owes the defendant but disputes the amount owing. The plaintiff claims that the amount outstanding is as per the statement which is Kshs. 2,835,824.60 and not Kshs. 4,148,415.10 as advertised in the Daily Nation of 27/2/17.

As a general rule, disputes on accounts or amounts owing on a charge will not per se be a basis for granting of an injunction. The chargee may be restrained from exercising its statutory power of sale only if it can be established from the charge or evidence adduced in court that the amounts claimed are excessive or tainted with illegal charges and interest. The plaintiff has not stated whether the amounts claimed are tainted with illegal charges or are excessive. The plaintiff stated in his affidavit that he went to the defendant's offices to check his statement of accounts and found the figure of Kshs. 2,835,824.60. This is the way to go to sort out the issue of accounts not through the assistance of the court.

## **Forced Sale Valuation**

The Applicant alleges that the Respondent did not discharge the duty of care under section 97(2) of the Land Act to undertake valuation of the suit property in order to obtain the best market value of the suit property.

The primary provision on forced sale valuation is Section 97(1) and (2) of the Land Act No. 6 of 2012. It applies where the charged land is to be sold in exercise of power of sale or pursuant to an order of the court. The Act provides as follows;-

*1. chargee who exercises a power to sell the charged land, including the exercise of the power to sell in pursuance of an order of a court, owes a duty of care to the chargor, any guarantor of the whole or any part of the sums advanced to the chargor, any chargee under a subsequent charge or under a lien to obtain the best price reasonably obtainable at the time of sale.*

*2. A chargee shall, before exercising the right of sale, ensure that a forced sale valuation is undertaken by a Valuer.*

I note that two points are clear from the above section. The Defendant/Respondent is under a statutory duty; 1) to ensure that a forced sale valuation is undertaken by a valuer; and 2) to obtain the best price reasonably obtainable at the time of sale. I have not seen any valuation attached by the defendant respondent to confirm that a forced sale valuation was undertaken as required by law. The defendant has

neither addressed the issue in the replying affidavit nor in the submissions to counter the plaintiffs' assertion that it did not undertake a valuation as required by law before exercising the right of sale. Did the defendant fail to undertake a forced sale valuation? Is that the reason why they have not referred to it? On this issue, I find that there was no compliance with requirement of undertaking a forced sale valuation.

### **Determination**

Having considered the above issues including whether the applicant has established a prima facie case with a probability of success, I find that the applicant did not meet the strict threshold for granting equitable relief of temporary injunctions. It seems the applicant is seeking for time to put his house in order or wait for the finalization of the case that he has filed before the Employment and Labor relations Court. He is waiting for the payment of his employment benefits if any to sort out the loan. I therefore find that the Statutory Notices are valid and there would be no need to re-issue them.

The plaintiff having failed to establish a prima facie case with a probability of success, I will give him the benefit of doubt and find that the balance of convenience tilts in his favour reason being that he has been repaying the loan until he was suspended. This is not to say that the tilt heavily lies on his side for the reason given.

The upshot is that I issue a conditional temporary injunction restraining the defendant from selling the charged property subject to undertaking a forced sale valuation as required under section 97 of the Land Act within 30 days from the date of this ruling, thereafter the defendant is at liberty to exercise its statutory power of sale.

The application dated 9<sup>th</sup> March 2017 succeeds to the extent I have mentioned above. Costs in the cause.

It is so ordered

Dated and delivered at Eldoret on this 31<sup>st</sup> day of July 2017.

**M.A ODENY**

**JUDGE**

**Read in Open Court in Presence of:**

Mr. Kenei holding brief for Mr. Yogo for Plaintiff

Mr. Kamau holding brief for Karanja Njenga for defendant

Mr. Koech: Court Assistant