



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND COURT
ELC. NO.47 OF 2016

DAVID MBURU GITHERE.....1ST PLAINTIFF/APPLICANT

SHELTER INVESTMENTS LIMITED.....2ND PLAINTIFF/APPLICANT

-VERSUS-

JAMII BORA BANK LIMITED.....DEFENDANT/RESPONDENT

RULING

The matter for determination is the Plaintiff's/Applicant's *Notice of Motion* application dated **25th January 2016**, brought under Order 40 Rules 1, 2, 3 and 4 of the Civil Procedure Rules 2010 and Section 3 and 3A of Civil Procedure Act.

The Plaintiff/Applicant has sought for the following orders:-

i. Spent.

ii. Spent.

iii. That pending the hearing and determination of this suit, the Defendants whether by themselves, agents, servants or otherwise howsoever be restrained from selling, leasing, renting, occupying, transferring, subleasing, using, misusing, wasting or in any other manner dealing with property title No.LR 13/1216/111. Eastleigh Section 3, Nairobi County (suit property).

iv. Costs of this application be provided for.

The application is based on the grounds stated on the face of the application and on the **Supporting Affidavit** of **David Mburu Githere**, sworn on **25th, January 2016**. The grounds in support are:-

a) The Defendant illegally advertised for sale of the suit property without issuing the statutory notices required under law.

b) The suit property was undervalued.

c) The computation of the interest was high.

The Plaintiff/Applicant's case is that he is the registered owner of the suit property and also the director of Shelter Investment Limited. He averred that the Company applied for a loan facility in the amount of **25,600.000/=** from the Defendant in **2014** and charged the suit property as security. He continued that he had started servicing the loan but underwent treatment abroad which delayed payments. He also stated that he informed the Defendant that he would dispose of some of his properties to regularize the loan. He further argued that he had already started the process of disposing of his property **Title Number Dagoretti/Riruta/3048**, in order to offset the loan facility. He argued that despite these efforts, the Defendant went on to illegally advertise for sale by public auction of the suit property without issuing the notices as required under the Law. Further he contested that the Defendant had undervalued the property at **32 Million**, while its market value is **45 Million**. The Plaintiff urged the Court to allow his application.

The application is opposed by the Defendant/Respondent. The Defendant filed a **Replying Affidavit** on **25th February 2016**, sworn by **Rufus Macharia, the Debt Recovery Manager** of the Defendant Company. He confirmed that the Plaintiff was the registered owner of the suit property and that a charge was created over the suit property to secure a loan facility for Shelter Investment Limited. He averred that the Defendant **defaulted in servicing the loan** and the account fell into arrears of **399,708/93** as of **20th April, 2015**, which prompted the bank to issue a demand notice to the 2nd Plaintiff, demanding settlement within 7 days. He further argued that sometime in **May 2015**, the **account** was found to be in **arrears again** prompting the bank to send a further **demand for payment** of the amount within **7 days**. He averred that on **16th July 2015**, after the account had been in arrears for over the statutory limit of one month, the bank issued the first Statutory Notice under Section 90(1)(2) and (3)(e) of the Land Act. The Defendant argued that they were strangers to the sale of the **Dagoretti/Riruta/3048**. They further acknowledged receipt of the letter authored by the 1st Plaintiff on the **22nd October 2015**, requesting an extension of the repayment period but that they responded with a letter dated **27th October 2015**, indicating to the Plaintiffs that they would continue with the recovery process as scheduled unless the entire amount in **arrears, 3,043,231/47** was paid in full or if the proposed **sum of 5,000,000/= was paid before 1st November 2015**. He argued that the Plaintiff did not adhere to the requirements set out in that letter. He further argued that once the **3 month Statutory Notice** lapsed, the Bank was at liberty to sell the charged suit. He averred that the bank issued a notice to sell, advising the 1st Plaintiff of their intention to **sell** the suit property via **public auction** and further that the **Auctioneers, M/s Leakey**, issued the Plaintiff a **45 day Redemption Notice**. He contended that the property was properly valued at an open market value of **50,000,000/=** by **Wamae Mureithi & Associates** at the Defendant's request. The Bank argued that the Plaintiffs admit to being indebted to the Bank and that their effort in this application is to frustrate the ends of justice. He further argued that 'The Statutory Power of Sale' was the only recourse the Bank had and that granting this application would frustrate this recourse. He urged the Court to dismiss the application with costs.

The application was **canvassed** by way of **Written Submissions** which this Court has carefully read and considered. The Court has also considered the pleadings in general and the annexures thereto. The Court renders itself as follows;

There is no doubt that the Applicants herein have sought for injunctive

Order which is an equitable remedy granted at the discretion of the Court. However, the said discretion must be exercised judicially. See the case of **David Kamau Gakuru...Vs..National Industrial Credit Bank Ltd, Civil Appeal No.84 of 2001**, where the Court held that"-

"An injunction being an equitable remedy, it cannot be granted to a party who has demonstrated openly by his conduct that he is undeserving of the equitable relief.... "It is trite that the granting of interim injunction is an exercise of judicial discretion and an Appellate Court will not interfere unless it is shown that the discretion has not been exercised judicially".

Since the Applicants have sought for injunctive orders, the principles that will guide this Court in determining whether the Applicants are deserving or not deserving of the orders

sought are the ones set out in the case of **Giella ...Vs...Cassman Brown & Co.Ltd 1973 EA 358** and later repeated in other judicial pronouncements. In the case of **Francis Jumba Enziano & Others ..Vs... Bishop Philip OKeyo & 2 Others, Nairobi HCCC No.1128 of 2001**, the Court held that:-

“The settled principles of grant of an injunction are; first that the Applicant must show a prima –facie case with probability of success at the trial. Secondly, an interlocutory injunction will not normally be granted unless the Applicant can show an irreparable injury which cannot be adequately compensated by damages. Thirdly, if the court is in doubt, it should decide the application on a balance of convenience”.

Further, as the Court delve into the available evidence, it will take into account that at this interlocutory stage, the Court should not venture into making definitive findings of facts and law particularly where the affidavits filed are contradictory as the Court cannot believe or disbelieve the statements made on oath of either party without in effect trying the case on affidavits evidence. That would in effect be contrary to the law which stipulates that causes are to be ordinarily tried on *viva voce* evidence. (See **Francis Jumba Enziano’s case (Supra)**. See also **Airland Tours and Travel Ltd...Vs...National Industrial Credit Bank, Nairobi HCC No.1234 of 2001**, where the Court held that:-

“In an interlocutory application, the Court is not required to make any conclusive or definitive findings of facts or law, most certainly not on the basis of contradictory affidavit evidence or disputed proposition of law”

Taking into account the above set principles, the Court finds that the first issue for determination is whether the Applicants have established that they have a prima facie case with probability of success at the trial.

Prima-facie case was described in the case of **Mrao Ltd... Vs... First American Bank of Kenya Ltd & 2 Others (2003) KLR 125**, to mean:-

“so what is a prima facie case----- In civil cases it is a case which on the material presented to the Court on a tribunal properly directing itself with concludes that there exist a right which has apparently been infringed by the opposite party as to call for a explanation on rebuttal from the latter”

From the above description of prima-facie, it is evident that it means more than an arguable case. It means that the evidence on record must show an infringement of a right and the probability of success of the Applicants case at the trial. Further, in the case of **Habib Bank A.G. Zurich...Vs...Eugene Marion Yakub, Civil Appeal No.43 of 1982**, the Court held that:-

“Probability of success means the Court is only to gauge the strength of the Plaintiff’s case and not to adjudge the main suit at that stage since proof is only required at the hearing stage”.

There is no doubt that the Applicant herein were offered a loan facility of 25,000,000/- by the Defendant vide a **Letter of Offer** dated **1st September 2014** and supplemental letter of offer dated **10th September 2014**. There is also no doubt that the parties executed a Legal Charge dated **7th October 2014** and **LR.No.36/1216/111 (Eastleigh)** was offered as a security for the said loan facility. There is also no doubt that the Plaintiffs herein started defaulting in the year **2015** and the Defendants served numerous demands to the Plaintiffs. There is no doubt that vide a letter dated **22nd October 2015**, the Plaintiffs had given a proposal for down payment of the loan due. There is also no doubt that the Defendant advertised the Plaintiffs suit property **LR.No.36/1216/111 (Eastleigh)** for sale through Public Auction on **29th January 2016**, due to the non-payment of the loan facility. The Plaintiffs thereafter filed the instant application and alleged that the Defendant illegally advertised the sale of the suit property through Public Auction without giving the Statutory Notices. That the Defendant is claiming illegal amount from the Plaintiffs and that the suit property was undervalued. The Plaintiffs have denied that they received the purported Notices as stipulated by Section 90 of the Land Act.

The Defendant on its part has alleged that it duly issued the Statutory Notices under Section 90(1)(2)(3) (e) of the Land Act. The said Statutory Notice was attached as **annexture RM4** to the Defendant's **Replying Affidavit**. It is also evident that the Plaintiffs did write a letter dated **22nd October 2015**, acknowledging that their account was in arrears and they promised to regularize the same by payment of **5,000,000/=** by **1st November 2015**. The said proposal was accepted by the Defendant vide their letter dated **27th October 2015**. Section 90(1) of the Land Act provides:-

90. (1) 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 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.

If indeed the Plaintiffs were in default as alleged by the Defendant and as acknowledged by the Plaintiffs vide their letter dated **22nd October 2015**, then the Defendant had a right to issue the Statutory Notice as provided above. The Defendant alleges that they served the said Notice to the Plaintiffs via registered post. The Plaintiffs have alleged that they did not receive the said Notice. However, it is evident that the Plaintiffs did acknowledge their indebtedness to the Defendant vide their letter dated **22nd October 2015**. What prompted the Plaintiffs to acknowledge the arrears in their account and the purported proposal of payment? The Court finds that the Plaintiffs did acknowledge their indebtedness to the Defendant because they had received the Statutory Notice as served on them by the Defendant. The Court finds that the Defendant herein did comply with the provisions of Section 90 of the Land Act by serving a Statutory Notice to the Plaintiffs vide their Notice dated **6th July 2015**.

The Applicants further alleged that the Defendant did not conduct a proper valuation of the property and that they undervalued the charged property at the detriment of the Plaintiff. Section 97(2) of the Land Act on the Duty of Chargee exercising power of sale states as follows:-

“A chargee shall before exercising the right of sale ensure that a forced sale valuation is undertaken by a valuer”.

The Plaintiffs have alleged that the Defendant intended to sell the property at **Kshs.32,000,000/=** while its market value was **Kshs.45,000,000/=**. However, the Defendant alleged that it discharged its duty of care by conducting a valuation before the intended sale. Indeed the Court has seen the said valuation dated **13th October 2015** and marked **RM9**. The value of the suit property was given as **Kshs.50,000,000/=**. It is therefore not true that the Defendant undervalued the property as it carried the valuation of the property as stipulated by Section 97(2) of the Land Act.

From the available evidence it is evident that the Plaintiffs are indebted to the Defendant as their loan Account was in arrears. The Defendant issued the relevant Notices and thereafter advertised the suit property for sale via Public Auction as provided by Section 96 of the Land Act. The Court finds that with default on the part of the Plaintiffs, the Defendant's right under the charge had accrued and the Defendant was not wrong in attempting to realize the security by exercising its Statutory Power of Sale as provided by Section 96 of the Land Act.

The Court finds that though the Plaintiffs have advanced an arguable case, there was no evidence that there was infringement of any of their rights by the Defendant. The Court therefore, finds that the Plaintiffs have **not established that they have a prima-facie case with probability of success**.

The second issue for determination is whether the Plaintiffs/Applicants will suffer irreparable damages in the event the injunction is not granted. In their submissions, the Applicants did not address the issue of irreparable loss. In the case of **Nguruman Ltd ..Vs...Jan Bonde Nielsen & 2 Others Civil Appeal no.77 of 2012**, the Court held that:-

“An injury is irreparable where there is no standard by which their amount can be measured

with reasonable accuracy or the injury or harm is such a nature that monetary compensation of whatever amount will never be adequate remedy”.

The Applicants deponent had alleged that the Defendant is intending to sell by Public Auction their matrimonial home. However, from the Report filed by the auctioneers, it was alleged that the mortgaged property was a commercial residential plot where tenants have leased the houses therein. It was stated that the Applicants do not live in the mortgaged property. However, it is evident that the Plaintiffs did offer the suit property as security for the loan facility. Once the said property was offered as security, then it became a commodity for sale and it has a value. Therefore the Applicants cannot be heard to say that they will suffer irreparable loss which cannot be adequately compensated by an award of damages. The Court will be persuaded by the findings in the case of **Andrew M. Wanjohi ...Vs....Equity Building Society & 7 Others (2006) eKLR**, where the Court held that:-

“By offering the suit property as security, the chargor was equating it for a commodity which the chargee may dispose off so as to recover his loan together with interest. Therefore if the chargee were to sell off the suit property, the chargor’s loss could be calculable on the basis of the real market value of the said property”.

Further in the case of **Isaack O. Litali...Vs...Ambrose W, Subai & 2 others HCCC No.2092 of 2000**, the Court held that:-

“ I am of the opinion that once land has been given as security for loan, it becomes a commodity for sale by that very fact and any romanticism over it is unhelpful.....for nothing is more clear in a contract of charge than that default in payment of the debt will result in the sale of the security.....”

The Plaintiffs herein, as submitted by the Defendant willfully gave the suit Property as security and as such it became a commodity for sale and it is therefore subject of sale in case of default. Further even if the Court was to find in favour of the Plaintiffs at the final determination of the suit, damages would be an adequate remedy. The Plaintiffs can find recourse in Section 99 (4) of the Land Act which provides that:-

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

Such was the finding by the ***Court of Appeal*** in the case of **Priscillah Krobought Grant ...Vs...Kenya commercial Bank**, where the Court held that:-

“Where a chargee had exercised its statutory power of sale and caused the property to be sold by public auction, the remedy of the chargor was a claim for damages if she would prove that there was improper or irregular exercise of the statutory power of sale”.

In this matter, the Court finds that in the event the Court was to find in favour of the Plaintiffs/Applicants at the final analysis of the case, then the Defendant/Respondent which is a financial institution would be in a position to compensate the Applicants in damages which would be adequate remedy given that the suit proeperty can be valued and quantified. Therefore the Court finds that Plaintiffs/Applicants have not demonstrated that they will suffer irreparable loss which cannot be adequately compensated by an award of damaged.

On the third issue of if the Court is in doubt to decide on the balance of convenience, the Court finds that there is no doubt that the Plaintiff are in loan arrears. The said loan and interest keeps on accumulating. If the security is not realized now, then the loan and interest will escalate to a higher amount that it would be impossible to recover the same. The Court finds that the a balance of convenience herein tilts in favour of the Defendants. In the case of **Andrew M. Wanjohi...Vs...Equity Building Society & 7 Others (supra)**, the Court held that:-

“...if the 1st and 2nd Defendants were restrained from selling off the suit property, there is a

very real risk that the debt may outstrip the value of the suit property as the borrower has never made any repayments. the stoppage of the intended sale by the chargee would result in the continued growth of the debt and thus exposing them to potentially substantial irrecoverable loss”.

The Applicants have admitted that they are in default, and they did not honour their repayment proposal. The Defendant therefore stands to suffer and undergo loss incase the sale is stopped until the suit is heard and determined, the Court finds that the balance of convenience tilts in favour of the Defendant herein.

Having now carefully considered the ***Notice of Motion*** dated ***25th January 2016***, the Court finds it ***not merited***. Consequently, the Court ***dismisses the said application entirely with costs to the Respondent***.

The parties herein to comply with Order 11 within the next 60 days from the date hereof and thereafter fix the matter for Pre-trial Conference before the Deputy Registrar of this Court.

It is so ordered.

Dated, Signed and Delivered at NAIROBI this ***31st*** day of ***August, 2017***.

L. GACHERU

JUDGE

31/8/2017

In the presence of

Mr. Sitienie holding brief for Mr. Nyakiagara for 1st Plaintiff/Applicant 2nd Plaintiff/Applicant

M/S Michira for Defendant/Respondent

Catherine - Court clerk.

Catherine - Court clerk.

L. GACHERU

JUDGE

31/8/2017