



Mr. Mathai Counsel for the plaintiff/applicant argued the application and submitted that he is seeking for prayers b, c, and d of the application. He relied on the grounds on the face of the application and on the supporting affidavit of the applicant. He stated that the applicant was a guarantor to Anne Gitau who had been advance a loan of Kshs. One million by the 1<sup>st</sup> defendant.

It was counsel's submission that the applicant ought to have been informed when there is default by the principal borrower. He stated that the chargor was not served with a statutory notice as required by section 90 and 92 of the Land Act 2012. He further submitted that on 15/9/16 the chargor was served with a notification of sale by auctioneers indicating that they had been given 45days.

Mr. Mathai Counsel for the plaintiff took issue with the lack of a forced sale valuation before exercising the statutory power of sale as provided for under section 97(2) of the Land Act. Counsel also submitted that there were discrepancies in the annexed documents in that by the time of instructing the auctioneers that 40 days had not expired. He stated that the notification of sale is dated 15/9/16 while the statutory notice is dated 23/9/16 alleging that the auctioneer must have been instructed before the issuance of the notice statutory notice.

Counsel submitted that the charge did not comply with the law as the principal borrower being the wife of the chargor did not have capacity to sign a consent to the charge. Counsel also took issue with the certificate of posting dated 28/5/16. He also relied on the case of ALBERT MARIO CARDERIO & ANOTHER -VS- VISHRAM SHAMJI 92015) and KOILENKEN OLE KIPOLONKA ORUMOI -VS- MELLECH ENGINEERING CONSTRUCTION LTD & 2 OTHERS (2015). He therefore submitted that the plaintiff has a prima facie case and urged the court to grant the orders as prayed.

### **Defendant's Counsel's Submissions**

Mr. Kamau, Counsel for the defendant/Respondent opposed the application and relied on the replying affidavit filed in court. He submitted that all the notices were served according to the law and are annexed to the replying affidavit. Mr. Kamau further stated that there were no discrepancies in the statutory notices as alleged by counsel for the plaintiff/applicant.

On the issue of valuation, counsel submitted that section 97 (2) does not give specific time when the forced valuation is to be undertaken. He further submitted that the amounts demanded are duly set out in the statutory notices.

Mr. Kamau Counsel for the defendant stated that there is no requirement that the defendant pursues or exhausts other remedies before redemption. It was his submission that the spouse gave a valid consent and she is not complaining. Counsel stated that ground number three of the application is an admission that the principal debtor defaulted.

Counsel submitted that the statutory notices were either sent to the plaintiff or copied to him and he was under an obligation by virtue of the guarantee to pay the debt. He argued that the plaintiff has not come to court with clean hands as equity demands. He urged the court to dismiss the application with costs to the defendant.

In response to the defendant's Counsel's submissions, Mr. Mathai relied on section 90 (3) of the Land Act 2012 to reiterate his earlier submissions. He submitted that the Chargee was repaying the loan.

### **Analysis and Determination**

This is an application for temporary injunction which is an equitable remedy. The court has discretion to grant such remedies but there are established principles which must be adhered to as was enunciated in the known case of **Giella Versus Cassman Brown (1973) EA 358**.

- 1) Has the Plaintiff made out a prima facie case with a probability of success?

2) Is the Plaintiff likely to suffer irreparable injury which would not be adequately compensated by an award of damages?

3) In whose favour does the balance of convenience tilt if the court is in doubt?

Apart from these laid down principles, the court should be alive to the fact that Article 159 of the Constitution as well as the Overriding Objective as provided for under sections 1A & 1B of the Civil Procedure Rules obliges the courts to do substantive justice by interpreting the law in a much wider manner in order to act justly and fairly.

The issues that the court is asked to determine in this application are as follows:

1) Whether there was a valid statutory Notice issued pursuant to section 90 & 96 (2) of the Land Act 2012.

2) Whether a forced sale valuation was carried out before the sale.

3) Whether the defendants have exhausted alternative remedies available before resorting to sale of the collateral.

### **Whether there was a valid statutory Notice issued pursuant to section 90 & 96 (2) of the Land Act 2012.**

The applicant herein is a guarantor to the borrower who signed a guarantee in a form of a charge over the suit property. When signing the charge, the applicant must have been aware of the consequences of default of payment of the loan by the borrower. The guarantee is a valid contract within the law which also enjoys similar protection under the charge.

The law requires that a statutory is served on the principal borrower to remedy any default within 90 days, and he should be fully informed of the acts needed to remedy the default and his right to apply for relief. The notice must fully comply with section 90(1) of the Land Act. The notice must be copied to the guarantor because the liability of the guarantor will arise upon default by the principal borrower.

The question that we must ask is whether the notice under this section was properly issued and if so was it copied to the guarantor who is the plaintiff applicant herein? Was section 96 (2) of the land Act adhered to? Was the chargor give at least 40 days from the date of service of the notice to sell? This section provides as follows:

***“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 sale of the charged land until at least forty days have elapsed from the date of the service of the notice to sell”.***

This provision of the law is mandatory and has to be fulfilled before a sale can be conducted. I have perused the notices and find that the same were properly issued as required under the law. The statutory notice was issued to the principal debtor under section 90 (1) (2) & (3) e of the Land Act 2012 on 6<sup>th</sup> June 2016 urging the debtor to rectify the debt within 90 days. The amounts were specified in the notice as required by law. This notice was also copied to the applicant herein who is the guarantor namely FRANCIS GITAU WAMUHIU OF POST OFFICE BOX 1876 -30100 ELDORET, which I note that is the same box number in the charge document. I have also perused the certificate of posting and have not seen any discrepancies as was alleged by the applicant’s counsel. The dates are very clear on the annexures.

The defendant’s Advocates wrote a further demand letter on 23<sup>rd</sup> September 2016 to the applicant informing him of the default of payment of the outstanding amount together with the intention of exercising its statutory power of sale as provided for under section 96 of the land Act. The letter also

stated that the Chargee will exercise its statutory power of sale over the property if after (40) days from (7) days from the date of registered postage of the letter the amount of Kshs. 930,003.40 together with interest is not paid in full.

Further the auctioneer wrote a letter dated 5<sup>th</sup> April 2017 to applicant informing him that the suit property would be sold by public auction on 23<sup>rd</sup> May 2017 if the outstanding amount is not paid within 45 days. The certificate of postage shows that it was posted on 7<sup>th</sup> April 2017 which is still within the 45 days stipulated by the law. It is evident from this that the auctioneer was given instructions by the Chargee after the forty days had lapsed as stipulated under section 96 (2) of the Land Act.

I therefore conclude that there was a valid statutory notice issued pursuant to section 90 & 96 (2) of the Land Act.

### **Whether a forced sale valuation was carried out before the sale.**

The second issue is as to whether a forced sale valuation was carried out before the sale. The applicant alleges under paragraph 9 of the supporting affidavit that no valuation of the property was carried out. 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:-

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.*

The question is whether it would be fatal for a chargee not to undertake a forced sale valuation? Is it crafted in mandatory terms? The chargee owes a duty of care to ensure that the best price reasonably obtainable at the time of sale. It should be noted that the drafters of the law used the word “shall” which is problematic as the use of this auxiliary to indicate obligation is slightly archaic. For example, if you said “you shall proceed as directed” or “he shall do as he is told” would you say that these statements indicate an obligation? The word ‘shall’ is the most misused in legal English. I do not intend to lecture in legal English or legislative drafting but it is important to point out that to avoid ambiguity, most legal writing experts now prefer the unambiguous “must” which denotes obligation rather than “shall” which indicates *future tense* or prediction. I leave that for the drafters who should be up to speed with modern drafting world over.

Back to the issue before me, was a forced sale valuation carried out as per the law? The answer is that there is no evidence that any forced sale valuation was done. In fact Mr. Kamau Counsel for the defendant submitted that section 97 (2) does not give a specific time within which the valuation is to be done. This is essentially an admission that no such valuation was done. If the applicant did not move to court to stop the sale, would the defendant have carried out the forced sale valuation? If they intended to do so, then at what stage were they going to comply? Having said that, I find that there was no forced sale valuation as required by law.

**Whether the defendants have exhausted alternative remedies available before resorting to sale of the collateral.**

The other issue for determination is as to whether the defendants have exhausted alternative remedies available. Is there a requirement in law that you must exhaust alternative remedies before you exercise the statutory power of sale? The law is very clear on the options provided which a party may choose under section 90 (3) (1) which states that:

- a) Sue the chargor for any money due under the charge,
- b) Appoint a receiver of the income of the charged 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.

In this case the chargee opted to exercise its statutory power of sale. It was under no obligation to exhaust any alternative remedies. I find that this argument by Counsel for the applicant that the defendant had not exhausted alternative remedies does not hold any water.

Counsel alluded to the issue of spousal consent that the principal borrower being the wife of the chargor did not have capacity to sign the consent for the property to be charged. If this was the case then the applicant should have raised it on the onset when taking the loan. They should not have charged the property in the first place if they thought that there was an illegality. The applicant cannot be heard to raise it now.

Consequently, after considering the submissions by the counsels for both parties, together with the supporting documentation and relevant authorities, I find that the plaintiff has not established a prima facie case with a probability of success. The plaintiff in effect seems to be seeking for more time to reorganize himself to repay the outstanding loan arrears. This is evident from prayer number ( c ) of the application.

I will give the plaintiff the benefit of doubt and find that the convenience tilts in his favour just on the ground that the forced valuation was not carried out as required by law. This in effect does not invalidate the statutory notices.

The upshot is that I allow 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 19th May 2017 succeeds to the extent I have mentioned above. Costs in the cause.

It is so ordered

Dated and delivered at Eldoret on this 28<sup>th</sup> day of September 2017.

**M. A ODENY**

**JUDGE**

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

Miss Isiaho for Mathai for Plaintiff/Applicant

