



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

MILIMANI LAW COURTS

ELC CASE NO 851 OF 2015

PATRICIA ACHIENG ONYANGO AND BENEY AWINO ONYANGO

(Suing as the Legal Rep. of

DISMAS JUMA ONYANGO KAMB.....PLAINTIFFS/APPLICANTS

VERSUS

MERIDIEN BIAO BANK LIMITED (IN LIQUIDATION)...DEFENDANT/RESPONDENT

RULING

The Application for determination is the Notice of Motion dated 4thSeptember, 2015 brought under **Order 51 Rule 1 and Order 40 Rule 1, 2, 3, 4, and 8 and Sections 3A and 63(c) of the Civil Procedure Act, Cap 21 and Section 13 of the Environment and Land Court, Act Cap 12A** seeking for orders, inter-alia, that;-

- i. That Pending the hearing and determination of this suit, an order of injunction do issue restraining the Respondent or any of them from selling, transferring, disposing, wasting, alienating or encumbering of all that piece of land together with the buildings, fixtures and other developments thereon comprised in L.R Number Nairobi/Block 103/163 situated in Mugoya Estate, South C in Nairobi County within the Republic of Kenya.*
- ii. The Respondent do pay costs of this application.*

This Application is premised on the supporting affidavit of **Patricia Achieng Oyango** “the Plaintiff/Applicant herein”. She submitted that she was the **Legal Administrator** together with her daughter, **Beney Awino Anyango** in her husband’s Estate, the late **Dismas Juma Onyango (deceased)**. She deposed that the deceased was the registered proprietor of all that property known as **L.R Number Nairobi/Block 103/163**, situated in **Mugoya Estate, South C in Nairobi County**, (hereinafter referred to as the “suit property”), upon which stands a residential house, which is her matrimonial home wherein she has resided together with all her children and continue to reside therein.

She deposed that vide a **Tripartite Agreement** made sometime in **1995**, the deceased agreed to temporarily guarantee a third party known as **Sunwise Travel (k) Ltd.**(hereinafter “the third party”) to secure certain financial accommodation made by the Respondent to the Third party pending the Third party’s providing its own security. The deceased provided the title to the suit property in order to secure his guarantee sometime in the **year 1995**.

Subsequently the Third Party through its Director, one **John Siganda (now deceased)**, forwarded to the Respondent the securities envisaged to discharge the Deceased from his guarantee to the Respondent. Immediately thereafter the Respondent went into statutory management holding the deceased's title to the Suit property as well as the Titles held by **John Siganda**, but without discharging the deceased from his guarantee and returning his title as per the **Tripartite Agreement**.

It was her deposition that the Respondent fraudulently misrepresented to the deceased that the guarantee to the Third Party was temporary and that deceased would be discharged once the Third party offered alternative security in the manner that the Respondent intended to make it permanent and conditional, releasing the security belonging to the Third Party instead of substituting, calling the deceased to meet the Third party's indebtedness to the tune of **Kshs.49,562,457/45** and demanding the said sums from the Plaintiff/Applicant.

She submitted that the Respondent was in breach of all the terms of this agreement between the parties. Further that despite numerous requests for clarification made on the Respondent by the Deceased during his lifetime and herself, the Respondent instead issued a **Redemption Notice**. She urged this Court to restrain any, intended sale of the suit property. She deponed that **Keysian Auctioneers**, a Firm of Auctioneers, has on instruction from the Respondent, already advertised the Suit Property for sale by **Public Auction** to be carried on the **30th September 2015**.

In response thereto, the Defendant/Respondent filed its **Replying Affidavit** through its **Assistant Liquidation Agent, Mr. Winsome Kossom** on **14th September 2015**. He averred that in the **year 1995**, the Defendant Bank granted various financial accommodations to **Sunwise Travel Limited** which loans were secured by a **charge** over the Suit Property executed by the proprietor the deceased, **Dismas Juma Anyango**. On **23rd February 1995**, the charge was registered in favour of the Defendant Bank. The borrower and the chargor deliberately defaulted in repaying the loan facilities which as at **6th August, 2013**, stood at **Kshs.49,622,007/45**. That upon that default, on **6th March 2012**, **KDIC** through its **Advocates M/s Oraro Advocates** sent a **Statutory Notice** to the chargor and the borrower. The chargor failed to comply with the Notice prompting **KDIC Advocates** to send a further Notice on **7th April 2015**. Consequently upon failure to repay the loans, the lenders sought to exercise its **Statutory Right of Sale** and the on **26th May 2015**, the lender's liquidator through its advocates instructed **Keysian Auctioneers** to help it realize its security. Upon receipt of the instructions, **Keysian Auctioneers** sent out a **45 days' Notice** to liquidate the debt thereby leaving the auctioneers with no other option but to advertise the suit property for sale.

The parties sought to canvass the application by way of **Written Submissions** and respectively the Applicant filed hers on **11th December 2015**. and the Respondent filed theirs on **21st September 2016** respectively.

The Applicant in her submission stated that an injunction being an equitable remedy, the usual rule that damages must be an inadequate remedy before the court will issue an injunction does not apply. She cited the case of **Marco Producton Limited.. Vs... Pagola**, where the Court held that an injunction may be granted if an award of damages would be useless. It was further submitted that a party to a contract has a right to its performance and not merely to compensation for breach and hence an injunction will be granted to restrain breaches of contracts.

The Applicant cited the *locus classicus* case of **Giella ...Vs. ..Cassman Brown & Co. Ltd (1973) EA**, wherein an Applicant must show a *prima facie* case with a probability of success, an interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury. She also cited the case of **Simon Gatutu Kimamo & 587 Others...Vs. East Africa Portland Cement Co. Ltd**, wherein it was held that besides the three main factors to be considered in determining whether to grant a preliminary injunction, the Court should take into account after the first three public interest.

Further Plaintiff cited the case of **Suleiman...Vs... Amboseli Resort Ltd**, which set out the well accepted principles that for an Applicant to be successful in seeking an interlocutory injunction, he must establish a

right. This general rule cuts across board that is in relation to other branches of law. Secondly, once the Applicant establishes his right and its violation, he will be entitled to an injunction.

The Applicant further submitted that the injunction should issue based on the following grounds;- The Statutory Notice issued to the Applicant was fundamentally defective in that it provided for 45 days contrary to the statutory mandatory minimum period of 3 months. This was therefore contrary to Section 90(1) of the Land Act 2012.

Secondly, no valuation for the property was conducted. The chargor was under an obligation to conduct valuation over the charged property before exercising the right of sale. The Applicant cited the case of **Moses Kibiego...Vs...Ecobank Kenya Limited (2014) eKLR**, wherein the principles enunciated therein was that the Plaintiff was not properly served with the Statutory Notice and what was served was deemed to be a defective Statutory Notice. This was buttressed by the case of **Elizabeth Wambui... Vs.... Housing Finance Co. ltd (2006) eKLR**, which stated that the omission to serve a Valid Statutory Notice is not an irregularity or impropriety to be remedied in damages. It is a fundamental breach of the Statute which derogates from the Chargor's equity of redemption.

Thirdly, it was her submission that the Respondent by its own omission, failed to substitute the Deceased's security for which was offered by the third party. It was the Applicants case that the deceased issued his title as a stop gap measure to enable the Third Party to transfer its facilities from one bank to the Respondent. Once the transfer was completed, the Respondent was required to perfect the Third Party's Security and discharge the deceased. Consequently, the Applicants contend that this omission by the Respondent was a fundamental breach of their agreement entitling the Respondent to repudiate the guarantor.

Fourthly the Applicant submitted that the Respondent was in liquidation and would not be able to compensate the estate of the deceased in damages if the sale were allowed to continue hence, the prayers for injunctive relief pending the determination of the suit.

In its Submissions the Defendant/Respondent also cited the case of **Giella Vs... Cassman Brown & Co. Ltd(1973) EA**. It expounded on the meaning of a prima facie case as considered by the Court of Appeal citing the case of **Mrao Limited....Vs. First American Bank of Kenya Limited & 2 others (2003)KLR 125**, wherein it was held that a *prima facie* case must be one where it is established that a right has been infringed by the opposite party as to call for an explanation or rebuttal from the other.

The Respondent submitted that the Applicant was in default of the loan agreement and it sought to exercise its right of sale. It submitted further that 'The Statutory Notice' was indeed served, however it was unaware that the chargor had passed on. The Respondent contended that it had not undertaken a valuation of the property as it was yet to exercise its power of sale and thus it would comply with this condition before exercising its power of sale. Further thereto, the chargee instrument was executed between the Respondent Bank and the deceased as Chargor, and therefore the Respondent pointed out that nowhere was stated that the same was to be substituted by a security offered by the third party. And hence an injunction could not issue.

It submitted that Damages was not inadequate remedy over the conditions for the grant of injunction citing the case of **Kenya Commercial Finance Co. Ltd vs. Afraha Education Society (2001) EA 86**, which held the principal of grant of temporary injunction apply sequentially meaning the second condition would only apply if the first was fulfilled. It was their prayer that damages were sufficient in the present application. It further submitted in regards to the requirement that where the Court is in doubt of the conditions, it should determine the injunction application on a balance of convenience.

In this regard, the Respondent cited the case of **American Cynamid...Vs. Ethicon Ltd 1975 ALLER 504**, on extent to which the disadvantages to each party would be incapable of being compensated in damages in the event of his succeeding at the trial is always a significant factor in the assessing where the balance of inconvenience lies. Based on the foregoing, the Defendant is convinced that the Applicant has not met the threshold established in the case of **Giella Vs Cassman Brown (1973) EA 358**. The Defendant

submitted that since the remedy being sought by the Plaintiffs is an equitable one, the Court should decline to exercise its discretion because the Applicant has been shown to be guilty of conduct which does not meet the approval of the Court of equity.

This Court is being called upon to determine whether the Plaintiffs have established a *prima facie* case with the probability of success. And if the answer in the negative, whether damages are adequate remedies. If in doubt, where does the convenience lie? The law on Injunctions keeps growing as exhibited by **Ojwang Ag. J.** (as he then was) in the case of **Suleiman...Vs...Amboseli Resort Ltd (2004) eKLR 589**. Thus;

“A fundamental principle is that the court should take whichever course that appears to carry the lower risk of injustice if it should turn out to have been “wrong”.

Therefore, the Court finds that there are two issues herein for determination which are:-

- 1) Was there a valid Statutory Notice served upon the Plaintiffs.
- 2) Was the Applicant’s right to redemption fettered or clogged?

The first issue herein is whether there was a valid Statutory Notice

served on the Plaintiffs. Section 90 of the Land, Act 2012 lays down the requirements for a **Valid Statutory Notice**, and provides as follows:-

“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.

And 90(3), provides that if the chargor does not comply within two (2) months after the date of service of the notices under subsection (1), the chargee may Sell the charged land.

Justice Gikonyo in **David Ngugi Ngaari ...Vs...Kenya Commercial Bank Limited [2015] eKLR** elucidated that:-

“There is no doubt that the Applicant is a guarantor to the borrower. The guarantee was in a form of a charge over the suit property. The law, the way I understand it, is that a guarantee is a separate and distinct contract from the borrower’s contract. The guarantee is, therefore, enforceable as such. Except, however, the guarantor who has given his land as guarantee and a charge has been registered, he also enjoys the protections offered to a chargor under the Land Act. The principal debtor should be served with the requisite statutory notice 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 Notice under section 90(1) of the Land Act was properly issued and liability on the guarantor attached. However, I understand the law to be that, after the borrower has failed to remedy the default in accordance with the notice issued under the law, the chargor, who is the guarantor is entitled to a notice of not less than 40 days under section 96(2) of the Land Act before the chargee can sell the charged property. I should think that, the rationale of the position of the law I have postulated is that once a mortgage always a mortgage; the charge created on the suit

land is a charge for all purposes and intents within the sense of the Land Act and such charge does not become of a different character because it has been created by and over the land of a

guarantor of the borrower; it is a charge in favour of the lender. The notice under section 96(2) of the Land Act is mandatory, precedes and is quite apart from the Redemption Notice issued under rule 15 of the Auctioneers Act. Courts have rendered themselves explicitly on this obligation and I am content to cite some few cases. Albert Mario Cordeiro & another ..Vs.. Vishram Shamji [2015] eKLR, where the Court rendered itself thus:

Further Section 96(2) of the Land Act which 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”.

The Applicants contended that she was only made aware of an intended sale on **20th July 2015**, with a 45 days’ notice from the Auctioneer. In **David Ngugi Ngaari case (supra)**. It highlights the procedures to be followed when a Lender is or intend to exercise its power of sale. One, It must be a **Valid Notice of 3 months**, followed up by a **Notice of 45 days** under Section 96(2) and then under Rule 15 of the Auctioneers Rules, a **45 days Notice** with an intention to sale. Going through the Affidavit by the Applicant, it is clear that she was not aware about the Statutory Notice purportedly served on her late husband back in the **year 2012**. The deceased passed on in the **year 2006** as per the attached Death Certificate and by **2012**, that was **6 years** after his demise. This affirmation was made by the Defendant in its Affidavit. In my view the Statutory Notice was defective.

2. Was the Applicant’s right to redemption fettered or clogged?

As **Gikonyo J.** rightfully put it in **Albert Mario Cordeiro & Another Vs...Vishram Shamji [2015] eKLR;**

“If the sale of the suit property is carried through in the absence of a proper Notice to sell it will amount to a clog on the Chargors’ Equity of Redemption”

The Applicant has being issued with a **45 days’ Notice**. The Applicant in particular contests the manner in which the suit property was not discharged after the Third Party brought in its securities. This Court holds the issues of fraud and Third Party agreements are best suited for the trial Court. Therefore, this Court finds that the Plaintiff has established a **prima facie** with a probability of success at the trial. Further, the Court finds that this is a suitable case where the suit property should be preserved by maintenance of **status quo**.

Given that the suit property is the matrimonial home for the Applicant, if the sale is allowed to go on before the issues in dispute are resolved, then the Applicant will indeed suffer irreparable loss which cannot be adequately compensated by an award of damages. See the case of **Notco (Mombasa) Limited & Another... Vs...Halima Bakari Ramadhani, Civil Appeal No.158 of 1992**, where the Court held that:-

“Where the Plaintiff has been residing in the suit premises and that has been her home and the seat of the family for more than four decades, that place which she fondly calls her home, has a value of her which cannot be measured purely in economic terms as money cannot buy for the Respondent a home with the same sentimental value and attachment as the suit property.”

Therefore, the suit property being the family home for the Applicant should be preserved until the suit is heard and determined.

On the third limb, the Court finds that the balance of convenience tilts in favour of maintaining the **status quo** and the **status quo** herein is what was prevailing before the Defendant threatened to realize the security.

Consequently, after careful consideration of the instant **Notice of Motion** dated **4th September 2015**, the

Court finds *it merited and it is allowed entirely with costs being in the cause.*

Further, the Court directs the Plaintiff to take out Summons and then serve them upon the Defendant so that the Defendant can enter appearance accordingly and then file its Defence. Thereafter, the suit can be prepared for hearing by complying with Order 11 of the Civil Procedure Act.

It is so ordered.

Dated, Signed and Delivered at Nairobi this 7th day of September, 2017.

L. GACHERU

JUDGE

In the presence of

No appearance for the Plaintiffs/Applicants, though served

M/S Kadima holding brief for Mr. Chacha Odera for Defendant/Respondent

Philis - Court clerk.

L. GACHERU

JUDGE

7/9/2017