REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 93 OF 2017

ALICE NASAMBU SIMIYU

T/A MACFAST SUPPLIES…….....…….PLAINTIFF

VERSUS

AFRICAN PROVIDENT LTD

T/A REAL PEOPLE……...……1ST DEFENDANT

CRATER VIEW AUCTIONEERS……..…… 2ND DEFENDANT

R U L I N G

1. The plaintiff approached this court by way of an application dated **19/5/2017** seeking an order of temporary injunction to restrain the defendants from selling **LR. No. Kaplamai/Sirende Block 2/Ngonyek/334** pending the hearing and determination of this suit.

THE PLAINTIFF'S CASE

2. The applicant has sworn an affidavit dated 19/5/2017 in support of the application. The grounds on which the application is made are that the 1st respondent has deliberately and without regard to the plaintiff's interests charged and maintained an unconscionable interest rate and debited the plaintiff's loan account with other charges thereby making it impossible for the plaintiff to service the loan and thus clogging the plaintiff's equity of redemption.

3. Further, it is alleged that the 1st respondent has without first issuing the mandatory notices instructed the 2nd respondent to sell the charged property by way of public auction. The 2nd respondent is alleged to have, without service of notice under the Auctioneers Rules or advertising the same, put up posters for sale, advertising the property by way of public auction. The applicant avers that the respondents' actions are unlawful and amount to blatant disregard of the due process.

THE RESPONDENTS' DEFENCE

4. According to the replying affidavit of Irene Tarus filed on behalf of the defendants on 8/10/2017, the defendants aver that the land was part of the assets provided for as security for a loan of **Kshs.700,000/=** advanced to the applicant; that the applicant only serviced the loan as agreed for the months of July and August, 2014 after which she issued bad cheques and making irregular payments until September, 2015 when she stopped paying; that the plaintiff knows that the loan balance has been attracting a monthly interest and no other hidden charges; that as at 5/6/2017 the outstanding total loan balance was

Kshs.949,859/49; that statutory notices were issued to the applicant and her co-registered owner to the property one Paul Thuo Njuguna by way of dispatch through registered post; that the plaintiff never responded hence the 1st respondent's instructions to the 2nd respondent to issue a redemption notice which the 2nd respondent issued on 27/3/2017; that it was only after the expiry of that notice that the 2nd respondent advertised the property; that the applicant has admitted that she has been on default in making regular repayments; that there is another suit, ***Kitale CMCC No. 259 of 2015*** on the same cause of action and that spousal consent had been issued; that the interest rate has never been increased; it is alleged that the plaintiff is out to frustrate the 1st respondent from recovering what she owes it.

THE APPLICANT'S REJOINDER TO THE REPLYING AFFIDAVIT

5. The applicant has filed a supplementary affidavit admitting that she has only ever issued one bad cheque for Kshs.100,000/= under duress to save her property from auctioneers and that she called the 1st defendant promptly and explained that the cheque should not be banked. The applicant also faults the 1st respondent for not providing an account as to how much has been received and how the amount of Kshs.949,859.49/= was arrived at. The alleged notices sent by registered post are also said not to have reached either the applicant or her husband who is her co-registered owner. In this regard the applicant terms the 2nd defendants' certificate of service marked as "AT 7(b)" as false.

6. In addition the applicant avers that the ease in the subordinate court relates to unlawful attachment of her business stock and tools of trade while *the suit herein concerns land and so the cases are not the same or subjudice* of each other.

7. Further, the applicant emphasizes that no spousal consent was issued and faults the 1st respondent for not exhibiting a copy thereof if any such consent was issued. The applicant avers that as late as 17/6/2017 she made some payments by way of Mpesa and she is committed to repayment of the loan balance that is genuinely outstanding in spite of the tough economic times. She avers that due to the prolonged teachers strike of 2015, her business was adversely affected and she is still owed by schools over Kshs.800,000/=. She exhibits documents in her supplementary affidavit in support of this averment.

ISSUES FOR DETERMINATION

8. The issues arising for determination are as follows:-

(a) Whether the applicant has shown that she has a prima facie case with probability of success.

(b) Whether the applicant has demonstrated that she would suffer irreparable injury which would not adequately be compensated by an award of damages.

(c) Where does the balance of convenience lie of the court is in doubt regarding (a) and (b) above.

(d) Who should bear the costs of the application?

DETERMINATION

(a) Prima Facie whether the applicant has shown that she has a prima facie case with probability of success.

9. A prima facie case was defined in the case of ***Mrao –vs- First American Bank of Kenya Ltd & 2 Others 2003 eKLR*** as follows:-

"So what is a prima facie case? I would say that in civil cases it is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there

exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.

10. So, has the applicant made out a prima facie case? The applicant has openly acknowledged her indebtedness to the 1st respondent but she raises a number of issues that she opines entitles her to relief under the application at hand.

11. On the issue of service of Notices I do note that the receipt of the Statutory Notice marked "IT4" in the replying affidavit issued under ***Section 90 (1) (2) and 3(e) of the Land Act 2012*** is disputed.

12. The addressees named in the postal receipts marked as **"IT5 (a)"** and **"IT5 (b)"** are the applicant and one Paul Thuo Njuguna. In paragraph 6 of her supplementary affidavit the applicant reiterates that though they said Notices are shown to have been sent by post, they never reached her or her co-registered owner.

13. Regarding the issue of the 45 days Redemption Notice said to have been served by the 2nd respondent, the applicant states that the certificate of service purporting that she was served with the 45 day Redemption Notice is false.

14. She pokes holes into the testimony of the 2nd defendant's agent by asserting that on the day she is alleged to have been served while in the suit property, she was in her office in Kitale town from 8.00 to 6.00 pm. the 2nd respondent's agent alleges that the applicant was within the suit premises at 15.25 hours and also alleges that the applicant declined to sign. She also questions the wisdom of having the server travel all the way to Nakuru in order to send the 45 days Redemption Notice rather than send it from the Kitale Post Office or even effect service upon her in her office which in any event is near that Post Office.

15. As seen from the analysis above, the issue of service is not an open and shut case for the respondents. It is an issue which in my view requires more evidence which can only be obtained at the hearing, in view of the fact that doubts have been cast upon the veracity of claims of service.

16. On the issue of spousal consent, the record is clear that no copy of spousal consent has been exhibited by the respondents. This is an issue of great significance in view of the Constitutional and Statutory Protection afforded the Matrimonial home in Kenya.

17. The applicant has cited the case of ***Joseph Mbugua Gichanga –vs- Co-operative Bank of Kenya*** (unreported) in which it was observed that a statutory power of sale was not available to a party who is in breach of the law.

18. The only evidence that there was spousal consent to the charge lies in **paragraph 20** of the replying affidavit which states that when the applicant approached the 1st respondent for a loan she was accompanied by her husband who allegedly gave spousal consent. The name of the person who accompanied the applicant and the document he signed as consent are not revealed.

19. Propriety in proceedings demands that such details relating to the vital issues be made clear in the defence of an application such as this one.

20. On the issue of the non-disclosure of material facts and subsequent breach of the equitable doctrine of "clean hands", the respondent cites the cases of **John Muritu Kigwe and another Vs Agip Kenya Limited NBI HCCC No 2382 of 1999** and **Sport Cars Ltd Vs Trust Bank Ltd NBI HCCC No 754 of 1999.**Materiality of the undisclosed facts is what may, when the respondent avails them, disentitle the applicant from an injunction. This materiality is a subject to the determination of the court. This is clear from the passage that the court in the **John Muritu Kigwe** case cites from the case of **The King Vs General Commissioners For Income Tax 1917 1 KB 486** as follows:

"So here, if the party applying for a special injunction, abstains from stating facts which the court thinks are most material to enable it to form its judgment, he disentitles himself to that

relief which he asks the court to grant. I think therefore that the injunction must fall to the ground."

21. The respondent's main grievance is that the applicant never disclosed the existence of **Kitale CMCC No 259 of 2015** and that thus she has not come to court with clean hands. My understanding of the **John Muritu Kigwe** case is that not every fact is material. The omission of the statement of the facts allegedly left out must be material to the grant of the injunction.

22. Kitale CMCC No 259 of 2015 relates to property other than land. The jurisdiction of this court is on matters relating to land. The existence of such a suit therefore, has not been shown to affect this suit so as to render it *sub judice.* Further it is not shown how material those facts of the existence of a case on the chattels in the subordinate court is most material to enable the court form its judgment in this case.

23. Unless there are any vital outcome obtained in the subordinate court proceedings, and I do not hear the respondent to be saying so, I do not find any advantage that the applicant would gain from the said non-disclosure of the lower court case, even when chattels mentioned therein form part of the security for the loan partially secured by the subject matter land in this case. In any event, it is the applicant who would be at a disadvantage owing to non- disclosure of what she calls in her supplementary affidavit an "unlawful raid" on her office and threats to "*attach her stock and tools of trade without notices whatsoever*" for these could cripple her remaining business in the manner that receivership normally does.

24. On the issue of whether or not the statutory power has been exercised oppressively so as to warrant the court's intervention the respondent cites the case of **Fina Bank Limited Vs Spares And Industries Ltd-Nairobi Civil Appeal No 51 Of 2000 where** the Court Of Appeal observed that the respondent was making payments up to one day before the receivership commenced.

25. In contrast, in the present case there is the admission of indebtedness, default, the occurrence of extenuating circumstances of the teachers strike and the frank expression of intent to repay. It may seem as if the applicant has no case. However, it must be remembered that a crucial claim by the applicant in her plaint is that the 1st defendant has *deliberately and without regard to the applicant's interests charged and maintained an unconscionable interest rate and debited the applicant's loan account with other charges thereby making it impossible for the applicant to service the loan and clogging the applicant's equity of redemption*. This allegation, if true, appears to be not any different in effect from the exercise of the power of appointment of receiver before default critiqued by the Court Of Appeal in the **Fina Bank Case** (supra). Though this court is not at this interlocutory stage able to make conclusive findings on evidence, the applicant's assertions may well be true. In *toto*, all these factors only serve to make the court take a longer and harder look into allegations that the statutory power of sale had not crystallized.

26. Regarding the sum owing, the applicant does not dispute owing the 1st respondent but alleges some element of bad faith at **paragraph 8** of the plaint on the nature of the unconscionable interest rate allegedly deliberately charged, maintained and debited the plaintiff's loan account and the subsequent clogging the plaintiff's equity of redemption.

27. Further the applicant avers that she has paid an amount of **Kshs.607,000/=** leaving only a balance of **Kshs.268,000/=** due and owing. While not taking the statement as the gospel truth, this court finds that this stated balance is a far cry from the amount that the 1st respondent asserts was due and owing as at **5th June, 2017**, that is, **Kshs.949,859.49**.

28. The applicant is of the view, and even without going into deep and detailed scientific computations, this court finds some simple logic in her argument, that if she borrowed **Kshs.700,000/=** repayable within **12 months** at the interest of **25%,** the principal would attract **Kshs.175,000** interest per annum, making the initial principal sum and interest accrued to be **Kshs.875,000/=.** The applicant argues that having repaid **Kshs.607,000/=,** it is not therefore credible that the principal sum would accrue interest that would bring the total sum to **Kshs.949,859.49** within **3 years.** Further the 1st respondent has not revealed how it arrived at that sum. Is it possible that there were unauthorized charges and penalties levied? Only time can tell.

29. The court finds that some reconciliation would surely be necessary to determine the appropriate sum due and owing. The plaintiff has included a prayer for an account from the 1st respondent in her plaint. This account would of necessity stipulate clearly the amount so far acknowledged as received by the 1st respondent and the interest and any other charges levied on the loan.

30. Whereas the respondent would have this court believe that the statement of account that it has exhibited reflects the true position, it is noted that the proceedings herein are pending and it has not been shown that that is the account agreed on by the parties.

31. The applicant cites the case of ***Koileken Ole Tupolanka –vs- Melech Engineering & Construction Ltd & 2 Others 2015 eKLR*** where the court stated as follows:-

> **"As a general rule, disputes on accounts or amounts owing on a mortgage will not *per se* be a basis for granting of an injunction. But if, from the charge or evidence adduced in court, the amounts claimed are excessive or tinctured with illegal charges and interest, the mortgagee may be restrained from exercising its statutory power of sale."**

The applicant also cites the case of ***Givan Okallo Ingari & Another –vs- Ltd 2007 eKLR*** where the applicant quotes passages from the decision of the ***Hon. Warsame J*** as follows:-

> **"The acts of the defendant, in my view amount to muddling the waters that were for the benefit of all parties. This court cannot force the plaintiffs to drink from a well muddled by the hands and legs of the defendant. To do so would be inequitable.**
>
> **"In my humble opinion, a party in breach of the contractual document cannot be allowed to benefit from his own transgression, until there is a proper determination of the dispute. The court is empowered to hear the circumstances that made the defendant to behave in the way it acted against the plaintiffs. The question that the court would ultimately have to answer is the amount due and payable by the plaintiffs. And pending that determination, I think it is illegal to alienate, sell or dispose the central thread that joins the parties to this suit. The court must intervene to curb such prima acts of illegality committed by the defendant and which does not stem from the contractual document."**

On the basis of the above analysis, there is clear evidence of a prima facie case that has been made out by the applicant.

(b)Whether the applicant may suffer irreparable injury if no injunction is granted

32. The suitland is said to be the dwelling place of the applicant and her family and therefore they may be rendered homeless if it is sold. Further it has been submitted by counsel for the plaintiff that, and I believe this is correct for most family dwellings, that the applicant has sentimental attachment to the property due to its use.

33. He urges that monetary compensation subsequent to the sale, in the event that the sale turns out to have been based on an illegal exercise of the statutory power of sale, would be insufficient.

34. He cites the cases of ***Alice Owino Okello –vs- Trust Bank Ltd & Another and Gilgil Distributors & 2 Others –vs- Kenya Breweries Ltd & 2 Others 2015 eKLR***. **Article 68** ***of the Constitution of Kenya*** states as follows:-

> **"68.Legislation on land Parliament shall-**
>
> **(a) revise, consolidate and rationalize existing land laws;**
>
> **(b) ….**

(c) enact legislation-

(i) ….

(ii) …. .

(iii) to regulate the recognition and protection of matrimonial property and in particular the matrimonial home during and on the termination of marriage;"

35. Section 12 (1) and **12(5)** of the **Matrimonial Property Act** makes it a necessity that the consent of both spouses is required in the event of a disposition in the form of a lease or a charge over a Matrimonial Home.

36. In view of the constitutional and statutory protections sought as in the provisions above, I must agree with the counsel for the applicant when he submits that damages would not be an adequate remedy.

37. The respondents cite the cases of ***Sodhia –vs- Vohra & Others*** and ***Paul Muhoro Kivuvia –vs- Barclays Bank Ltd*** in support of the proposition that once the plaintiff offered the charged property as security she converted it into a sellable commodity in the event of default. That may well be so, but supposing that at the end of the suit the court finds that the exercise of statutory power of sale was premature yet the suit property has already been sold? There would be total irreparable loss.

38. Perchance the court is wrong on the issue of irreparable injury, it is noted that where a prima facie case has been raised, even if damages would have been a sufficient remedy, the court may, in consideration of the probability of a final decision in favour of the applicant, opt for an injunction to preserve the subject matter of the suit till the end of the proceedings. This is in line with the reasoning of the court in the case of **Suleiman Vs Amboseli Resort Ltd (2004) KLR 589** as cited by the Hon Mabeya J. in **Jan Bolden Nielsen V Herman Philipus Steyn & 2 others [2012] eKLR.** In the **Suleiman** case**,** the Hon Justice JB Ojwang said as follows:

> **"Counsel for the defendant urged that the shape of the law governing the grant of injunctive relief was long ago, in *Giella –vs- Cassman Brown, in 1973* cast in stone and no new element may be added to that position. I am not, with respect, in agreement with counsel in that point, for the law has always kept growing to greater levels of refinement, as it expands to cover new situations not exactly foreseen before. Justice Hoffman in the English case of Films Rover Internationale made this point regarding the grant of injunctive relief (1986) 3 All ER 772 at page 780 – 781:-**
>
> **"A fundamental principle is that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been 'wrong' ……"**

39. At the end of the proceedings, the chargee, who may have been kept out of the realization of security would still be in a position to sell the land after the chargor's right to a fair hearing on the above issues has been exercised. While saying this it is my observation that the suit property, by the respondent's own valuation exhibited as **"IT9"** in the replying affidavit, shows that the market value of the property is almost double the sum now said to be owed and no evidence is available that such value may embark on any downward trend any time soon.

40. For the above reasons I grant **prayer 3** the application dated 19/5/2017. The costs of this application shall be in the cause.

Dated, signed and delivered at Kitale on this **19th** day of **October, 2017.**

MWANGI NJOROGE

JUDGE

19/10/2017

CORAM:

Before Mwangi Njoroge - Judge

Court Assistant – Isabellah

Ms. Sitati holding brief for Kraido for applicant

N/A for the respondent

COURT

Ruling read in open court in the presence of the counsel for the applicant.

MWANGI NJOROGE

JUDGE

19/10/2017