



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT NYAHURURU

ELC CASE NO 422 OF 2017

SIMON NGIGI KARIUKI.....1ST PLAINTIFF

BENSON NJOGU NGIGI

T/A WAVE PETROLEUM AGENCIES.....2ND PLAINTIFF

VERSUS

BARCLAYS BANK OF KENYA LIMITED.....DEFENDANT

RULING

1. Before me for determination is the Notice of Motion dated 12th May 2017 brought under *Order 40 Rule 1 and 2, of the Civil Procedure Rules, and sections 3A and 63(c) and (e) of the Civil Procedure Act*. The applicant has sought for these orders.

a. Spent.....

b. Spent.....

c. An order for interim injunction do issue restraining the Defendant/respondent by itself, its servants or agents from selling, disposing, transferring by private treaty or public auction or otherwise however from realizing its securities as chargee or in any other manner whatsoever dealing with the first plaintiff/Applicant's parcels of land known as L.R NOS. 14912/14, 14912/15, 14912/16, 14912/17, 14912/18, 14912/19, 14912/24, 14912/25, 14912/26, 14912/27, 14912/28, 14912/29, 14912/30 and 14912/31 in any manner adverse to the 1st Plaintiff/Applicant pending the hearing and determination of this suit.

d. That costs of this application be borne by the Defendants/Respondents.

2. The Application was premised on the grounds that:

i. The Defendants/Respondents has served the 1st Plaintiff/Applicant with a notice of intension to dispose of all those properties known as L.R NOS. 14912/14, 14912/15, 14912/16, 14912/17, 14912/18, 14912/19, 14912/24, 14912/25, 14912/26, 14912/27, 14912/28, 14912/29, 14912/30 and 14912/31 which are registered in the 1st Plaintiff/Applicant's name in an apparent wrongful exercise of its statutory power of sale.

ii. The said intended sale by the chargee in purported exercise of its statutory power of sale is illegal and wrongful for the following reasons;

a) No formal statutory notice under section 90 of the Land Act No, 6 of 2012 was ever served upon the Plaintiff/Applicant.

b) The Defendant/Respondent has wrongfully imposed upon the Plaintiff/ Applicant liability beyond the limits of his guarantee.

iii. The threatened exercise of the chargees' statutory power of sale is wrongful and illegal in so far as the Defendant/Respondent herein purports to hold the 1st Plaintiff/Applicant liable for financial accommodation made to the 2nd plaintiff/applicant and the resultant interest made without the 1st plaintiff/Applicant's consent and without a further legal charge to that effect.

iv. The Plaintiff/ Applicants risk to suffer irreparably if the Defendant/Respondent is not restrained by way of an injunction from disposing of the same.

v. The plaintiff/ Applicants have a prima facie case with a high probability of success.

vi. It is in the interest of justice that the plaintiff/ Applicants' Application be allowed so that the substratum of their suit does not crumble.

vii. The balance of convenience tilts in favor of granting the orders sought.

3. The Application was further supported by an affidavit sworn by Mr. Simon Ngigi Kariuki, the 1st Plaintiff/Applicant on his behalf and on behalf of the 2nd Plaintiff/Applicant, his son upon which their counsel relied upon while arguing this application.

4. Briefly, the 2nd Plaintiff/ Applicant herein operated a current account number 0770L01132560001 and a loan account No. 2022744200 with the Defendant /Respondent herein and entered into an agreement with the Defendant/ Respondent to provide him with credit facilities to the tune of Ksh3,000,000/= in forms of loans and/or overdraft facilities.

5. The facilities were to be secured by legal charges over various parcels of land owned by the 1st Plaintiff /Applicant who was to act as a guarantor to the 2nd Plaintiff /Applicant.

6. That the said charges were executed on the 24th September 2012 and 21st August 2013 respectively.

7. That unknown to the 1st Plaintiff /Applicant, the defendant/ Respondent converted one of the facilities into an overdraft facility wherein they made numerous advances of Ksh. 3,000,000/= to the 2nd Plaintiff /Applicant outside the scope of the of the 1st Plaintiff /Applicant's guarantee.

8. That subsequently, the 2nd Plaintiff /Applicant partly repaid the loan and overdraft but due to injuries suffered in an accident on 26th August 2015, his business also suffered a lot due to the tough economic hard times and he was unable to keep up with the loan repayment.

9. On the 9th March 2016 when the Defendant/ Respondent made a demand against the 2nd Plaintiff /Applicant for payment of the outstanding principle amount plus interest, the 1st Plaintiff /Applicant was unaware that the 2nd Plaintiff /Applicant had defaulted.

10. On the 19th January 2017, the Defendant/ Respondent sent to the 2nd Plaintiff /Applicant a notice to sell, under section 96(2) of the Land Act, No. 6 of 2012, intimating their intention to sell the 1st Plaintiff /Applicant's properties, the subject of the said charges.

11. The said notice was followed by a 45 days redemption Notice and Notification of sale both dated the 30th March 2017 served upon the 1st Plaintiff /Applicant.

12. The plaintiff filed a further affidavit to address the matters raised in the replying affidavit. Inter alia, the plaintiff averred that he was not privy to the multi- option facility, secondly, that there was nothing in the Deed of charge suggesting that the 2nd plaintiff/Applicant was to benefit from the overdraft facilities which were extended without the 1st plaintiff/Applicant's knowledge and thirdly, that the statutory notice dated the 23rd August 2016 was not served personally on the 1st plaintiff/Applicant and the certificate of posting does not show to which post office the notice was sent to

13. Further, it is averred that 2nd Plaintiff/applicant received the Notice of sale dated the 19th January 2017 referring to a statutory Notice dated 18th August 2016 which was also not received by the 1st Plaintiff/Applicant. In essence the 1st Plaintiff/Applicant received neither of the statutory notices and is hence in a dilemma as to which of the notices comprised of the actual notice.

14. That service of the Redemption notice and Notice of sale were served upon the 1st Plaintiff/Applicant in person in the offices of Messer Legacy Auctioneering services and not via the post.

15. There was no formal notice served as is required under Section 90 of the Land Act, intimating default and demanding payment.

16. That following the said Redemption Notice, the 1st Plaintiff /Applicant wrote to the Defendant/Respondent with a proposal on how to liquidate the loan and seeking that the overdraft facility be converted into a loan as the interest rates were very punitive, but the Defendant/Respondent would not indulge him.

17. The liability imposed on the 1st Plaintiff /Applicant by the Defendant/Respondent was beyond the limits of his guarantee.

18. It was against this background that counsel for the Applicant submitted that there was no compliance with section 90 of the Land Act which provided for a mandatory 2 months statutory Notice before a charge could exercise its statutory power of sale.

19. All that the bank served the applicant were;

i. A formal demand letter dated the 9th March 2016

ii. A Notification to sale from the bank's advocate dated 19th January 2017

iii. A Redemption Notice from the defendants instructing auctioneers dated the 30th March 2017

iv. A notification of sale from the auctioneers dated the 30th March 2017

20. Counsel reiterated that there was no Statutory Notice served upon the applicant.

21. That although the Defendants averred that they served the notice through post, yet their annexure marked as 'LG 6b' does not offer any evidence that the letter was posted and addressed to the Plaintiff/Applicant. It did not indicate the address used nor disclose the person posting the same. Counsel relied on the case of Nyangilo Ochieng and Abel Omuom vs. Fanuel B. Ochieng and others where the court of appeal held that

“It is trite that before a chargee can exercise its statutory power of sale there must be compliance with section 74 (1) of the Registered Land Act (Cap 300 Laws of Kenya). This section obliges the chargee to serve by registered post, the relevant statutory notice. Three months after the chargers receiving such notices the bank’s power of sale arises. This is the basis upon which the bank can put up the properties for sale.”

22. The court also obligated the charge to prove that such notice was in fact sent.

23. Counsel submitted that the said notice was in fact served upon the 2nd Plaintiff/Applicant who was not the charger but the borrower. Notice ought to have been sent to the 1st Plaintiff/Applicant and relied on the decided case of Trust Bank Ltd vs. Eros Chemists Ltd and Whitestone Auctioneers (K) Ltd [2000] eKLR where the court of Appeal held that:

In our judgment, with respect, there is a mandatory requirement that a statutory right to sell will not arise unless and until three months' notice is given. We consider that the provision as to the length of the notice is a positive and obligatory one; failing obedience to it a notice is not valid. That being so, it seems to us that in failing to have the notice to say so, the Bank failed to give a valid notice, with the result the right of sale did not accrue under such a notice. Without any hesitation, the notice in the Russell case threatening a sale of the charged property on a 14 days' notice was an invalid notice for accrual of a right of sale.

24. Secondly counsel submitted that the Defendant/ Respondent herein did impose on the 1st Plaintiff/Applicant who guaranteed the loan liability beyond the limits of his guarantee. This was by converting the loan facility into an overdraft facility without informing the 1st Plaintiff/Applicant.

25. The main prayer sought in the application is a declaration that the acts of the defendant in seeking to exercise its chargee's statutory power of sale are unlawful and thus the applicants seeks for an injunction restraining the defendant /Respondent from exercising its statutory power of sale.

26. The applicant sought interim orders in the first instance which orders were given by my brother Judge sitting in the Environment and Land Court-Nakuru. The purpose of this application therefore is to determine whether the plaintiff is entitled to a stay of sale pending hearing and determination of this suit.

27. Counsel submitted that their case had met all the requirements set out in the Geilla vs. Cassman Brown & Co Ltd to grant them the interim injunction so sought.

28. The application was opposed by the defendant/Respondent's counsel who submitted that two issues arose out of the application;

i. The 90 days' Notice under section 90 of the Land Act.

ii. What was outstanding was over and above what the 1st plaintiff guaranteed as a guarantor.

29. Counsel relied on the annexed documents and the replying affidavit sworn on the 29th May 2017, by Mr. Lucas Gikungu, the Defendant's co-operate Recoveries Manager who was also in charge of the 2nd Plaintiff's account.

30. Counsel submitted that at the 2nd plaintiff's request, the Defendant/Respondent issued him with a Multi option facility of Ksh. 3,000,000/= dated 16th July 2012 which he could draw over and over again provided that he was within the Ksh. 3,000,000/= and of which he utilized as a short term loan of

31. The lending was secured by a Charge dated 24th September 2012 over land Parcels Nos. 14912/24, 14912/25, 14912/26, 14912/27, 14912/28, 14912/29, 14912/30 and 14912/31 in the name of the 1st Plaintiff/Applicant, as well as a personal guarantee of the 1st Plaintiff/Applicant in the sum of Ksh. 3,000,000/=. The facility letter was signed by the 2nd Plaintiff/Applicant.

32. A Further facility letter dated the 13th June 2013 was offered by the Defendant/Respondent to the Plaintiff /Applicant in terms of a loan for Ksh. 3,000,000/= secured by the existing securities above and a new charge over land Parcel L.R Nos. 14912/14, 14912/15, 14912/16, 14912/17, 14912/18, 14912/19, in the name of the 1st Plaintiff/Applicant was secured by a personal guarantee of the 1st Plaintiff/Applicant in the sum of Ksh. 6,000,000/=

33. The Guarantee was limited to a sum of Ksh. 6,000,000/= to which was added interest, fees, commission, costs, charges and expenses as provided in the guarantee.

34. Subsequently the 2nd Plaintiff/Applicant defaulted in repayment of the initial overdraft facility as well as the short term loan to the tune of Ksh 4,637,836.45/= to which the Defendant/Respondent wrote a 30 days demand notice to the Applicant to repay monies owing, which demand notice elicited no response.

35. The bank then issued a 3 month the statutory notice dated the 23rd August 2016 upon the 2nd Plaintiff/Applicant and copied the same to the 1st Plaintiff/Applicant through the law firm of M/s Iseme, Kamau & Maema Advocates. The notice and a certificate of its posting are annexed herein.

36. That the address used by the Defendant/Respondent was P.O box 78800-00507 Nairobi, the address given by the Applicants, and which appears in all the facility documents.

37. Counsel relied on the case of Jimmy Wafula Simiyu vs. Fidelity Commercial Bank Limited [2016] eKLR where the issue discussed was to whether or not the plaintiff had received posted documents. With due respect this authority is distinguishable with the present case and is therefore not useful in the circumstances herein.

38. Counsel further submitted that the Plaintiff/Applicants did not deserve the orders sought as the requirement of Section 90 and 92(2) of the Land Act were to the effect that service be effected to the Principle borrower in this case the 2nd Plaintiff/Applicant. The rationale being that should the borrower be unable to realize his obligation, then guarantor steps into the shoes of the borrower. The notice was also copied to the guarantor, the 1st Applicant herein.

39. Reliance was on the decided case of **David Ngugi Ngaari vs. KCB Ltd [2015] eKLR** where the High court held that

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.

40. Also in the case of **First Choice Mega Store Ltd vs. Eco bank Kenya Ltd [2017] eKLR** the High Court held that ;

The property having been pledged and charged as security by the Applicant, a simple promise was made to the Respondent: I agree you may sell my property subject to all the legal requirements cometh the hour. It was simply a commercial property but whose value could also be placed. I did not hear any suggestion as well that the Respondent may not pay any damages.

41. In the above case, the court did not believe that the applicant would had shown that he would suffer irreparably if the property was sold.

42. On the second issue as to whether the debt was over and above what was guaranteed counsel submitted that the indebtedness was guaranteed by the 1st Plaintiff to a limit of Ksh 6,000,000/= of the principle debt together with the interest and charges.

43. The plaintiff/Applicants are indebted to the defendant/ Respondent a sum of Ksh.4,357,772.40/=on the loan account and Ksh. 1,429,153.05/= in the current account as per the statement account annexed. This amount was within the sum deed of guarantee as executed by the 1st plaintiff/Applicant.

44. Upon service of the statutory notice and redemption notice, dated the 19th April 2017, the 1st Plaintiff/Applicant, through his letter dated the 21st April 2017 acknowledged the existence of the two facilities and asked for the restructuring of the loan.

45. Counsel submitted that the 2nd Plaintiff/Applicant only made intermittent payments which did not meet the monthly repayment obligations. Further he had not tabled any repayment proposal to which he intended to liquidate the admitted debt.

46. The defendant/ Respondent's counsel reiterated that they were justified in realizing the security given to secure the borrowing by the 2nd Plaintiff/Applicant.

47. As a rejoinder Counsel for the Plaintiff/Applicant submitted that the Authorities relied on were of a persuasive value to the court and secondly that they were distinguishable from the present case and that prayed that the court do exercise its discretion to grant them the prayers sought.

48. Having heard submission by counsel for the parties as well as having perused the affidavits and annexures herein attached, as well as the applicable law, I find that the matters for determination are as follows:

The matters for determination;

- i. Whether the Defendant served the Plaintiffs with a Statutory Notice pursuant to section 90(2) of the Land act
- ii. Whether service of the statutory Notice was properly effected upon the plaintiff/Applicants.
- iii. Whether the acts of the defendant in seeking to exercise its chargee's statutory power of sale are unlawful

iv. Whether the Defendant/Respondent has wrongfully imposed upon the Plaintiff/ Applicant liability beyond the limits of his guarantee.

v. Whether the conditions for issuance of an injunction have been met herein.

49. I find that the 2nd Plaintiff/Applicant was advanced two financial facilities which was secured by the 1st Plaintiff/Applicant's aforesaid securities. The 1st Plaintiff/Applicant further executed a guarantee limited to a sum of Ksh 6,000,000/= dated the 13th August 2013 in favor of the defendant in addition to the charges over his properties.

50. The 2nd Applicant having defaulted in the servicing of his loan, the Defendant/Respondent issued a 3 month the statutory notice dated the 23rd August 2016 upon the 2nd Plaintiff/Applicant.

51. A statutory notice through registered post, was addressed to the 2nd Plaintiff/applicant and copied to the 1st Plaintiff/Applicant by the Defendant's Advocates dated 23rd August 2016, listing the status of the 2 accounts held by the 2nd Plaintiff with the Defendant Bank.

52. The letter demanded that a total sum of Ksh. 5,329,500.80/-, the amount required to rectify the default accruing as from 16th August 2016, was be paid immediately.

53. The letter gave three months' notice as provided for under the provisions of section 90(2) of the Land Act to wit:

The notice required by Subsection (1) shall adequately inform the recipient of the following matters –

The notice required by subsection (1) shall adequately inform the recipient of the following matters—

a) the nature and extent of the default by the chargor;

b) if the default consists of the non-payment of any money due under the charge, the amount that must be paid to rectify the default and the time, being not less than three months, by the end of which the payment in default must have been completed;

c) if the default consists of the failure to perform or observe any covenant, express or implied, in the charge, the thing the chargor must do or desist from doing so as to rectify the default and the time, not being less than two months, by the end of which the default must have been rectified;

d) the consequence if the default is not rectified within the time specified in the notice, the chargee will proceed to exercise any of the remedies referred to in this section in accordance with the procedures provided for in this sub-part; and

e) the right of the chargor in respect of certain remedies to apply to the court for relief against those remedies

54. It is worth noting that a statutory notice issued under section 90(2) of the Land Act, prompts a process, which leads to the chargee ultimately exercising its remedies outlined under section 90(3) of the Act. The notice is issued where the chargor is in default of any obligation under the charge or has failed to pay interest or any other periodic payment and such default continues for one month.

55. As read together with section 90(3), section 90(2) of the Land Act obligates the chargee to firstly, state the nature and extent of default. Secondly, where the default consists of non-payment, to state the amount required to be paid within three months for the purposes of making good the default or where the default is non observance of a covenant in the charge, then the notice is to state what the charger is to do or desist from doing so as to rectify the default. Thirdly, the notice ought to state the fact that if the default is not rectified within the time stated in the notice, then the chargor would thereafter sue for money due and owing under the charge, appoint a receiver of the income of the security property, lease the security property, enter into and keep possession of the security property or sell the security property. The fourth and final requirement under the notice is that the notice needs to state that the chargor has the right to apply to court and seek any relief or challenge the exercise by the charge of any of the statutory remedies. The notice crystallizes after the expiry of ninety days from the date it is received by the chargor.

56. The Statutory notice in in the present case in my humble view was in accordance with section 90(2) of the Land Act and therefore the acts of the defendant in seeking to exercise its chargee's statutory power of sale were lawful.

57. On the second issue as to whether service of the statutory Notice was properly effected upon the plaintiff/Applicants, counsel for the Plaintiff/ Applicant's submission was to the effect that statutory notice dated the 23rd August 2016 was not served personally on the 1st plaintiff/Applicant and the certificate of posting does not show to which post office the notice was sent to. I have looked at the computer generated receipt from the Postal Co-operation of Kenya which clearly indicates that the registered letter was addressed to both the Plaintiff/Applicants. A further observation on the Notice itself indicates that it was addressed to the 2nd Plaintiff/applicant and copied to the 1st Plaintiff/Applicant vide, an address given by the Plaintiff/Applicants and which appears in all the facility documents. Further it is not in dispute that the 2nd Applicant received the said Notice.

58. On the third issue as to whether the Defendant/Respondent had wrongfully imposed upon the Plaintiff/ Applicant liability beyond the limits of his guarantee, it was submitted by counsel for the defendant that the plaintiff/Applicants are indebted to the defendant/ Respondent a sum of Ksh.4,357,772.40/=on the loan account and Ksh. 1,429,153.05/= in the current account as per the statement account annexed. This amount was within the sum deed of guarantee as executed by the 1st plaintiff/Applicant

59. In the case of **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others (2003) KLR 125**, the court of appeal relied on Halsbury's Laws of England, Vol 32 (4th edition) paragraph 725 which stated as follows:-

“When mortgagee may be restrained from exercising power of sale. The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has begun a redemption action, or because the mortgagor objects to the manner in which the sale is being arranged. He will be restrained, however, if the mortgagor pays the amount claimed into court, that is, the amount which the mortgagee’

60. **In essence thereof, the court held that**, an amount owing by chargor is not a ground for the granting of injunctive relief.

61. Looking at the final issue as to whether the conditions for issuance of an injunction have been met, this court is guided by the principles governing the grant of interlocutory injunctions as set *Giella v Cassman Brown & Co Ltd [1973] EA 358* to the effect that:

a) *The applicant must show a prima facie case with a probability of success;*

b) *An interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not be adequately compensated by an award of damages;*

c) *If the court is in doubt, it will decide an application on the balance of convenience.*

62. A prima facie case in civil cases 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.

63. Have the Plaintiff/Applicants in the present application established a prima facie case?

64. In his letter dated the 21st April 2017, to the defendant the 1st Plaintiff/Applicant acknowledged receipt of the notice of redemption and admitted that the 2nd Plaintiff/Applicant was in arrears and that he wanted to take over the repayment of the loan facility and overdraft and asked for a period of one(1) year to clear the same.

65. Section 90(1) of the said Land Act Cap 280 (Laws of Kenya) provides as follows:-

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.

66. Having found that the Statutory Notice was properly effected, and that a substantial amount of money given to the 2nd Applicant as a loan facility, had been utilized by the Applicant who had not fully repaid the money and the accruing interest, the suit properties being offered herein by way of security to the Defendant Bank for the loan facilities availed to the 2nd Plaintiff, became a commodity which the chargee, the Defendant Bank, could sell off in order to recover monies lent to the 2nd Plaintiff together with the interest thereof.

67. In the case of **Mrao supra** Kwach, JA (as he then was), had this to say:

‘I have always understood that it is the duty of any person entering into a commercial transaction particularly one in which a large amount of money is involved to obtain the best possible legal advice so that he can better understand his obligations under the documents to which he appends his signature or seal. If courts are going to allow debtors to avoid paying their just debts by taking some of the defences I have seen in recent times for instance challenging contractual interest rate, banks will be crippled if not driven out of business altogether and no serious investors will bring their capital into a country whose courts are a haven for defaulters. I agree entirely with the Commissioner of Assize Shah that the appellants was not entitled to an injunction upon any one of the grounds urged on its behalf.’

68. On the issues of irreparable loss, this case brings out an important contractual principle that security pledged to a financial institution or bank stands the risk of being sold and the intended sale is within the contemplation of the parties to the loan agreement. In other words, the sale of property by the mortgagee cannot lead to irreparable loss since it is the contractual arrangement or intention of the parties and expressly provided for in the loan agreement or mortgage deed. Exceptions to the general rule must relate to issues like whether the mortgagor is in default and whether statutory power of sale has arisen. Where the agreed amount has not been paid and the borrower is still in default on the agreed amount, the right of the bank to sell is established and what the court can do is to cause the ascertainment of the right value for forced sale of the property.

69. *In determining where the balance on convenience lies*, considering the facts of this case in totality, I find that the balance of convenience is in not in favour of the applicants. Since the Respondents statutory power of sale has arisen, I find that the balance of convenience lies in enforcing the contractual obligations of the parties.

70. Consequently, I find that the application under determination has no merits and that the Plaintiff/Applicants have not satisfied the tests for granting the injunction sought as laid down in the *Giella v Cassman Brown* case. Accordingly, I dismiss the application dated 12th May 2017 with costs to the Respondent.

Dated and delivered at Nyahururu this 2nd day of October 2017.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE