



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT ELDORET**

**ELC NO. 19 OF 2017**

**MARY NYANGUKA.....PLAINTIFF**

**VERSUS**

**KENYA UNION OF SAVINGS AND CREDIT**

**CO-OPERATIVE LIMITED (KUSCO).....1<sup>ST</sup> DEFENDANT**

**S.O JUMA T/A IN TIME AUCTIONEERS.....2<sup>ND</sup> DEFENDANT**

**RULING**

**INTRODUCTION**

This is the ruling in respect of an application dated 19<sup>th</sup> January 2017 brought by way of Notice of Motion by the plaintiff/applicant for orders that:

1. Spent
2. Not granted
3. That the Defendants be restrained from whatsoever selling, transferring or dealing in any manner with the Plaintiff parcel of land comprised in title No. ELDORET MUNICIPALITY BLOCK 14/854 until the suit is heard and determined.
4. THAT the court orders that accounts in respect to the Plaintiff's loan account be done and the same be reconciled to establish the true amount payable to enable the Plaintiff to settle.
5. THAT the court be pleased to order that the Defendants/Respondents do supply the Plaintiff/Applicant with a statement of accounts on her loan account on the financial facilities the loan granted to the Plaintiff from the time the loan was disbursed to date.
6. Costs of this application be in the cause.

This application was brought under certificate of urgency before Justice Ombwayo who ordered that the application be served for inter parte hearing. The same was served and parties agreed to canvass the application by way of written submissions. The same were filed by 2/11/2017 and a ruling date given.

**PLAINTIFF'S COUNSEL'S SUBMISSIONS**

The plaintiff's counsel wrote a lengthy submission giving the background of the case . Counsel relied on the grounds on the face of the motion and the annexed affidavit of Mary Nyanguka together with the annexures thereto.

## **Brief Background**

Counsel gave this as the background of the case

- That the Plaintiff jointly with her husband one Apollo Nyambuga Omido are the legal and registered owners of Eldoret Municipality Block 14
- On or about 2009 the Plaintiff joined the 1<sup>st</sup> Defendant's Sacco (Kenya Union of Savings and Credit Co-operatives Limited (Kuscco) as a member thereof and consequently started making deposits since then therein.
- The Plaintiff made deposits totaling Kshs, 500,000/ as at 2010 and since it was a policy at the 1<sup>st</sup> Defendant company that one is entitled to a loan thrice what has been deposited, she qualified for a loan of Kshs. 1,500,000/.
- On or about 3/8/2010, the Plaintiff approached the 1<sup>st</sup> Defendant and requested for a loan amount of Kshs. 1,500,000/ for purposes of construction of a house which loan was advanced to her.
- As security for the loan facility, the Plaintiff offered the property land title no Eldoret municipality block 14/854 (to be referred to as the charged land hereunder) and a charge was consequently created.
- The terms of agreement were that the facility advanced should be repaid in 15 years with monthly installments of Kshs. 19,976. The Plaintiff has been complying with the terms of the agreement as agreed by making deposits of Kshs. 20,000/= every month to the loan account.

The applicant's Counsel cited the case of MRAO LTD VS FIRST AMERICAN BANK OF KENYA LTD & 2 OTHERS (2003) eKLR to emphasize that the applicant has established a prima facie case. Counsel submitted that it is not in dispute that the Defendant/Respondents admit the contents of contract and the terms thereof. Counsel rightly stated that the court is under a duty to interpret the contract and not to redo or impose terms on the parties. Counsel therefore referred the court to paragraph 4 of the charge document annexed as J03 to the replying affidavit by Julius Owino which reads;

*'It is hereby agreed and declared that it shall be lawful for the lender from time to time at the request of the chargors and/or borrower to accept payment of the moneys due or becoming due under by such increased or reduced installments as shall from time to time be agreed or agree to suspend payments in reduction of principle or to give further time for payment of moneys due or becoming due hereunder or to grant such indulgences as may be from time to time be agreed '*

It was counsel's submission that the 1<sup>st</sup> Defendant was in breach of the said clause to the detriment of the Plaintiff because the Plaintiff made proposals on how to settle the outstanding loan amount and raised the issue of rescheduling of the loan repayment but the defendant declined to accept the proposal. Counsel urged the court to enforce the terms of the contract and in particular clause 4 of the charge document that the Plaintiff be indulged and the parties do reach an agreement on how to settle the loan amounts in the interest of justice. The court was referred to the case **of MATEX COMMERCIAL SUPPLIES LIMITED VS EURO BANK LTD IN LIQUIDATION** 2008 where Warsame J stated that'

*'The duty of the court is to enforce or legitimate what parties have agreed upon themselves'*

Counsel submitted that the defendant should be allowed to resume payment of Kshs. 20,000/ as per her proposal which was rejected by the defendant on the grounds that is it too low and uneconomically viable.

## **No redemption notice issued**

On the issue of notice, Applicant's Counsel submitted that there was no service of requisite redemption notice as required under The Land Act 2012. She stated that Under Section 96 (2) of The Land Act 2012 before a chargee exercises his power of sale under Section 90(2) he must give a further notice. It was Counsel's submission that the Defendant served a notification of sale issued by its auctioneers according to the auctioneers' rules and not as per section 92(2) of the Land Act . She cited the case of **PALMY COMPANY LIMITED VS CONSOLIDATED BANK OF KENYA (2014) eKLR** where it was stated that;

*"I think the notice to sell the suit premises required under Section 96(2) of the Land Act, should be seen within the land reform and the constitutional desire to protract the chargors' right to property by allowing reasonable opportunities to redeem the charged property. That is why unlike before; the doctrine of equity of redemption had been provided for under section 89 of the Land Act as an express statutory provision. Therefore Section 96(2) of The Land Act should be seen in that light and thus places a separate obligation on the chargee to issue a notice to sell which is quite apart from the obligation placed on the auctioneer under the Auctioneer Act to issue a redemption notice before selling an immovable property on instruction of a chargee or court order. A fusion of the notice under Section 96(2) of The Land Act and that under rule 15(d) of the Auctioneers rules will not only obfuscate a clear distinctive between the two but will also bear the innuendos of a clog on the equity of redemption of the Chargor. The two procedures come into operation at different times and offer different legal opportunity and expectation to the chargor to redeem the charged property and should never be a bridged or fused ...redemption notice under the Auctioneer's Act is actual step albeit the very initial, of sale of the charged property and may be attended to by other consequences which are not intended in Section 96(2) of the Land Act.*

It was Counsel's submission that the notice issued by the Auctioneer is not a substitute for or sufficient notice to sell the charged property and that Non-adherence with that Section is a matter which would vitiate the notification of sale or any sale based on the flawed process given the circumstances of this case. This failure therefore infringed on the Plaintiffs right of redemption and hence vitiates the notification of sale dated 6/12/2016.

On the issue of the amount deposited by the plaintiff counsel submitted that the plaintiff indicated that she had deposited amounts worth Kshs. 500,000/ to her Sacco account as at 2010 which amounts were disputed by the defendant claiming that the Plaintiff had deposited Kshs. 300,000/ Counsel stated that it was the company's policy that one is entitled to a loan thrice amount deposited which make it 1.5 Million which was advanced to the plaintiff.

On the issue of amounts owing, Counsel submitted that the Plaintiff disputes the amounts owing as the same are exaggerated and does not reflect the true balance of the loan account. Counsel also stated that the Plaintiff is ready and willing to settle the loan account upon the true amount payable being established. Counsel stated that the statement annexed as J04 by the defendant is challenged by the Plaintiff on the ground of its authenticity and some of the amounts deposited by the plaintiff have not been credited. Counsel urged the court to order that the accounts be done and the same be reconciled to establish the true amount payable to enable the Plaintiff to settle the amount.

Counsel cited the case of **JACK J. KHANJIRA & ANOTHER VS SAFARICOM LIMITED (2016) EKLR** to buttress the issue of pre requisite of taking accounts which she stated that are two fold;

- (i) The plaintiff must seek an order for account.
- (ii) The defendant fails to enter an appearance or satisfies the court by an affidavit or otherwise that there is preliminary questions to be tried'

Counsel submitted that the plaintiff has satisfied the said condition and has established the necessity for taking of accounts being that there is need to ascertain the amount so far paid by the plaintiff in settlement of the loan account and how much is due to enable the plaintiff to settle. Further that the defendants have failed by the replying affidavit herein filed or otherwise to satisfy the court that there is some preliminary

question to be tried.

On the issue as to whether the applicant will suffer Irreparable loss that cannot be adequately compensated by an award of damage, counsel submitted that the applicant's property is likely to be sold when in fact there is no legal authority to sell by the chargee. She also stated that the charged land is matrimonial home of sentimental value as it is where the Plaintiff, her husband and children live and if the application is not allowed the applicant will suffer irreparable damage or loss which cannot be compensated by damages. Counsel further alluded to Article 40 of the Constitution which provides for the right to property and that care and caution has to be exercised before one is deprived of the same.

Counsel submitted that the balance of convenience tilts in favour of the applicant as she has established that the Defendant is in breach of clause 4 of the charge document and that no redemption notice was issued to her according to Section 96(2) of the Land Act. Further that the amounts deposited in the savings account prior to the loan being granted is disputed and that some of the amounts deposited by the Plaintiff were not credited or were wrongly credited. The applicant's counsel therefore urged the court to allow the application as prayed and stated that the applicant is willing to settle any amounts truly owing upon accounts being taken and reconciliation done.

### **DEFENDANTS RESPONDENTS' COUNSEL'S SUBMISSIONS**

The defendant opposed the application and relied on the the Replying Affidavit sworn by Julius Owino on the 23<sup>rd</sup> of February, 2017. She stated that it is not disputed that the Applicant and one Apollo Nyambuga Omido are the registered owners of the property Title No. **ELDORET MUNICIPALITY/BLOCK 14/854**. Counsel further submitted that the property is currently Charged to the 1<sup>st</sup> Respondent as security for a loan for Kshs. 1,500,000/ advanced to the Applicant in the year 2010.

Counsel also stated that the evidence on record shows that the Applicant deposited Kshs. 300,000/ as at 2010 in savings prior to her application for the loan, and not Kshs. 500,000/ as alleged by the Applicant without any supporting documentation. It was a term of the agreement that the plaintiff was to make monthly instalments of Kshs19,976/, and continue contributing at least Kshs. 2,000/ monthly towards her savings in KUSCCO Housing Fund. (see Clauses 4 and 8 (a) of the Letter of Offer marked as annexure MN2 to the Supporting Affidavit.

It was Counsel's further submission that it is clear from the evidence on record that the Applicant did not pay the monthly instalments of Kshs.21 ,976/= as required and any payments made were always below the amounts agreed between the parties as confirmed at paragraphs 11, 13, 14 and 15 of the Replying Affidavit. Counsel further stated that the Applicant admitted that she failed to make remittance of the due amount due to financial constraints therefore falling in breach of the terms of the agreement

Counsel for the defendant submitted that the applicant was duly served with a Statutory Notice under Section 90(1) of the Land Act which she admitted in paragraph 10 of the Supporting Affidavit and at the time of issuance of the Statutory Notice, the arrears stood at Kshs.l,416,779.50/. It was Counsel's submission that the applicant subsequently made a proposal vide her letter of 23<sup>rd</sup> August, 2016 to resume repayment of the sum of Kshs.20,000/ without settling the arrears which proposal was rejected as it was not only unreasonable but economically not viable for the 1<sup>st</sup> Respondent. It was further submitted by counsel that applicant did not make any other proposal to reduce the outstanding arrears. Courts are under a duty to interpret the contracts and not to redo and impose terms to the parties.

Counsel further submitted that the case cited by the Applicant to support her claim above MATEX COMMERCIAL SUPPLIES LIMITED is distinguishable from the present case as in that case the Plaintiffs entered into negotiations with the liquidation agent and their payment proposal was accepted, and in that case there was no holding on the obligation to accept such a proposal. The court dismissed the Plaintiff's Application.

The 1<sup>st</sup> respondent's Counsel argued that the Applicant's contention that she had frequently requested to

be furnished with the statement of accounts is not supported by any evidence save for what purports to be an extract/ copy of an email to the 1<sup>st</sup> Respondent dated December 22, 2016, long after the notices had been issued to her. That the applicant having been supplied with the statement of account, has not sought leave to file a further affidavit to dispute the figures therein to show how the demanded amount is exaggerated. Counsel stated that the applicant chose to raise the issues in the submissions which are statements from the bar.

The 1<sup>st</sup> Respondent's Counsel submitted that the conditions for grant of injunction as was established in the Giella case have not been met by the applicant. Counsel stated that it is well settled that a court ought not to grant an injunction on the basis only that the amount demanded by a mortgagee is disputed. The applicant is in default of payment of the loan arrears and that she was served with the Statutory Notice under Section 90 of the Land Act and the same is still in force. Finally, that the Applicant was further served with a notification of sale and notified to exercise her equity of redemption within 45 days.

Counsel buttressed the position above with the case of **ESTHER CHELIMO KAVEMBA V HOUSING FINANCE COMPANY (K) LIMITED [2008] eKLR**, wherein the Court of Appeal decision in **JOSEPH OKOTH WAUDI V NATIONAL BANK OF KENYA, C.A. NO. 77 OF 2004** was cited. That the court cannot grant an injunction on the basis that the amount demanded by a mortgagee is disputed. Counsel submitted that in the unlikely event that this court finds that either of the notices issued were irregular, or omitted, then the remedy lies in allowing the 1<sup>st</sup> Respondent to issue proper notice without preventing it from realizing the security. Counsel relied on the case of **NATURE HEALTH INTERNATIONAL LIMITED & ANOTHER V EQUITY BANK LIMITED & ANOTHER [2015] Elkr** where. Kamau J. held:-

*However, as was seen hereinabove the Plaintiffs did satisfy the court that the Statutory Notices that were issued by the Defendants herein had no legal basis and the illegal actions ought not to be allowed to continue. At the same time, nothing would prevent the 1<sup>st</sup> Defendant from realizing its security and the 1<sup>st</sup> Defendant, whether by itself or through its agents is therefore at liberty to reissue the Statutory Notices that comply strictly with the provisions of the Land Act. This is because issuance of invalid notices would not in itself be a ground for a grant of injunctive orders as the omission can be rectified...*

The Application for injunction was dismissed.

On the issue raised by the applicant that the charged property is a matrimonial home of sentimental value, counsel cited the case of **MATEX COMMERCIAL SUPPLIES LIMITED & ANOTHER V EURO BANK LIMITED (IN LIQUIDATION) [2007] eKLR** where Warsame J stated that:-

*...in my view any property whether it is a matrimonial property or spiritual house, which is offered as security for a loan/ overdraft is made on the understanding that the same stands the risk of being sold by the lender if default is made on the payment of the debt secured. This court is concerned with the importance and the comfort such a home generates but once a party feels that the property is suitable for purposes of a security, it means the party has destroyed, defaced and/or degraded the sanctity and ritual of the said matrimonial home...*

*...the rite of marriage and the place where that marriage is celebrated usually has no relation to a contractual obligation which has matured. The issue whether a party attaches special sentimental value is not an issue meant for consideration in the grant of an injunction...in this case, it is the persons who joined in the marriage, who felt the property was suitable merchandise for sale by making it a security... once parties decide to deface that sanctified place by making it a security for a loan/ overdraft, then that legal position cannot be relegated to a position lower than the material and sentimental position of the family unit. In this case, it is the family that made the decision to convert its property into saleable commodity, with all the risks accruing therefrom..*

Counsel submitted that the applicant having offered the property as security, and having defaulted in

repayment the Applicant is precluded from relegating the 1<sup>st</sup> Respondent's statutory power of sale to a position lower than the sentimental value attached to the family unit and any loss can be adequately compensated by an award of damages. In the unlikely event that the court is in doubt, the balance of convenience weighs heavily in favour of the Respondents as against the Applicant. Counsel finally submitted that the Application dated 19<sup>th</sup> January, 2017 lacks merit and is an abuse of this court's process and ought to be dismissed with costs to enable the 1<sup>st</sup> Respondent recover its money.

### **Analysis and Determination**

The court is being asked to decide whether the applicant deserves the order of injunction as prayed in the application. The principles of grant of injunction are clear as was established in the case of *Giella vs. Cassman Brown*. Has the Applicant established a *prima facie* case? Will she suffer irreparable damage unless an injunction is granted? If the court is in doubt then it should decide on the basis of where the balance of convenience lies. As I have stated in my previous rulings that apart from the principles laid down for grant of injunctions, a court should look at a case in its entirety and consider the circumstances to enable it come up with a just and fair decision.

I have considered the submissions from both Counsel for the Plaintiff/ applicant and the Defendant/ respondent together with the supporting documentation. I have also looked at the list of various judicial authorities and have come to the conclusion that the issues for determination are follows:

1. Whether the Plaintiff/Applicant has established a *prima facie* case with a probability of success?
2. Whether the applicant was served with a valid statutory notice?
3. Whether disputes in accounts is a basis for granting an injunction?

Apart from those issues, the court is also alive to the fact that it must be guided by the principles of the granting interlocutory injunctions enunciated in the case of **Giella v Cassman Brown Co. Ltd & Anor (1973) EA 358**.

### **Whether the Plaintiff/Applicant has established a prima facie case with a probability of success?**

The applicant laid down the background of this case in the submissions above. I will not repeat the genesis of this case and where it is now. It is not in dispute that the plaintiff /applicant was advanced a loan of Kshs. 1.5million by the 1<sup>st</sup> defendant respondent. It is also not in dispute that it was a term of the agreement that the applicant was to make monthly instalments to repay the amount advanced. It is further not disputed that the suit property was offered as security to secure the amount advanced by the 1<sup>st</sup> defendant. Lastly in is also clear that the applicant has fallen in arrears that has given rise to this case.

The applicant seeks for orders to restrain the defendants from selling or dealing with the suit property in any way, that accounts in respect of the applicant's account be done to enable her to settle and finally that the defendant do supply the applicant with statements of accounts.

### **Statutory Notice**

The applicant alleged that she was not served with a statutory notice as required by law. I notice in paragraph 10 of the applicant's supporting affidavit that she admitted that she was served with a Statutory Notice dated 5/7/16 which she has annexed as 'MN4' and described it as a statutory notice however she states that she never received demand letters or notice from the 1<sup>st</sup> defendant. Even though the applicant was served with the Notice as admitted in paragraph 10 of the supporting affidavit, I have perused the annexures and I have not seen any demand notices requiring the applicant to rectify the default. The notice also does not indicate that it is pursuant to section 90 of the Land Act 2012. Further the Notification of sale by the auctioneer does also not indicate that the same was issued pursuant to section 96 of the Land Act. The 1<sup>st</sup> defendant/Respondent was also very lackluster on this issue. Counsel

submitted that 'in the unlikely event that the court finds that either the notices issued were irregular, or omitted, then the remedy lies in allowing the 1<sup>st</sup> defendant to issue proper notice without preventing it from realizing the security.' On this issue I find that the applicant was not properly served with a statutory notice as it did not adhere to the laid down procedures.

### **Whether disputes in accounts is a basis for granting an injunction?**

It has been held in many cases that 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. See the case of **Koileken ole kipolonka orumoi v Mellech Engineering & Construction Limited & 2 others [2015] eKLR** where Gikonyo J stated that:

*'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 claims that she disputes the amount owing as the same is exaggerated and does not reflect the true balance of the loan account. In the same breath the applicant states that she is ready and willing to settle the loan account upon the true amount being established. She does not say how much she believes is owing and the extent of the exaggeration as alleged. If the applicant felt that there were errors or exaggeration in the calculations, then she should have commissioned an Independent expert to calculate the amount owing. This would have been helpful to the court to show the discrepancy and whether there is an exaggeration as claimed by the applicant. Without that, it is the applicant's word against the respondent's.

The applicant has further not shown that she requested for the statement of accounts and was denied an opportunity. The respondent annexed the statement of accounts but the applicant has questioned the authenticity of the statement. Is it that the statement is fake or it did not originate from the 1<sup>st</sup> respondent? What if she is given the same statement from the bank, will she still question its authenticity? She has not given a reason why she claims that the attached statement is not authentic. I find that the applicant is just buying time to organize her finances to clear the loan arrears. The applicant has stated that she is ready and willing to clear the loan balance but she wants to be given time and a rescheduling of the loan repayment. This is evident from her pleadings and the letter that she wrote to the 1<sup>st</sup> respondent to reschedule her repayment plan.

What the applicant wants in respect of statement of accounts and rescheduling of the repayment does not need the intervention of the court. This she can do directly with the 1<sup>st</sup> respondent as there is no evidence that the respondent has refused to give her the statement of accounts.

On the interpretation of clause 4 of the charge document which states that:

*'It is hereby agreed and declared that it shall be lawful for the lender from time to time at the request of the chargors and/or borrower to accept payment of the moneys due or becoming due under by such increased or reduced installments as shall from time to time be agreed or agree to suspend payments in reduction of principle or to give further time for payment of moneys due or becoming due hereunder or to grant such indulgences as may be from time to time be agreed'*

I am of the view that the applicant or her counsel has tried to misinterpret this clause to suit their purpose. The applicant interpreted the clause to mean that the 1<sup>st</sup> respondent was in breach of the same because they rejected the proposals made by the applicant on how she intended to settle the outstanding balance and rescheduling the loan repayment. The respondent stated that the applicant made a loan repayment proposal which was not acceptable to them as it was uneconomically viable. In a contract, when you want to review the terms of a contract both parties must agree to the new terms. You cannot be held in breach if you refuse to accept unfavorable terms. The respondent stated that the applicant did not make proposals on how to factor in the arrears for clearance. I find that there was no breach of this clause as submitted by

counsel for the applicant.

**Whether the applicant will suffer irreparable loss which cannot be adequately compensated by way of damages.**

The applicant stated that the suit property is matrimonial property where the family reside. It was submitted that the 1<sup>st</sup> respondent has no legal authority to sell the property. The applicant having offered her property as a security for the loan advanced by the 1<sup>st</sup> respondent it would not be proper to deny that they do not have legal authority to sell the charged property if procedures are followed.

On the issue of a charged property being a matrimonial home with sentimental value and attachment I subscribe to Warsame J's rendition that '*once you offer your matrimonial home as a security then it is made on the understanding that the same stands the risk of being sold by the lender if default is made on the payment of the debt secured*'

The applicant was aware of the consequences of default in repayment of the loan. The respondent being a financial institution submitted that the applicant can be adequately compensated by an award of damages. So, this limb also fails.

I therefore give the following orders in respect of the application dated 19<sup>th</sup> January 2017:

The 1<sup>st</sup> defendant to serve fresh notices to the plaintiff/applicant according to the law and can proceed to exercise its statutory power of sale after the proper notices are served.

Costs of this application in the cause.

**Dated and delivered on this 27<sup>th</sup> day of November, 2017**

**M.A ODENY**

**JUDGE**

**Read in the presence of:**

Miss Odwa holding brief for Miss Wanyonyi for defendant

Mr. Misoi holding brief for Mr. Onyinkwa for the Plaintiff

Mr. Koech – Court Assistant