



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO 237 OF 2017

MOSES MWENJERA NDABA

MAUREEN NJERI MUHINYAAPPLICANTS/PLAINTIFFS

VERSES

KENYA WOMEN FINANCE TRUST

JOSEPH GIKONYO T/A

GARAM INVESTMENTS AUCTIONEERS.....DEFENDANTS/RESPONDENTS

RULING

1. By a Notice of Motion application dated 27th June 2017 and brought under Order 40 Rules 1 and 3(1) of the Civil Procedure Rules and Sections 1A, 1B, 3A and 63 (e) of the Civil Procedure Act, the Applicants are seeking for orders:

1. Spent

2. Spent

3) THAT the defendant herein by itself, its servants and/or agents otherwise howsoever be restrained by injunction from selling, alienating, transferring or in any other manner whatsoever disposing of the Plaintiffs Property known as TITLE NO. KWALE/DIANI S.S/2376 AND 2992 until the hearing and determination of this Suit/

4) Spent

5) THAT costs of this Application be provided for.

2. The Application is based on the grounds on the face of the Notice of Motion that :

a) The auction sale has been set for Monday 10th July 2017.

b) The Defendant is selling the Property contrary to the provisions of Section 97 of the Land Act, 2012.

c) The Defendant has acted in bad faith as regards the sale contrary to the requirements of Section 97 of the Land Act, 2012 as the reserve price is set at gross under value of the Suit Property.

d) The 1st Defendant has increased the loan interest contrary to the current Central Bank of Kenya rates 2016.

3. The Application is supported by the Affidavit of Maureen Njeri Muhinya sworn on 9th June 2017. Briefly, the 1st Defendant on or about 16th July 2014 offered the Plaintiffs a loan of Kshs.7,500,000 for which the Plaintiffs offered their Property known as TITLE NO.KWALE/DIANI S.S./2576 and TITLE NO.KWALE/DIANI S.S./2992 as security, and signed a charge over each of the said Property. The Plaintiffs aver that they had taken the loan to construct residential houses and had been promised that the interest rate was to be 15% but when the letter of offer dated 9th July 2014 came it indicated an interest rate of 20%. The Plaintiffs further aver that they have made a total repayment of Kshs.3,803,422.50. The 1st Plaintiff has deposed that in April 2016, she fell sick and was hospitalized, making her unable to continue with the loan repayment at the agreed amount but later on resumed repaying the loan. That the monthly repayment was supposed to be Kshs.144,941.75 but was increased to Kshs.157,000 by the Defendant vide its letter dated 1st April 2015 and to date, the same has not been reduced as recommended and/or as regulated by the Central Bank of Kenya. The 1st Plaintiff has deposed that on 23rd May 2017, she received a notification of sale from the 2nd Defendant which advertised the sale of the Suit Property by Public auction on 10th July 2017. It is the Plaintiffs contention that the charges of interest, arrears, default charges, default adjustment charges and interest on arrears are illegal hence this Application. The Plaintiffs aver that they will suffer irreparable loss and prejudice if the auction takes place.

4. The Application is opposed by the 1st Defendant who filed a Replying Affidavit sworn by Phanice Kakai, its Diani Branch Manager on 9th August 2017 in which it is deposed *inter alia*, that the Plaintiffs made an Application and were advanced a loan of Kshs.7,500,000 which was secured by the Plaintiffs two properties in Diani. That on 12th May, 2014 the Plaintiffs executed the Loan Agreement which provided for the terms of repayment of the principal amount of Kshs.7,500,000 plus interest and loan application charges. Subsequently, the 1st Defendant issued the Plaintiffs with the offer letter dated 9th July 2014 which was duly executed by the Plaintiffs and thereafter the Plaintiffs executed two separate charges over the properties known as KWALE/DIANI SS/2376 and KWALE/DIANI S.S./2377. It is further deposed that the terms and conditions of the loan agreement and the charges were clear that in the event of default on the part of the Plaintiffs, the 1st Defendant as chargee was entitled to sale the charged properties to recover any outstanding loan balance. The 1st Defendant avers that the applicable interest and interest rate was clearly set out in the Loan Agreement which was signed by the Plaintiffs and there has never been a dispute over the same since the loan amount was disbursed in 2014. It is 1st Defendant's contention that the Plaintiffs have no or no reasonable cause of action against the Defendants and that the intended sale of the charged properties is within the 1st Defendant's right and the law. The 1st Defendant further contends that the Plaintiffs' Application does not meet the threshold for grant of injunctions as the Plaintiffs have failed to establish a *prima facie* case against the Defendants.

5. On 10th July 2017 directions were granted that the Motion be canvassed by way of Written Submissions. The Plaintiffs filed their submissions on 4th August 2017 while the Defendant filed theirs on 15th August 2017.

6. I have duly considered the application, the Affidavits and pleadings on record, the submissions filed and the authorities cited. It is not disputed that the Applicants applied for and were advanced a loan of Kshs.7,500,000 by the 1st Respondent. The loan was secured by a legal charge over the Applicants' properties known AS TITLE NO.KWALE/DIANI S.S./2376 and KWALE/DIANI S.S./2992. The Applicants defaulted in repaying the loan advanced to them by the 1st Respondent and the 1st Respondent served the Applicants with a notification of sale of the Suit Property and the Auctioneers set the sale for

10th July 2017. The Suit Property was advertised for sale upon the terms of the charges created. In law, the 1st Respondent had a right to proceed against the Applicants where there is default as per the terms of the charge. However, in exercising its statutory power of sale of the Suit Property, the Respondents are bound to follow the law.

7. The main ground upon which the Applicants are seeking the orders herein is that the Respondents are selling the Suit Property contrary to the provisions of Section 97 of the Land Act, 2012. It is the Applicants contention that the reserve price is set at a gross undervalue of the Suit Property. The Applicants have also submitted that the 1st Respondent did not issue a statutory notice as required by Section 90(2) of the Land Act, 2012. Section 97 (1) and (2) of the Land Act, 2012 provides as follows: -

1) A chargee who exercises a power to sell the charged land, including the exercise of the power to sell in pursuance of an order of a Court, owes a duty of care to the chargor any guarantor of the whole or any part of the sums advanced to the chargor, any chargee under a subsequent charge or under a lien to obtain the best price reasonably obtainable at the time of sale.

2) A chargee shall, before exercising the right of sale, ensure that a forced sale valuation is undertaken by a valuer.

It is clear from the above provisions of the law that a chargee is under a statutory duty to ensure that a forced valuation is undertaken by a valuer and to obtain the best price reasonably obtainable at the time of sale. This is meant to protect the right of the chargor to Property and to prevent unscrupulous chargee from selling the charged Property at a price not comparable to interests in land of the same character and quality.

8. I have examined the Replying Affidavit. There is no evidence that the Respondents undertook any valuation as required under Section 97 of the Land Act, 2012. The Notification of Sale simply states that the properties were last valued at Kshs.4,700,000 and Kshs.5,000,000 respectively, but does not specify the exact date when such valuation was done. The 1st Respondent is required by law to undertake a valuation. It is not sufficient for the Respondents to state in the notification of sale that the properties were last valued at the figures given. The Court needs cogent evidence and material showing that indeed a valuation was undertaken as required by the law.

9. On the basis of the foregoing, the Applicants are entitled to some relief. Violation of Section 97 of the Land Act, 2012 is evident, thus a violation of the Applicants rights. In such a situation, an award of damages will never be an alternative or adequate relief. Irreparable damage not compensable in an award of damages will certainly result if the Suit Properties are sold without following the clear provisions of the Law. In my view, this is a perfect ground on which the Court should issue an injunction on account that *prima facie* case has been established in terms of **GIELLA VS- CASSMAN BROWN & CO LTD (1973)EA 358**. In the case of **MRAO LIMITED –VS- FIRST AMERICAN BANK OF KENYA LTD & 2 OTHERS(2003) KLR 125**, the Court of Appeal held that *“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 from the latter....”*

10. Accordingly, I find merit in the Application and grant the order for Temporary Injunction. Such an injunction will subsist for as long as the 1st Respondent has not carried out a forced valuation as required under Section 97(1) of the Land Act, 2012. There shall be no order as to costs.

It is so ordered.

Ruling dated, signed and delivered at Mombasa this 22nd day of November 2017

C. YANO

JUDGE