



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
THIKA LAW COURTS

ELC 666 OF 2017

GEORGE MURITU GATHECHA.....PLAINTIFF/APPLICANT

-VERSUS-

FAMILY BANK LIMITED.....DEFENDANT/RESPONDENT

RULING

Coming up for determination is the *Notice of Motion* application dated **18th July 2017** brought by the Plaintiff herein **George Muritu Gathecha** against the Defendant seeking for the following orders:-

1) Spent.

2) Spent.

3) That a temporary injunction do issue restraining the Defendant by themselves, their agents or servants, advocates or auctioneers or any person claiming under them or otherwise be restrained from repossessing, auctioning, advertising, selling, transferring, dealing in whatever manner and/or interfering with the Plaintiff's/Applicant's property known as Title No.Thika Block XI/1036 pending hearing and determination of this suit.

4) That this Honourable Court be pleased to order the Defendant/Respondent release all documents pertaining to this loan facility and the loan statements to the Plaintiff/Applicant which the Defendant has refused and/or declined to issue.

5) That the OCS Thika Police Station and any other police station within the Republic of Kenya do enforce this order of ensuring compliance of any given orders.

6) That the costs of this application be ordered to the Applicant.

This application is premised upon the grounds stated on the face of the application and on the **Supporting Affidavit** of **George Muritu Gathecha**, the Applicant herein. These grounds are:-

a) That the subject property known as Title No.Thika Block XI/1036 situated in Thika is at risk of being repossessed and sold by the Respondent through fraud to the detriment of the Plaintiff/Applicant who is the rightful owner.

b) That the Respondent unlawfully, illegally and without colour of right advertised for sale the

subject property without issuing any requisite statutory notice to the Applicant herein.

c) That the Respondent has caused unlawfully, illegally, and without colour of right refused to hand over the loan documents and bank statements and closed the Applicant's loan account without giving him any notice.

d) That the Plaintiff/Applicant is apprehensive that the subject property may unlawfully be disposed off much to the detriment of the Plaintiff/Applicant.

e) That the Plaintiff's/Applicant's risks being rendered destitute by the Defendant/Respondent unless his rights are protected by this Honourable Court.

f) That unless the application is heard forthwith and orders sought herein granted, the Plaintiff shall suffer irreparable loss and damage.

In his Supporting Affidavit, the Applicant averred that he bought the suit property **No.Thika Block XI/1036**, with the help of a loan facility from the Respondent which advanced him **80%** of the purchase price and he paid the difference. He contended that he has made payments towards settling of the said loan up until **April 2017** without fail. He also contended that due to financial constraints, he approached the bank early in the month of **May 2017** and requested the Credit Manager to allow him sometime upto **September 2017** to look for funds for repayment of the loan. That the said Manager agreed to reschedule the loan to that time. He further contended that he later realized that the Bank had instructed its auctioneers to sell his property without giving him the requisite **Statutory Notices**. It was his contention that his property had been advertised for sale on **2nd August 2017**. He averred that he would suffer irreparable loss in case there is repossession and sale of his property by the Respondent herein. He urged the Court to allow his application.

The application is vehemently opposed by the Respondent and one **Antony Ouma, a Senior Legal Counsel** with the Defendant swore a **Replying Affidavit** and denied the allegations made by the Plaintiff/Applicant herein. He averred that indeed in **November 2015**, the Plaintiff/Applicant applied for a banking facility of **Kshs.10,000,000/=** from the Respondent and the said application was accepted vide a letter dated **6th January 2016**, addressed to the Plaintiff. It was his contention that the loan was disbursed on **26th May 2016**, and the expected **monthly loan instalment** was **Kshs.282,102/=**. However from the date of disbursement of the loan, the Plaintiff never fulfilled his commitment subject of the charge instrument dated **21st April 2016**. He further contended that the Plaintiff did not make payments towards repayment of the loan in the months of **October, November and December 2016** and **March, April, June and July 2017**. It was his contention that the Defendant wrote various demand letters to the Plaintiff demanding repayment of the various arrears owed to the Bank. However, the Plaintiff failed to honour the said demand and subsequently on **11th November 2016**, the Defendant issued the first Statutory Notice under Section 90(1) of the Land Act. That the Plaintiff was given **a three months Notice** to remedy the default but he failed to honour the same.

He further alleged that a second Statutory Notice was issued via a letter dated **13th February 2017**, which was also copied to the Plaintiff's wife and the same were sent through registered mails. Further the Auctioneers issued a Notification of sale and gave the Plaintiff **45 Days Redemption Notice**, which was sent via registered post. Again the said redemption Notice was not honoured. He deposed that the said charged property was valued and a Valuation Report was issued and is dated **23rd February 2017**. It was his further disposition that due process was followed and the Plaintiff/Applicant was aware of the danger the suit property faced by being identified as security for the above loan facility. Therefore the Applicant cannot allege that he stands to suffer irreparable loss in the event the security herein is realized.

He also contended that the Applicant has not availed any evidence of how he intends to clear the loan and/or regularize the loan account. He urged the Court to allow it exercise its power to recover the proceeds due to it as the Plaintiff/Applicant has failed even after formal demands have been issued to fulfil his obligations under the charge instrument. It was further contended that the Plaintiff has

essentially come to court for the sole purpose of defeating the Defendant's statutory right of realization of its security and if the orders sought are granted, the Defendant is likely to suffer irreparable loss as the debt herein continue to grow and it may eventually surpass the value of the charged property. The deponent urged the Court to dismiss the Plaintiff's **Notice of Motion** dated **18th July 2017**, with costs for the interest of justice.

The Court directed the parties to canvass the application by way of written submissions wherein the parties complied and filed their respective written submissions.

The Defendant submitted that the Plaintiff has come to court with unclean hands and he should therefore not benefit from the equitable reliefs sought. Further that the Plaintiff has failed to do equity and since he who comes to seek equity must do equity, the Plaintiff should not be granted the orders sought.

The Plaintiff also filed his submissions and relied on various decided cases. Among the cases relied on is the case of ***Mureithi ...Vs...City Council of Nairobi (1979) eKLR***, where the Court of Appeal relied on the position held in the case of ***American Cynamid...Vs. Ethicon Ltd (1975) AC 396***, and held that:-

“The object of the interlocutory injunction is to protect the Plaintiff against injury or violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial.... If damages in the measure recoverable at common law would be adequate remedy and the Defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted however strong the Plaintiff's claim appeared to be at that stage...”

This Court has now considered the available evidence and the written submissions and it makes the following findings:-

There is no doubt that the Plaintiff herein applied for a loan facility from the Respondent vide his letter dated **17th November 2015**. There is also no doubt that vide a letter dated **6th January 2010**, the Respondent agreed to provide the Plaintiff with a loan facility of **Kshs.10,000,000/=** which was payable within a **period of 60 months**. There is also no doubt that the Respondent offered the terms of repayment as being direct payment of equal monthly instalments of **Kshs.282,105/=** with effect from the first month of draw down. It is also evident that the Plaintiff offered his parcel of land **LR.No.Thika Block XI/1036**, as security for the said loan facility. As a result thereof, a first legal charge for **Kshs.10,000,000/=** was registered in favour of the Respondent.

It is also evident that the Plaintiff accepted the offer given by the Respondent and subsequent thereto a charge was drawn in favour of the Respondent on **21st April 2016**. The Plaintiff signed the said charge and acknowledged that he understood the effect of Section 90 of the Land Act and the Bank's remedies under the charge.

The Court has seen the Bank Statement of the Plaintiff attached to the Replying Affidavit filed by the Respondent. Apart from the month of **July 2016**, wherein the Plaintiff paid an amount of **Kshs.285,675/=** as loan repayment amount, there is no other month that the Plaintiff paid the agreed monthly instalment of **Kshs.282,105/-**. The Plaintiff in his Supporting Affidavit alleged that he made payments towards settling the said loan upto **April 2017** without fail. However as the Court has observed hereinabove, apart from the month of **July 2016**, there is no other month that the Plaintiff paid the agreed monthly instalment of **Kshs.282,105/=**. The Court has seen several demand letters written to the Plaintiff demanding for payment of arrears. These letters are dated **11th July 2016**, **5th August 2016**, **14th September 2016**, **5th October 2016** and **10th October 2016**. There is also a **Statutory Demand Notice** dated **11th November 2016**, which culminated in a **45 days Redemption Notice** by the Auctioneers and the debt amount was indicated as **Kshs.10,676,633.19** as at **26th April 2017**. There is also a **Notification of Sale** of immovable property of the Plaintiff's properties which sale was scheduled for **2nd August 2017**.

The Plaintiff alleged that the said sale is illegal as he was never served with the Statutory Notice. He

therefore urged the Court to allow his application.

The Defendant on its part contended that the Plaintiff has not denied that he owes the Defendant the stated amount and has not even offered any evidence of how he intends to settle the loan facility. Further that the Defendant followed the due process and that it should be allowed to realize its security.

The above are the undisputed facts. The issue now for determination is whether the Applicant is deserving of the orders sought herein.

The Applicant herein has sought for injunctive orders which are equitable reliefs granted at the discretion of the Court. However this discretion must be exercised judicially. See the case of **David Kamau Gakuru...Vs...National Industrial Credit Bank Ltd, Civil Appeal No.84 of 2001:-**

“an injunction being a equitable remedy cannot be granted to a party who has demonstrated openly through his conduct that he is undeserving of the equitable relief.”

Further, as this Court delves into the available evidence to determine whether the Applicant is deserving of the orders sought, it will also take into account that at this juncture, the Court is not expected to determine the disputed facts with finality especially based on the affidavits evidence. All that the court is expected of at this point is to determine whether the Applicant is deserving of the orders sought based on the usual tested criteria. See the case of **Airland Tours and Travel Ltd...Vs...National Industrial Credit Bank, Milimani HCCC No.1234 of 2003**, where the Court held that:-

“In an Interlocutory application, the Court is not required to make any conclusive or definitive findings of facts or law, most certainly not on the basis of contradictory affidavit evidence or disputed proposition of law”.

The Court will now consider the above stated criteria and then juxtapose it with the available evidence and then arrive at a conclusion on whether or not the Applicant is deserving of the orders sought herein.

First, the Applicant needs to establish that he has a prima-facie case with probability of success. Prima-facie case was described in the case of **Mrao Ltd...Vs...First American Bank of Kenya Ltd & Others (2003)KLR**, to mean:-

“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”.

And how would the Court determine probability of success? In the case of **Habib Bank Attorney General Zurich...Vs...Eugene Marion Yakub, Civil Appeal No.43 of 1982**, the Court stated that:-

“Probability of success means the Court is only to gauge the strength of the Plaintiff’s case and not to adjudge the main suit at that stage since proof is only required at the hearing stage”.

Bearing in mind the above decided cases, the Court will now delve into the available evidence to answer the above questions for determination.

As the Court stated earlier, there is no doubt that the Plaintiff took a loan facility from the Respondent and offered land parcel **No.Thika Block XI/1036** as security. The Plaintiff alleged that he continued to pay the monthly instalments as agreed in the charge document until **April 2017** without fail. However, from the Bank Statement attached to the Replying Affidavit by the Respondent, it is evident that the Plaintiff was inconsistent with the monthly loan repayments and did not pay the agreed amount of **Kshs.282,105/= per month**. It is also evident that the Bank sent several demand letters to the Plaintiff using the last known postal address of the Plaintiff. There is no evidence availed that the Plaintiff ever made good the said demands.

The Plaintiff also alleged that the Bank instructed their Auctioneers to recover the loan facility from the Plaintiff without giving any Notice to the Applicant. However apart from the several demand letters sent to the Plaintiff in the months of **July, August, September and October 2016**, the Respondent sent a **first Statutory Notice** to the Plaintiff on **11th November 2016** by **Registered Post**. The Court has seen the Postal Corporation list of registered mails and the Plaintiff herein was one of the persons sent such a registered mail and a certificate of such posting is annexed to the Defendant's Replying Affidavit. The said registered mail was sent to the Plaintiff using his last known address since the said mail was never returned unclaimed, it is evident that the Plaintiff received such a Statutory Notice and he cannot claim that the Respondent instructed their auctioneers without Notice to the Plaintiff.

The Statutory Notice herein was issued in compliance with Section 90(1) of the Land Act which provides as follows:-

90. (1) 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 in 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.

The Court has also seen a copy of Notification of Sale of Immovable Property which was issued on **24th May 2017**, and the date of the intended sale was given as **2nd August 2017**. Further 45 days Redemption Notice was also served on the Plaintiff herein. The Respondent followed the due process and the Plaintiff cannot be said to allege that he did not have **Notice** of default.

Further the Plaintiff/Applicant alleged that the Respondent failed to avail Bank Statement to him. However failure to obtain the Bank Statement was not a reason to default in monthly repayments as the Letter of Offer and the Charge document were very clear on what amount the Plaintiff was supposed to pay every month. The Plaintiff did not honour the terms of the Charge entered between himself and the Respondent and therefore the Respondent's right under the charge had crystalized. The Respondent was entitled to realize its security as provided by Section 96(1) of the Land Act which provides as follows:-

96. (1) Where a chargor is in default of the obligations under a charge and remains in default at the expiry of the time provided for the rectification of that default in the notice served on the chargor under section 90 (1), a chargee may exercise the power to sell the charged land.

The Plaintiff herein charged his suit property to secure a loan facility of **Kshs.10,000,000/=**. He defaulted in loan repayment and he has not made any offers on how he intends to repay the loan. He now wants the Court to restrain the Respondent from exercising its right under the charge which right has not crystalized without offering a proposal on how to repay the loan.

The Plaintiff has also denied that he was served with the Notice under Section 90(1) of the Land Act whereas, it is clear that the said Notice was sent to him through a Registered Post. The Plaintiff also alleged that he repaid the monthly loan without fail until **April 2017**. That is not the position as the Bank Statement shows that he was in default immediately after receiving the loan. The Plaintiff has therefore not come to court with clean hands.

The Court finds that the Plaintiff herein had an obligation to pay the loan facility and in default, the charge document was very clear that the Respondent had a right to seek for remedies and one of such remedies is exercise of its Statutory Power of Sale as provided by Section 96(1) of the Land Act. In the case of **Jopa Villas LLC...Vs...Private Investment Corp & 2 Others, Machakos HCCC No.215 of 2008**, the Court held that:-

"I am clear in my mind that the applicant is running away from the obligations lawfully imposed and with its knowledge and participation court should not aid in that quest but will instead uphold the rights of the 1st Defendant to recover the monies lawfully advanced.... Our courts must uphold the sanctity of lawful commercial transactions".

The Plaintiff herein took a loan facility and he has a duty to meet his obligation under the charge entered between himself and the Respondent.

Having now carefully considered the available evidence, the Court finds that the Plaintiff has not established that he has a prima-facie case with probability of success.

On the second limb, the Applicant had to establish that he will suffer irreparable loss which cannot be compensated by an award of damages. The Plaintiff has alleged that if the suit property herein is sold by the Respondent, then he will suffer irreparable loss which cannot be compensated by an award of damages. However, it is evident that the Plaintiff herein voluntarily offered his property as security for a loan facility. Once the property was offered as a security for loan facility, it became a commodity for sale and the Applicant cannot turn around and claim that he will suffer irreparable loss. The Plaintiff knew that in the event of default, the suit property might be sold to recover the loan. See the case of **Isaack O. Litali...Vs...Ambrose W, Subai & 2 others,HCCC No.2092 of 2000**, the Court held that:-

“ I am of the opinion that once land has been given as security for loan, it becomes a commodity for sale by that very fact and any romanticism over it is unhelpful.....for nothing is more clear in a contract of charge than that default in payment of the debt will result in the sale of the security.....”

Again this suit property has been quantified and valued vide the ***Valuation Report*** dated ***23rd February 2017***. In case the Plaintiff succeeds in the final analysis of the evidence at the main trial, then he can adequately be compensated by an award of damages. See the case of **Wairimu Mureithi..Vs...City Council of Nairobi, Civil Appeal No.5 of 1979(1981) KLR 322**, the Court held that:-

“However strong the Plaintiff’s case appears to be at the stage of interlocutory application for injunction, no injunction should normally be granted if damages in the measure recoverable at common law would be adequate remedy and the Defendant would be in a financial position to pay them”.

Having carefully considered the available evidence, the Court finds that the Applicant has not established that he will suffer irreparable loss which cannot be compensated by an award of damages.

On the third limb, the Court finds that it is not in doubt. Even if the Court was to decide on a balance of convenience, the same would tilt in favour of the Respondent as the Plaintiff is in default and the loan arrears keep on rising and eventually the loan and the outstanding loan arrears might skyrocket and even exceed the value of the charged property. Such situation would disadvantage the Respondent and the sanctity of lawful commercial transactions would have been eroded. See the case of **Andrew M. Wanjohi...Vs...Equity Building Society & 7 Others (supra)**, the Court held that:-

“...if the 1st and 2nd Defendants were restrained from selling off the suit property, there is a very real risk that the debt may outstrip the value of the suit property as the borrower has never made any repayments. the stoppage of the intended sale by the chargee would result in the continued growth of the debt and thus exposing them to potentially substantial irrecoverable loss”.

It is evident herein that if the court is to consider the balance of convenience, it will arrive at a finding that the right of the Defendant herein has been infringed and therefore the balance of convenience tilts in favour of the Defendant/Respondent.

For the above reason, the ***Court finds that the Plaintiff’s/Applicant’s Notice of Motion dated 18th July 2017 is not merited***. Consequently, the said ***application is dismissed entirely with costs to the Defendant/Respondent***. For avoidance of doubt, the ***injunctive orders*** issued on ***31st July 2017 are hereby discharged forthwith***.

Further, the parties to comply with Order 11 of the Civil Procedure Rules within the next 30 days from the date hereof and thereafter take a date for Pre-trial Conference before the Deputy Registrar of this Court and then set down the matter for hearing of the main suit expeditiously.

It is so ordered.

Dated, Signed and Delivered at Thika this **20th** day of December **2017**.

L. GACHERU

JUDGE

In the presence of

M/S Kahindi for the Plaintiff/Applicant

M/S Gitau for Defendant/Respondent

Lucy - Court clerk.

L. GACHERU

JUDGE

20/12/2017

Court – Ruling read in open court in the presence of the above stated advocates.

L. GACHERU

JUDGE

20/12/2017