REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MURANG'A

E.L.C NO. 417 OF 2017

NANCY WACICI - PLAINTIFF

VS

KENYA WOMEN MICRO FINANCE BANK LTD - DEFENDANT

RULING

1. The Plaintiff borrowed Kshs. 7.5m from the Defendant in July 2011. The loan was secured by LR No. LOC.19/KIAWAMBOGO/806 registered in the name of Susan Wangari Mwangi. That the Plaintiff serviced the loan from the proceeds of her liquor and forex businesses that she owned. Later the businesses faced financial hurdles and the monthly repayments slowed down. That she did sell her plots and motorvehicle to offset the arrears including surrendering LR No. 8867, Plots Nos 104 (1/2) from Githunguri Tinganga and Certificate of ownership ballot No. 1894 from Nyakinyua Investments Ltd all valued Kshs. 8.0m to the Defendant to further secure the facility. Due to the default in repaying the instalments the Plaintiff was unable to access credit elsewhere as she was listed as a defaulter by the Credit Reference Bureau at the instigation of the Defendant. Interalia, she sought an Order for compliance/and or rectifying any default to redeem the charged property be extended for a period of 12 months or such other period determined by the Court pursuant to powers conferred under section 104 (2) read together with section 90 of the Land Act, 2012.

2. On the 6.9.17 the Plaintiff moved the Court by way of Notice of Motion seeking the two Orders; Temporary injunction restraining the Defendant/Respondent from selling advertising the suit property pending the hearing of the application and secondly any Order relief under section 104 (2) of the Land Act 2012.

3. The application is supported by the grounds adduced thereto as well as the affidavit of the Applicant sworn on even date. She deponed that she was not served with the statutory notice as per law provided and only discovered the intended sale by Public auction through a newspaper notice dated 15.9.17. That the property is family land and if the sale is allowed the whole family will be prejudiced as the suit land is the only source of income. She urged the Court to exercise its powers under section 104 (2) that provide interalia for cancellation, variation suspension or postponement of sale or extension of the period of time for compliance by chargor or substitution of a different remedy than an outright sale.

4. In opposing the application, the Defendant stated that the Applicant is a habitual defaulter; that the Applicant owes the bank Kshs. 7.8 m as at 29.9.16 which remains unpaid; the banks statutory power of sale was exercised as per law provided; the Applicant was duly served with the statutory notice; the Applicant has admitted being in default but has not proffered an agreement out of Court. The Respondent urged the Court to be allowed to recover monies land to the Applicant and which is due and payable to

the Respondent.

5. In her supplementary affidavit filed on 15.11.17 the Applicant reiterated her averments made in her supporting affidavit of 10.7.17. She challenged the valuation report by Dansal & Associates Ltd on the basis that the valuation is low and is aimed at disposing off the suit property at a throw away price.

6. Parties were directed to file written submission which they have filed. I have considered together with the rival affidavits both supporting and supplemental in arriving at the determination herein.

7. As to whether the Plaintiff/Applicant has a primafacie case with a probability of success, it is now trite law that the Principles of granting a temporary injunction are bid down in the celebrated case of **Giella vs Cassman Brown & Co. Ltd(1973) EA 358** where the Court stated the broad principles as thus;

> "The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an Applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience."

The Court of Appeal in the case of **Nguruman Limited –vs- Jan Bonde Nielsen & 2 Others (2014) EKLR** when applying the above Principles further enunciated the 3 conditions as follows;

> " (a) Establish his case only at a prima facie level,
>
> (b) Demonstrate irreparable injury if a temporary injunction is not granted; and
>
> (c) Ally any doubts as to (b) by showing that the balance of convenience is in his favour."

8. In the instant case the Applicant contended that it is not in dispute that the Applicant was advanced a loan facility by the Respondent. The Applicant states that she is unhappy about the mode of recovery of the loan which the Respondent has insisted on recovering despite the Plaintiff taking steps to repay the outstanding loan. She has averred that she surrendered two plots to the Defendant to settle the arrears that is LR No 8867, Plot No. 104 (1/2) by Githunguri Tunganga Co. Ltd & Ballot No. 1894 by Nyakinyua Investments Ltd all valued at 8.0 million. She contends that the Respondent in invoking its statutory power of sale acted in bad faith in view of the efforts that the Applicant had taken to remedy the outstanding arrears. She stated that she has not been indolent and has every intention to repay the arrears and the entire loan. That the Respondent has in its possession the certificates of the plots and is imprudent on their part to so insist on selling the security. The Respondent contends that the Plaintiff has not established any prima facie case with a probability of success as she has been in default. Further that the remedies under section 104 of the Land Act are not available to the Plaintiff on the basis of imprudence on her financial affairs. In respect to the certificates of Plots surrendered to the Defendant, the Respondent contends that it is not obliged to take an alternative property and in any event the said properties have no titles and are not capable of being charged.

9. The Respondent contents that the Applicant was advanced a loan facility of Kshs. 7,500,000/= at the request of the Applicant against a registered charge on the suit property on 16.7.14. A copy of the official search dated 16.7.14 is enclosed. It is the Respondents case that the Applicant has been in arrears in payment of the loan and as 29.9.16 the amount outstanding stood at Kshs 7.8 million. That due to the default the bank took the following actions in the pursuant of its statutory power of sale:-

> a. On 22.3.16 the first statutory notice was sent to the Applicant and guarantor notifying them of the default and requesting them to rectify the default in 3 months.
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> b. A 2nd statutory notice dated 23.8.06 was sent to the debtors giving them 40 days' notice in accordance to section 90(3) (e) of the Land Act 2012 to exercise its statutory power of sale.

c. On expiry of the aforementioned 40 days the Respondent instructed Messrs Garam Investments who issued by registered post a 45 days' notice to the Applicant in respect to public auction to take place on 31.3.17 unless the amount of Kshs. 7.3 million was repaid by the Applicant.

d. On 23.1.17 a notification of sale was issued to the Applicant in respect to the sale. The said documents were served upon the Applicant as stated in the certificate of service dated 30.1.17.

10. Section 90(1) – (3) of the Land Act states 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 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.
>
> (2) 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, being not less than two months, by the end of which the default must have been rectified;
>
> (d) the consequence that 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.
>
> (3) If the chargor does not comply within ninety days after the date of service of the notice under, subsection (1), the chargee may—
>
> (a) sue the chargor for any money due and owing under the charge;
>
> (b) appoint a receiver of the income of the charged land;
>
> (c) lease the charged land, or if the charge is of a lease, sublease the land;
>
> (d) enter into possession of the charged land; or
>
> (e) sell the charged land;

I am satisfied that the Respondent has complied fully with the statutory procedure provided by the law in exercising their statutory power of sale. I also note that the guarantor Mrs Susan Wangari Mwangi was served with the Notice to sell in accordance with Section 96 (3) (h) of the Land Act No 6 of 2012. None of the parties have produced a copy of the loan agreement nor the charge document for the Court to appreciate the terms of the charge/contract agreed between the parties. That notwithstanding, I find and hold that the Respondents statutory power of sale had crystallized and that the Respondent did exercise its statutory power of sale as per the provisions of the law.

11**. Halsbury's Laws of England, Vol 32(4th edition) paragraph 725** states as follows;

> "The Mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has began 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 in Court, that is, the amount the mortgagee claims to be due him, unless, on the terms of the mortgage, the claim is excessive."

It is manifestly clear that the Plaintiff enjoyed a bank facility which she has continued to be in default prompting the Respondent to issue demand notices for payment as well as statutory notices as required under the Land Act 2012. The Applicants have not paid the outstanding arrears or the full loan only contending that they are displeased with the manner in which the Respondent went about the exercising its power of sale. I have found and held that the statutory notices were properly issued and served on the Applicants, invariably the same have not been contested by the Applicants.

12. In the case of **HCCC No. 3125 of 1995 John P.O Mutere & Another vs Kenya Commercial Bank Ltd** it was held that;

> "Once a power of sale has arisen a mortgage has the right to exercise it. The Court has no power to prevent the exercise of that power if it is being properly exercised. It is a power parliament has granted a mortgagee and Courts cannot and ought not to interfere if it is being exercised."

I find and hold that the Defendants right to exercise its power of sale has accrued and I find no basis to restrain the same.

13. As to whether damages could be adequate remedy, the Plaintiff freely and voluntarily charged the subject property and was clearly aware that in the event of default in servicing the debt the property would be liable to be sold. There is on record a valuation report which has been challenged by the Applicant. In case of **Andrew Muriuki Wanjohi –vs- Equity Building Society Ltd (2006) eKLR** the Judge states as follows;

"Whenever the Applicant offered the suit property as security, he was conscious of the fact that if the borrower did not meet his obligations, the suit property could be sold off. Therefore, in the event that it later became necessary for the suit property to be sold off, by the charge, the chargor could not be heard to complain that his loss was incapable of being compensated in damages. He had the property evaluated in monetary terms. He had then told the chargee that he knew the property to be capable of providing the chargee with the peace of mind, of knowing that the money given as a loan would become recoverable even if the borrower did not pay it."

By offering the suit property as security the chargor was equating it to a commodity which the chargee may dispose of, so as to recover his loan together with interest thereon. Therefore, if the chargee were to sell off the suit property, the chargor's loss could be calculable on the basis of the real market value of the said property. I find and hold that damages would be adequate remedy and therefore an injunction cannot be granted in the circumstances.

15. As to whether the Plaintiff is entitled to relief under section 104(2) of the Land Act, the Applicant has stated that in compliance with section 90 of the Land Act, she handed over alternative plots to the bank as a demonstration of good faith. The Bank's bank has acknowledged receipt of the plots but insist that they are not obliged to accept them as security. The fact of accepting the plot titles or certificates creates a legitimate expectation on the part of the borrower that the bank will accede to her plea. What is so difficult in releasing the titles to the borrower in the event the bank has found them unsuitable? The Plaintiff could sell the plots on her own and raise the outstanding the amounts. This I find unconscionable on the part of the bank.

15. The Applicant sought relief under section 104(1) of the Act on the ground that if the Respondent was to be allowed to exercise its statutory power of sale, the guarantor will be rendered homeless. She

contends that the charged land is family source of income for the guarantor and selling the land will render her and her family landless & destitute. In particular she sought relief under section 104 (2) which provide for cancellation, varying suspending and or postponing the scheduled sale or extend the period for compliance by the charger or substitution of a different remedy other than outright sale.

16. Section 104(2) of the Land Act states as follows; -

> "A Court may refuse to grant an Order under subsection (1) or may grant any relief against the operation of a remedy that the circumstances of the case require and without limiting the generality of those powers, may—
>
> > a) cancel, vary, suspend or postpone the Order for any period which the Court thinks reasonable;
> >
> > b) extend the period of time for compliance by the chargor with a notice served under section 90;
> >
> > c) substitute a different remedy or the one applied for or proposed by the chargee or a different time for taking or desisting form taking any action specified by the lessor in a notice served under section 90;
> >
> > d) authorize or approve the remedy applied for or proposed by the chargee, notwithstanding that some procedural errors took place during the making of any notices served in connection with that remedy if the Court is satisfied that—
>
> (i) the chargor or other person applying for relief was made fully aware of the action required to be taken under or in connection with the remedy; and
>
> (ii) no injustice will be done by authorising or approving the remedy, and may authorise or approve that remedy on any conditions as to expenses, damages, compensation or any other relevant matter as the Court thinks fit.

I have reviewed the reasons advanced by the Applicant as far as the property is alleged to be family land is concerned. When the Applicant/guarantor gave the land as security, she ought to have contemplated a situation where the same could be sold off if the Applicant defaults. It is on record that the guarantor is the mother of the Plaintiff. There are no special circumstances to persuade this Court to grant reliefs contemplated under Section 104(2). The reason being that the Plaintiff is clearly in default and she has not made any steps to repay the loan or make any proposals to the bank. The rights of both the borrower and the bank are within the contractual framework and I would hesitate to so interfere unnecessary.

17. In the end I make Orders as follows;

a. The application is dismissed with costs to the Defendant.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 14TH DAY OF DECEMBER, 2017

J.G. KEMEI

JUDGE