



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA

THIKA LAW COURTS

ELC.761 OF 2017

MARY WANJIKU MWANIKI.....1ST PLAINTIFF/APPLICANT

SARAH WAMBUI KIMANI.....2ND PLAINTIFF/APPLICANT

-VERSUS-

DREAM CREDIT LIMITED.....1ST DEFENDANT/RESPONDENT

RULING

The matter for determination is the Plaintiffs/Applicants *Notice of Motion* application dated **2nd October 2017**, brought under Order 40 Rules 1 & 2, of the Civil Procedure Rules 2010 and Section 3A and 83(c) of the Civil Procedure Act, Cap 21 Laws of Kenya.

The Applicant has sought for the following orders:-

1. Spent.

2. Spent.

3. An order for temporary 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 howsoever from realizing its securities as Chargee or in any manner whatsoever dealing with the 1st Plaintiff's/Applicant's parcels of land known as Title No. Limuru/Ngecha/3423 in any manner adverse to the Plaintiff/Applicant pending the hearing and determination of this suit.

4. The costs of this application be borne by the Defendant/ Respondent.

The application is premised on the grounds stated on the face of the application and on the *Supporting Affidavit* of *Mary Wanjiku Mwaniki*. The grounds in support of the application are:-

1. The Defendant/Respondent has served the 1st Plaintiff/ Applicant with a Notice of Intention to dispose off all that piece of land known as Title No.Limuru/Ngecha/3423, which is registered in the 1st Plaintiff's/Applicant's name in an apparent wrongful exercise of its Statutory Power of Sale.

2. The said intended sale by the Chargee in purported exercise of its Statutory Power of Sale is illegal and wrongful for the reason that no Formal Statutory Notice under Section 90 of the Land Act, No.6 of 2012 was ever served upon either the Plaintiff/Applicant.

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

4. The Plaintiffs/Applicants have a prima-facie case with a high probability of success.

5. It is in the interest of justice that the Plaintiffs/Applicants application be allowed so that the substratum of their suit does not crumble.

In her **Supporting Affidavit**, the Applicant **Mary Wanjiku Mwaniki**, averred that vide a loan facility agreement between the Defendant/

Respondent and 2nd Plaintiff, the parties entered into an agreement whereof the Defendant/Respondent would provide credit facilities and/or financial accommodation to the 2nd Plaintiff/Applicant to the tune of **Kshs.1,500,000/=**.

Further that the said facility was to be secured by legal charge over a parcel of land known as **Title No.Limuru/Ngecha/3423**, owned by the 1st Plaintiff/Applicant and the said parcel of land was a collateral in favour of the Defendant/Respondent.

It was her averment that pursuant to the said agreement between the 2nd Plaintiff/Applicant and the Defendant/Respondent, she executed a charge instrument in respect of the said parcel of land for the financial accommodation of **Kshs.1,500,000/=** in favour of the Defendant/ Respondent. The said funds were disbursed on **15th September 2016**.

She alleged that on **28th July 2017**, the Defendant/Respondent through its auctioneers **Messrs Antique Auctions Agencies** served upon her a **45 days Redemption Notice** and a **Notification of Sale**, intimating intention to sell her property, the subject of the said charge. She further alleged that the said development took her by surprise as he had not been served with any Statutory Notice or had no prior notice that 2nd Plaintiff/Applicant was in default of loan repayment. She averred that the 2nd Plaintiff/Applicant partly repaid the loan but her business suffered a great loss due to the tough economic times as a result of political climate in the country. It was her contention that the Defendant has threatened to sell her parcel of land held as collateral to recover the said debt and the said **sale** was scheduled for **4th October 2017**, through a **public auction**.

She also contended that the said sale is illegal and wrongful for the failure to issue formal Statutory Notice under Section 90 of the Land Act and that if the said sale is allowed to go on, she will suffer irreparable loss. That it is for the interest of justice that her application should be allowed.

The application is **contested** and **Martin Gichovi**, the Head of Operations of the Defendant's Company swore a **Replying Affidavit** and confirmed that indeed the 1st Plaintiff/Applicant requested for and was granted a loan amount of **Kshs.1,500,000/=**, and she used her parcel of land known as title **No.Limuru/Ngecha/3423**, as security over the **legal charge** which was duly registered on **19th September 2016**. Further that the legal charge was binding between the 1st Plaintiff and the Defendant but the 1st Plaintiff defaulted in redeeming the said loan with interest despite several reminders. He averred that the Defendant consequently issued a **45 days** redemption Notice on **6th April 2017, marked MG2** and a further **45 days** redemption Notice dated **28th July 2017**. The second redemption Notice demanded payment of **Kshs.2,813,200/=**, which the 1st Plaintiff acknowledged on **2nd August 2017**.

It was his further contention that the 1st Plaintiff ignored the said Notice and consequently after

complying with the legal Notice, their Agent advertised for sale the 1st Plaintiff's property known as title *No.Limuru/Ngecha/3423*, which had been held as collateral. He further contended that their agents carried out the public auction on **4th October 2017**, and so this application has been overtaken by events. He urged the Court to dismiss the instant application.

The application was canvassed by way of written submissions which this Court has carefully read and considered. The Court has also considered the relevant provisions of law and renders itself as follows:-

This application is brought under Order 40 Rule 1(a) which provides as follows:-

Where in any suit it is proved by affidavit or otherwise—

a. that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree;

the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.

The application is also brought under Section 3A for the Civil Procedure Act, which grants the Court the inherent power to make such orders that are necessary for ensuring that the end of justice is met and to prevent abuse of the court process.

Further, the application is brought under Section 63(c) of the Civil Procedure Act which provides:-

“grant a temporary injunction and in case of disobedience commit the person guilty thereof to prison and order that his property be attached and sold”

Taking into account the above provisions of law, the Court will juxtapose them together with the facts of the case and determine whether the Applicants are deserving of the orders sought.

There is no doubt that the 1st Plaintiff herein *Mary Wanjiku Mwaniki*, entered into a **charge** with the Defendant, *Dream Credit Ltd* on **24th August 2016**. The said charge is a simple document and title *No.Limuru/Ngecha/3423*, was used as security for a loan facility of **Kshs.1,500,000/=**. In the said charge, the 1st Plaintiff/Applicant *Mary Wanjiku Mwaniki*, is the borrower and there is no mention at all of the 2nd Plaintiff/Applicant. For all practical purpose, a cursory look at the charge shows that the 1st Plaintiff is the borrower of the stated loan facility. The 1st Plaintiff's parcel of land aforesaid was used as a collateral for the said loan facility. There is no doubt that the 1st Plaintiff signed the charge document and acknowledged that she understood the effect of Section 90 of the Land Act and Section 59 of the Land Registration Act.

It is also not in doubt that the borrower of the loan facility is in default of repayment of the loan. The Defendant issued Redemption Notices and instructed its Agent, *Antique Auctions* to sell the suit property herein. The said advertisement appeared in the *Daily Nation* of **Monday 1st September 2017**.

The auction was to take place on **4th October 2017**, but the Plaintiffs came to court on **2nd October 2017**. The Court observed on the first instance that the Notification for sale was served on **28th July 2017**, but Plaintiffs chose to come to court on **2nd October 2017**, two days before the intended auction.

The Plaintiffs have acknowledged that they are in default of loan repayment and 1st Plaintiff alleged it was due to the prevailing political climate. She alleged that the Defendant breached the provisions of Section 90(1) of the Land Act which provides:-

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 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.

It is clear from the above provisions of law that if the Chargor is in default, the chargee may serve on the chargor the Notice in writing to pay the money. The operating word herein is may and not shall. Therefore it is clear that the chargee had a discretion to serve a Notice to the chargor herein.

From *annexture MG2* attached to the Defendant's *Replying Affidavit*, it is clear that the Defendant served a Notice to the 1st Plaintiff who had signed the charge and the said Notice was referred to as **45 days Redemption Notice**. The said Notice stated the amount that was due, and the effects of failure to pay the due amount. The said Notice was served on the debtor, **Mary Wanjiku Mwaniki**. Having received the said Notice dated **6th April 2017**, the 1st Plaintiff cannot allege that she was not aware of the default in payment of the loan or the demand for payment of the said loan.

Further there is another **45 days Redemption Notice** issued on **28th July 2017**. The 1st Plaintiff acknowledged receipt of the same. However, there was no evidence of any payment of the outstanding debt. Though the 1st Plaintiff was served with the **45 days Redemption Notice** on **28th July 2017**, she did not move to court to seek for any relief if she felt aggrieved. She waited until two days to the public auction to come to court. The Court finds that the action of the Plaintiff herein of waiting till the eve of the public auction and then come to court did not portray good faith. An injunction relief is an equitable relief and whoever comes to court to seek for such order must demonstrate good faith and should come to court with clean hands. The Plaintiff herein did not do so. See the case of **Amalo Company Ltd...Vs...Trust Bank Ltd, Kisumu HCCC No.7 of 2004(B)**, where the Court held that:-

“A grant of interlocutory injunction is equitable remedy and accordingly the applicant’s conduct in all the matters relating to the suit must meet the approval of the court of equity before he can obtain the reliefs he seeks.”

The Court after considering the available evidence and facts finds that the 1st Plaintiff who signed the charge document is in default of loan repayment. She has not submitted how she would repay the said amount.

She is only disputing the process of service of the alleged Notice. However, Section 90(1) of the Land Act provides that in the event that the chargor is in default, the chargee may issue Notice. The Defendant herein issued a **Notice** to the 1st Plaintiff on **6th April 2017**, and 1st Plaintiff did acknowledge receipt of the same.

In the case of **Mrao Ltd...Vs...First American Bank of Kenya Ltd (2003) KLR**, the Court held that:-

“If Courts are going to allow debtors to avoid paying their just debt by taking some of the defences I have seen in the recent times, 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”

Further in the case of **Kenya Breweries Ltd...Vs...Okeyo (2002) 1 EA**, the Court held that:-

“It is trite law that a contracting party who fails to perform his part of the contract cannot obtain an injunction to restrain a breach of covenant by the other party”.

The 1st Plaintiff herein signed a charge and voluntarily offered the suit property as security. Once the said property was offered as a security for a loan facility, it became a commodity for sale. (See the Case of **Isaack O. Litali...Vs...Ambrose W, Subai & 2 others, HCCC No.2092 of 2000**, where 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.....”

The 1st Plaintiff cannot now allege that she will suffer irreparable loss yet she is in default and she knew the consequences of such default when she offered her suit property as security.

On the balance of convenience, it is evident that the 1st Plaintiff is in default. The more she stays without paying the outstanding loan, the higher the said loan grows. If the state of event is allowed to continue, then the outstanding loan might shoot to an amount that it would be impossible to recover the same. 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”.

The ***Court finds that the balance of convenience would tilt in favour of Defendant and in disallowing the injunctive orders sought herein.*** Consequently, the ***Court finds that the Plaintiff has not met the threshold criteria for grant of injunctive orders*** as was held in the case of **Giella...Vs...Cassman Brown & Co Ltd 1973 EA 358.**

For the above reasons, the ***Court finds*** that the Plaintiffs’/Applicants’

Notice of Motion dated 2nd October 2017 is not merited. The same is dismissed entirely with costs to the Defendant/Respondent. For avoidance of doubt, the interim orders issued on 12th October 2017 are hereby discharged.

It is so ordered.

Dated, Signed and Delivered at Thika this 8th day of December 2017.

L. GACHERU

JUDGE

In the presence of

Mr. Kyule holding brief for Mr. Wachira for Plaintiffs/Applicants

No appearance for Defendant/Respondent

Lucy - Court clerk.

L. GACHERU

JUDGE

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

L. GACHERU

JUDGE

8/12/2017