



**REPUBLIC OF KENYA**  
**ENVIRONMENT AND LAND COURT OF KENYA**  
**AT MALINDI**  
**LAND CASE NO. 1'B' OF 2014**

**JOSIAH KAMANJA NJENGA.....PLAINTIFF/APPLICANT**

**=VERSUS=**

**HOUSING FINANCE CORPORATION OF KENYA.....DEFENDANTS/RESPONDENT**

**GARAM INVESTMENTS.....DEFENDANTS/RESPONDENT**

**RULING**

**Introduction**

1. The Application before me is the one dated 21<sup>st</sup> January, 2014 filed pursuant to the provisions of sections 1A, 3A, 63(c) and (e) of the Civil Procedure Act, Order 40 of the Civil Procedure Rules, Sections 90 and 96 of the Land Act, 2012 and Article 40 of the Constitution. The application by the Plaintiff is seeking for the following orders;-

**(a) A permanent injunction restraining the defendant, its agents, employees and/or its servants from advertising and/or offering for sale, selling, transferring, alienating all that properties known as L.R. No. Mainland North/Section III/2146 and 2147 and registered in the name of the Plaintiff on the basis of the purported Statutory Notice dated 15.2.13 and 10.10.13, the purported Redemption Notice and Notification of sale dated 18.11.13.**

**(b) Costs of this suit together with interest thereon at such rate and for such period of time as this Honourable Court may deem fit to grant.**

2. The Application is supported by the Plaintiff's Affidavit.

**The Plaintiff's case:**

3. The Plaintiff has deponed in his affidavit that he is the registered and beneficial owner of Mainland North /Section 111/2146 and 2147(the suit property).
4. According to the Plaintiff, he entered into a mortgage agreement dated 9<sup>th</sup> March, 2009 for a loan

- sum of Kshs. 19,200,000 and the suit property was charged to secure the said sum.
5. On 18<sup>th</sup> November 2013, the Plaintiff was served with a redemption notice which indicated that the suit property would be sold through public auction unless a sum of Ksh.20,193,655.25 was paid within 45 days.
  6. It is the Plaintiff's deposition that by 18<sup>th</sup> November 2013, he was up-to-date with his repayment; that although the 1<sup>st</sup> Defendant agreed that the Plaintiff was up-to-date with his repayments, it loaded on his account a sum of Ksh. 406,100 being the auctioneer's fee and that the bank's statutory power of sale has not occurred.
  7. It is the Plaintiff's case that the 1<sup>st</sup> Defendant has never issued to him a notice requiring rectification of any default as required by section 90(1) of the Land Act and a Notification of sale; that he was never served with the purported statutory notices dated 15<sup>th</sup> February, 2013 and 10<sup>th</sup> October, 2013 and that the 1<sup>st</sup> Defendant set in motion the said notices with the design to extort the alleged auctioneer's fees from him.

### **The 1<sup>st</sup> Defendants' case**

8. In its Replying Affidavit filed on 5<sup>th</sup> February 2014, the 1<sup>st</sup> Defendant's Assistant Legal manager deponed that the first occasion when the Plaintiff's account fell into arrears, the 1<sup>st</sup> Defendant served the Plaintiff with a notice dated 11<sup>th</sup> March, 2011 giving the Plaintiff a 3 months' notice within which to settle the arrears. The Defendant's officer has deponed that the Plaintiff refused to settle the arrears and the 1<sup>st</sup> Defendant instructed the 2<sup>nd</sup> Defendant to recover the outstanding amount.
9. According to the 1<sup>st</sup> Defendant, the Plaintiff requested for the rescheduling of his mortgage account and the auction was abandoned. However, on 9<sup>th</sup> December 2011, the Plaintiff went back into defaulting and the account fell into arrears again.
10. It is the 1<sup>st</sup> Defendant's deposition that on 15<sup>th</sup> February, 2013, the 1<sup>st</sup> Defendant served the Plaintiff with a notice erroneously dated 15<sup>th</sup> February, 2012 pursuant to the provisions of section 90(1) and (2) of the Land Act and gave the Plaintiff three months to rectify the default by settling the arrears of Ksh.1,538,854.80 projected as at 28<sup>th</sup> February, 2013.
11. The 1<sup>st</sup> Defendant's legal officer further deponed that on 10<sup>th</sup> October 2013, the Plaintiff was served with a 40 days' notice under section 90(3) of the Land Act; that the 1<sup>st</sup> Defendant instructed the 2<sup>nd</sup> Defendant on 14<sup>th</sup> November, 2013 to proceed and realize the security constituting the subject property by public auction and that by that time the 1<sup>st</sup> Defendant's statutory power of sale had already crystallized.
12. According to the 1<sup>st</sup> Defendant, the 40 days' notice under section 96(2) of the Act may run concurrently with the Auctioneer's 45 days' Redemption Notice and that the 1<sup>st</sup> Defendant can realize its security before the lapse of the 40 day's Notice.

### **The Further Affidavit**

13. In his Further Affidavit, the Plaintiff deponed that on 27<sup>th</sup> November 2013, the 1<sup>st</sup> Defendant demanded a settlement Ksh.406,100 being the auctioneer's fees; that on 4<sup>th</sup> December 2013, the 1<sup>st</sup> Defendant demanded Ksh.632,693.10 which was inclusive of the alleged November 2013 monthly installment and that as at 17<sup>th</sup> January, 2014, the bank had loaded on his account Ksh.630,730.90 which he has since settled under protest.
14. The parties' advocates filed their respective submissions and authorities which I have considered.

### **Analysis and findings:**

15. The only issue that I am supposed to determine is whether the 1<sup>st</sup> Defendant's statutory power of sale had crystallized by the time it instructed the 2<sup>nd</sup> Defendant to sell the suit property through a public auction. The determination of that issue will, *prima facie*, determine whether the 1<sup>st</sup>

- Defendant was entitled to load the auctioneer's fees of Kshs.406,100 on the Plaintiff's account.
16. Section 90(1) and (2) of the Land Act provides that if a chargor fails to pay interest or any other periodic payment under a charge, and continues to be in default for one month, the chargee may serve on the chargor a notice in writing requiring the chargor to pay the money owing. The notice should adequately inform recipient the nature and extent of the default. The chargor must also be informed in the notice the amount that must be paid to rectify the default and the time within which to do so, being not less than three months.
  17. According to section 90(2) (d) of the Act, if the default is not rectified within the specified time, the chargee may proceed to exercise any of the remedies provided in the Act, which includes selling the land. Section 96(2) of the Act provides that before exercising the power to sell charged land, the chargee shall serve on the chargor a notice in the prescribed form and shall not proceed to complete any contract for the sale of the charged land until at least forty days from the date of the service of that notice.
  18. The Plaintiff has denied that he was ever issued with a written notice requiring rectification of any default as required by the provisions of section 90(1) and a valid notification of sale as required by section 96(2) of the Act.
  19. According to the 1<sup>st</sup> Defendant's Replying Affidavit, the Plaintiff was served with the first statutory Notice dated 11<sup>th</sup> March, 2011 which was annexed on the Affidavit as PMW 1. In the said notice, the outstanding arrears was indicated as Ksh.1,318,136.25. The notice was sent to the Plaintiff by way of registered post. The address used as shown in the list of letters received by the Postal Corporation of Kenya was 89272-80100 Mombasa. The Plaintiff has denied that that is his postal address.
  20. However, by way of a letter dated 9<sup>th</sup> December, 2011 and annexed on the 1<sup>st</sup> Defendant's Replying Affidavit, the 1<sup>st</sup> Defendant rescheduled the Plaintiff's mortgage account. The monetary loan repayment was adjusted to Ksh.312,000 with effect from 30<sup>th</sup> December, 2011. The address used in their letter was 41825-80100 Mombasa, which, according to the Plaintiff, is the correct address.
  21. According to the 1<sup>st</sup> Defendant's annexure PMW 4, the Plaintiff, vide a letter dated 18<sup>th</sup> December, 2012, was informed to regularize his loan account which had fallen into arrears of Ksh.1,205,591.80. The address that was used by the 1<sup>st</sup> Defendant to inform the Plaintiff about his default was 41825-80100 Mombasa.
  22. PMW 5 is a copy of a statutory notice, which, according to the 1<sup>st</sup> Defendant, was erroneously dated 15<sup>th</sup> February, 2012 instead of 15<sup>th</sup> February, 2013. By that time, the Plaintiff was in arrears of Ksh.1,538, 854.80 which was projected as at 28.02.2013. The address indicated in the letter is 41825-80100 which is the same address that is shown in the list of the letters that were received by the Post Master General on 19<sup>th</sup> February, 2013.
  23. The 1<sup>st</sup> Defendant also annexed on its Replying Affidavit the notice dated 10<sup>th</sup> October, 2013 issued pursuant to the provision of section 96(2) of the Land Act in which it stated as follows;-

**“We shall proceed to exercise our statutory remedy under section (3) (e) of the Land Act and sell the charged land at the expiry of forty(40) days from the date of service of this notice.”**

24. The address that is indicated in the said notice is 41825-80100 which is the same address that is shown in the list of letters that was received by the Post master general on 14<sup>th</sup> October, 2013. It is not true, as alleged by the Plaintiff, that the address indicated in the bank's dispatch book is 41825-8000 Mombasa and not 41825-8100.
25. In any event, the Plaintiff has not offered any evidence from the post master general that indeed the address used by the 1<sup>st</sup> Respondent to send to him the statutory notice and the demand letter was not his or that in fact those letters were never sent. In the case of **Elizabeth Wambui Njuguna-vs- Housing Finance Co. Kenya Ltd, Nairobi HCCC NO.293 of 2006**, Kasango J held as follows;-

**“The Plaintiff ought to have brought evidence to show that the letter sent by the**

**Defendants was not received by her and this could have been confirmed by the post master general”**

26. I am in agreement with the holding of the Judge in the above matter. In the circumstances, I am persuaded that the Plaintiff was validly served with the statutory power of sale erroneously dated 15<sup>th</sup> February, 2012 instead of 15<sup>th</sup> February, 2013 and the demand letter dated 10<sup>th</sup> October, 2013.
27. The Plaintiff has annexed on his supporting Affidavit a letter dated 27<sup>th</sup> November, 2013 in which the bank acknowledged receipt of Ksh.750,000. The money was received by the 1<sup>st</sup> Defendant on 18<sup>th</sup> November, 2013. In the letter, the bank advised the Plaintiff that the auction which had been scheduled for 26<sup>th</sup> January, 2014 will continue as per the notices served unless the auctioneer's fees amounting to Ksh.406,100 is cleared. It is the Plaintiff's contention that that fee is not payable.
28. The 1<sup>st</sup> Defendant instructed the 2<sup>nd</sup> Defendant to sell the suit property by way of public auction to recover its outstanding balance of Ksh.20,193,655.25 as at 30<sup>th</sup> November, 2013 by way of a letter dated 14<sup>th</sup> November, 2013.
29. It is the Plaintiff's case that according to clause 11 of the charge, any notice or demand shall be deemed to have been received if sent by post four days after posting. Consequently, it was argued, if the 40 days demand letter was sent on 10<sup>th</sup> October, 2013, the 40 days would have expired on 19<sup>th</sup> November, 2013. If the four days of service was to be considered, it was submitted, the expiry of 40 days was to be on 23<sup>rd</sup> November, 2013. However, the 1<sup>st</sup> Defendant, it was urged, instructed the 2<sup>nd</sup> Defendant on 14<sup>th</sup> November, 2013 to sell the suit property, an act which paved way for claiming the unlawful auctioneer's charges.
30. The Plaintiff annexed on the Supporting Affidavit the 2<sup>nd</sup> Defendant's "Notification of sale issued to the Plaintiff pursuant to the letter of instructions by the bank dated 14<sup>th</sup> November, 2013.
31. Having analysed the chronology of events, I take the view that the auctioneer's fees is only payable once the bank gives to the auctioneer lawful instructions. Section 96(2) of the Land Act stipulates that the Bank cannot exercise its power to sell the charged property until at least 40 days have lapsed. The Plaintiff was served with the 40 days' notice on 18<sup>th</sup> October 2013, which was the fourth day after the posting of the letter dated 10<sup>th</sup> October, 2013. The letter, according to the documents annexed on the Replying Affidavit, was received by the post master general on 14<sup>th</sup> October, 2013.
32. It is only after 27<sup>th</sup> November, 2013, which was the 40<sup>th</sup> day after 18<sup>th</sup> October, 2013, when the Plaintiff is supposed to have been served with the letter, that the 1<sup>st</sup> Defendant would have instructed the 2<sup>nd</sup> Defendant to proceed to issue to the Plaintiff with a notification of sale pursuant to the provisions of Rule 15 of the Auctioneers Rules, 1997 and not earlier than that.
33. Consequently, the letter of instructions dated 14<sup>th</sup> November, 2013 by the 1<sup>st</sup> Defendant addressed to the 2<sup>nd</sup> Defendant instructing it to sell the suit property was prematurely issued and is contra-statute. The said instructions and the subsequent notification of sale by the 2<sup>nd</sup> Defendant are therefore, *prima facie*, a nullity and cannot be the basis for the auction which had been scheduled for 26<sup>th</sup> January, 2014 or the loading of the auctioneer's fees on the Plaintiff's loan account.
34. For the reasons I have given above, I find and hold that the Plaintiff has established a *prima facie* case with chances of success. Consequently, I allow the Plaintiff's Application dated 21<sup>st</sup> January, 2014 as prayed.

**Dated and delivered in Malindi this 16<sup>th</sup> day of May, 2014.**

**O. A. Angote**

**Judge**