



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E&L 335 OF 2013 (OS)

HARROIL PETROLEUM HOLDING LTD.....PLAINTIFF

VS

CONSOLIDATED BANK OF KENYA & ANOTHER.....DEFENDANTS

J U D G E M E N T

This suit was instituted by way of an Originating Summons taken out under the provisions of Order 37 Rules 4, 8 and 14 of the Civil Procedure Rules, 2010. The O.S as filed seeks the determination of the following issues :-

- 1. Whether or not the 2nd defendant/respondent's Notification of Sale dated 25/4/2013 for sale of the charged property known as East Bukusu/South Kanduyi/15146 and East Bukusu/South Kanduyi/15147 by public auction on 4/7/2013 should be nullified.*
- 2. Whether or not the time within which the plaintiff/applicant ought to have repaid the current arrears and/or discharged the charge and/or the further charge should be extended.*
- 3. Whether or not the plaintiff/applicant should be allowed to redeem the said charged property by:-*
 - (a) repaying the current loan arrears to the 1st defendant/respondent.*
 - (b) After repaying the said arrears to subsequently continue repaying the monthly loan installments as per the charge and further charge secured by the said property.*
- 4. Who shall bear the costs of this suit.*

The applicant has sought the following orders :-

- 1. That the 2nd defendant/respondent's Notification of Sale dated 25/4/2013 for sale of the charged property known as East Bukusu/South Kanduyi/15146 and East Bukusu/ South Kanduyi/15147 by public auction scheduled for 4/7/2013 be nullified.*
- 2. That the time within which the Plaintiff /Applicant ought to have repaid the current loan arrears to the 1st Defendant/Respondent and/or discharged the herein charge and /or further charge be extended and/or the plaintiff/applicant be allowed by this Honourable court to redeem the charged property known as East Bukusu/South Kanduyi/15146 and East Bukusu/South Kanduyi/15147 by repaying the current loan arrears to the 1st Defendant/Respondent and subsequently to continue repaying the monthly loan installments as per the charge and further charge registered on 12/8/2011 and 13/8/2012 respectively.*

3. *That costs be in the cause.*

4. *That this court grants any other relief it may deem fit to grant*

The facts in this matter are not in dispute. The applicant is a limited liability company and the registered owner of two parcels of land which are the subject matter of this suit. These two properties are East Bukusu/South Kanduyi/15146 and 15147. The 1st respondent is a bank and the 2nd respondent an auctioneer. On 12 August 2011, the applicant charged these two properties to secure financial facilities accorded by the 1st respondent in the sum of Kshs. 2,400,000/=. A further charge was created on 13 August 2012 for the sum of Kshs. 793,081/=. In total the applicant was advanced the principal sum of Kshs. 3,193,081/=. Neither party annexed a copy of the charge but the applicant has deponed that the monies were to be paid in monthly installments of kshs. 107,264/= for a period of 5 years. Default has been admitted and the applicant has averred that it stands in arrears of Kshs. 800,000/=. The total amount inclusive of interest which is being demanded by the respondent is in the sum of Kshs. 3,737,761.37/= which was the amount due as at 29 April 2013. No doubt the amount now is higher owing to interest. Owing to the default, the 1st respondent, in exercise of its statutory power of sale as chargee, instructed the 2nd respondent, to sell the two properties in order to recover the money owing from the applicant. The 2nd respondent in accordance with the Auctioneers Rules, issued a notification of sale for an auction scheduled for 4/7/2013. It is this notification of sale that the applicant wants nullified.

The applicant has explained that the default in paying the loan was as a result of the resignation of its directors. New directors have taken over office and they have deponed that they are ready and willing to redeem the property by offsetting the arrears of Kshs. 800,000/= and thereafter continue making the monthly loan remittances as stipulated in the charge. It is further stated that the completion period in the charge is the year 2016 which has not yet lapsed. The applicant has claimed that it is solely dependent on the charged property as its assets and source of income and the intended sale will occasion it irreparable loss. It has been averred that since the applicant is ready and willing to offset the current loan arrears and thereafter make the monthly installments under the charge, no prejudice will be suffered by the 1st respondent.

The 1st respondent filed a replying affidavit through its legal manager, Ms. Janet Mwaluma, to oppose the Originating Summons. Apart from setting out the amount loaned to the applicant and the arrears of kshs. 800,000/= which is not disputed, Ms. Mwaluma had deponed that the bank is perfectly within its rights to proceed with the sale of the two properties. She has averred that the resignation of the directors is an internal matter within the plaintiff company which has no bearing on the obligation to repay the loan on a monthly basis as required by the terms of contract. She has further contended that the court is not the appropriate forum to re-negotiate the repayment schedule or period or any other term of the charge.

The Originating Summons was filed alongside an application seeking a stay of the intended sale pending the hearing of the substantive motion. When the applicant appeared before me ex-parte, I granted an interim order of injunction but subject to payment of the arrears of Kshs. 800,000/=. This amount had not been paid by the time the application for injunction was heard inter partes. After hearing the submissions of counsels on the application for injunction, I was of the view that the whole O.S be argued on the basis of the affidavits on record and I therefore did not make any ruling on the application for injunction but instead ordered that the O.S be heard.

Mr. Were, for the applicant submitted that pursuant to the provisions of Section 106 of the Land Act, the Court has inherent power to grant relief to a chargor. He submitted that the relief now sought by the applicant, as chargor, is the nullification of the notification of sale and for extension of time to pay off the loan. He pointed out the factors provided under S.106(3) which the court is obliged to consider. He concentrated on the factor of interest rates, degree of risk and value of the charged property. He stated that the market value of the property is kshs. 4.6 million and the loan advanced was kshs. 3.2 million. He submitted that the value of the property is way above the loan advanced. He also pressed that the charged properties are the only source of income of the applicant. He pointed out under Section 106 (3) (g) of the Land Act, the court ought to consider any other relevant factor. He submitted that the resignation of directors of the applicant was a relevant factor. He averred that the change of directors caused delay in

repaying the loan and that the new directors now ask for reasonable time to re-organise the company.

Mr. Mwetich for the respondents submitted that the change of directors is not an excuse as the company is a separate legal entity. He averred that there is nothing demonstrated to show that the change of directors halted the business operations of the applicant. He contended that the respondent cannot be faulted for proceeding to put up the property for sale pursuant to its statutory power of sale. He pointed out that the new directors have not demonstrated any effort towards repaying the loan. He pointed out that even the deposit of Kshs. 800,000/= that I had asked the applicant to make has not been paid. Indeed, he averred that the applicant has not paid a single cent to demonstrate good faith. He submitted that the Land Act, only gives relief to matrimonial property under S. 105 and argued that the suit properties are not matrimonial property. As to the factors laid out under Section 106 (3) (a) -(g) his view was that the factors therein are inapplicable to this case. He pointed out that one important consideration is laid out in Section 106 (3) (f) , that confidence of the banking industry should not be undermined by liberally granting relief to chargors who are in difficulty. He asked that the O.S be struck out as being unmerited.

I have considered the pleadings, the law and the arguments of counsels.

The issue herein is whether the court has power, granted by the Land Act, to give relief to a chargor in distress and if so the factors that the court ought to consider before giving such relief. Although the Land Act, was not cited as one of the provisions of the law upon which the O.S is based, Mr. Were's submissions were centered on the provisions of Section 106 of the Land Act.

In my view I think Section 106 has to be read together with Section 105 and the two Sections provide as follows :-

105. (1) *The Court may reopen a charge of whatever amount secured on a matrimonial home, in the interests of doing justice between the parties.*

106. (1) *The court may exercise the powers conferred on it by this Act either—*

(a) on an application made to it for that purpose by either the chargor or the chargee—

(i) to enforce the charge; or

(ii) to commence an action under section 90; or

(b) on an application by the chargor for relief against the exercise by the chargee of any remedy in connection with a default by the chargor under a charge; or

(c) on an application by the Registrar in respect of—

(i) charges provided by one or more specific chargees where there is prima facie evidence of a pattern of unfair dealing and practices by that chargee or those chargees; or

(ii) a chargee, being a corporate body, that appears to exercise discrimination against chargors on account of their gender, or by refusing to grant charges to persons on account of their gender except that a chargee, being a corporate body that is implementing any programme, approved or assisted by the national or county governments, designed to assist women to improve their economic and social position by providing them with advances secured by a charge of land shall not be taken to be acting in discriminatory manner if the advances under that programme are made only to women.

(2) In reopening the charge, the court may—

(a) direct that the charge shall have effect subject to modifications that the court shall order;

(b) require the chargee to repay the whole or part of any sum paid under the charge or any related or collateral agreement by the chargor or any guarantor or other person who assumed an obligation under the charge whether it was paid to the chargee or any other person;

(c) require the chargee to pay any compensation to the chargor which the court shall think fit; or

(d) direct the chargee, being a corporate body to cease acting in a discriminatory manner with respect to the granting of charges.

(3) In considering whether to exercise the powers conferred on it by this section, the court shall have regard to—

(a) the age, gender, experience, understanding of commercial transaction, and health of the chargor at the time when the charge was created, if the chargor is an individual;

(b) the financial standing and resources of the chargor relative to those of the chargee at the time of the creation of the charge;

(c) the degree to which, at the time of the creation of the charge, the chargor was under financial pressure and the nature of that pressure;

(d) the interest rates prevailing at the time of the creation of the charge and during the continuation of the charge and the relationship of those interest rates to the interest rate applying from time to time in the charge;

(e) the degree of risk accepted by the chargee, having regard to the value of the charged land and the financial standing and other resources of the chargor;

(f) the importance of not undermining the confidence of reputable chargees in the market for charges; and

(g) any other factors that the court considers relevant.

Section 105 gives the court power to re-open a charge. But such charge must be one secured on a matrimonial home. The question that arises is whether the power to re-open is exclusive to a matrimonial home . That to me appears to be the import. Section 106(2) and (3) only provide for the mode of the exercise of the power to re-open a charge and does not intend to expand any powers given to the court by the preceding section. I do not think it was the intention of the statute that relief may be given to all charges but only to those secured by a matrimonial home.

The applicant is a corporate commercial entity. The properties herein are owned by the company and cannot therefore be said to be matrimonial property. I do not see how the applicant can therefore fit itself within the provisions of Section 106 as read with Section 105 to enable this court grant it relief. I am therefore unable to grant the applicant the relief that is available under Sections 105 and 106. The applicant's only recourse is now to negotiate separately with the bank and hope that the bank considers its pleas for more time.

For the above reasons the O.S is dismissed with costs.

DATED, SIGNED AND DELIVERED THIS 2ND DAY OF AUGUST 2013

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET

Read in open Court

In the presence of:-

Mr. R.K. Mwetich of M/s Manani Lilan & Co for the Respondent

N/A for M/s D.L. Were & Were & Co. for the applicant