



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E&L 265 OF 2013

MICHAEL RONOH KIMUTAI & 2 OTHERS.....PLAINTIFFS

VS

CONSOLIDATED BANK OF KENYA LTD.....DEFENDANT

JUDGMENT

(Suit by applicants seeking to have an intended sale by Chargee postponed for reason inter alia that suit properties are matrimonial properties and that the applicants intend to sell another property to offset the debt; Application for relief from exercise of the Chargee's power of sale under the Land Act; Whether Chargor can seek relief against exercise of Chargee's power of sale under the Land Act; Section 85, 103-106 Land Act; Principles to be applied)

1. This matter was commenced by way of Originating Summons taken out pursuant to the provisions of Order 37 Rule 4 of the Civil Procedure Rules, 2010. In the suit, the applicants (whom I will refer to as plaintiffs) have sued the respondent bank (the defendant or the Bank) seeking to have a postponement of the exercise, by the bank, of its right as chargee, to sell certain properties offered to it as security by the plaintiffs. The O.S is supported by the affidavit of Michael Kimutai Rono, the 1st plaintiff who has sworn the affidavit on his own behalf and on behalf of the other two plaintiffs.

2. The three plaintiffs acted as guarantors to certain financial accommodation granted by the Bank to one Uday Patel & Company Limited. They offered three properties as securities being Eldoret Municipality/ Block 14/ 693, measuring 0.494 acres; Karuna/Sosian Block 8 (Uswu) / 476 measuring 21.86 acres; and Kitale Municipality/ Block 15 (Koitogos)/ 322. The principal debtor defaulted and as at 21st November 2012, was indebted to the Bank to the tune of Kshs. 16,048,720.75/=. A statutory notice was issued but it seems as if the account was never regularized. The Bank then instructed M/s Ruchaga Investments, a firm of auctioneers, to sell the properties in exercise of its statutory power of sale. The auctioneer served the usual notices and advertised the properties for sale in a Daily Newspaper, with the sale being scheduled for 10th May 2013.

3. The applicant then filed this suit seeking relief. The plaintiffs have sought to have the exercise of the chargee's power of sale stayed as they seek to dispose another property, being L.R No. 20523, measuring 10 acres, and situated at Mulolongo Trading Center in Machakos County. It has been averred that the value of the said property is in the region of Kshs. 22,000,000/= per acre and that the principal debtor has instructed the plaintiffs to scout for purchasers. The plaintiffs have averred that if they do not get a purchaser for the said land, they are willing to sell by private treaty the property Kitale Municipality/ Block 15 (Koitogos)/322 which they have claimed has a current market value of kshs. 22,000,000/=.

4. The applicants have averred that by dint of the provisions of Sections 103 and 104 of the Land Act, 2012, they have a right to seek the postponement of the intended sale. It has been stated that the land

situated in Eldoret Municipality is their matrimonial home. It is also averred that the land in Karuna, is where they grow food to sustain themselves and the family whereas the land in Kitale, is where they get money to sustain their daily expenses. The plaintiffs have sought that the intended sale be postponed by at least 6 months.

5. The O.S is opposed by the Bank which has filed a Replying Affidavit through its Legal Manager, one Janet Mwaluma. She has deponed that the Bank advanced a sum of Kshs. 15 Million to Uday Patel & Company Limited which loan was secured by the three subject properties. There was default and the bank issued the requisite statutory notices. The Bank then instructed the auctioneer to sell the properties. It has been stated that despite these notices, the plaintiffs made no attempt to exercise their equitable right or redemption, nor make any proposal, on how they intend to pay the debt. On the proposal to sell the property in Mlolongo, Ms. Mwaluma has averred that this is speculative. She has also stated that the Bank has not stopped the plaintiffs from marketing or selling the property Kitale Municipality Block 15 (Koitogos)/ 322 and use the proceeds thereof to offset the loan. She has further stated that the averments that the property in Eldoret is a matrimonial, home and the property in Karuna is a source of food, are a mere decoy aimed at defeating the chargee's power of sale. She has contended that there has been no breach of any covenant by the Bank so as to enable the court grant the reliefs contained in Section 104 of the Land Act. The Bank has thus asked that the O.S be dismissed with costs.

6. Mr. Y.M. Barasa for the plaintiffs, urged me to allow the O.S. His submissions were brief, and he entirely relied on the O.S, and the affidavit in support. He contended that pursuant to the provisions of Sections 103 and 104 of the Land Act, 2012, the plaintiffs are entitled to relief. He stated that all that the plaintiffs want was a postponement for a period of 6 months to enable them repay the loan.

7. Mr. E.O. Odhiambo for the Bank resisted the suit. He averred that all notices were duly issued and the Bank ought not to be restrained from exercising its statutory power of sale. He relied on the case of ***Gimalu Estates Ltd & 4 Others vs International Finance Corporation & Another (2006) eKLR***. On the allegation that the land is matrimonial property, Mr. Odhiambo submitted that it is the plaintiffs who availed the property as security and they knew that it could be sold in case of default. On the proposal to sell the Mlolongo property, Mr. Odhiambo stated that the same is speculative and in any event, that property, is not in the name of the plaintiffs or of the principal debtor, but is in the name of one of the Directors of the principal debtor. He further averred that the plaintiffs had promised to make proposals in vain, and have thus acted in bad faith. He contended that Section 103 of the Land Act, 2012 would only give relief if the Bank had committed a breach and that S.104 would only give relief if the land was customary land.

8. This O.S was filed pursuant to the provisions of Order 37 Rule 4 of the Civil Procedure Rules, 2010. The same provides as follows :-

Any mortgagee or mortgagor, whether legal or equitable, or any person entitled to or having property subject to a legal or equitable charge, or any person having the right to foreclose or redeem any mortgage, whether legal or equitable, may take out as of course an originating summons, returnable before the judge in chambers, for such relief of the nature or kind following as may be by the summons specified, and as the circumstances of the case may require; that is to say, sale, foreclosure, delivery of possession by the mortgagor, redemption, reconveyance, delivery of possession by the mortgagee.

9. From the above, it is discernible that a chargee can apply for relief, inter alia, when the chargee seeks to exercise its power of sale. The rules do not make provision on the principles that a court should apply before granting relief. There is no doubt that a chargor who alleges breaches of covenant, or who alleges that a sale should not proceed because of irregularities in the process leading to the sale, may be entitled to relief. However, in this case, the plaintiffs do not allege any breaches of covenant, and neither do they claim that the Bank is not entitled to exercise its statutory power of sale. What they say is that pursuant to the provisions of Section 103 and 104 of the Land Act, 2012, they are entitled to seek relief from the court.

10. I have looked at Sections 103 and 104 of the Land Act, 2012 which provides as follows :-

S. 103 . Application for relief by chargor.

(1) An application for relief against the exercise by the chargee of any of the remedies referred to in section 85 (3) (a) and (b) may be made by—

(a) the chargor;

(b) if two or more persons are joint chargors, by one or more of them on their own behalf;

(c) a spouse of the chargor;

(d) a lessee of the chargor; or

(e) the trustee in bankruptcy of the chargor.

(2) If an application made in accordance subsection (1) (b) is not made by all the joint chargors, then, unless the court orders otherwise, it must be served on all the joint chargors.

(3) An application for relief may be made at any time after the service of a notice under section 90 (1), section 91 (2), section 94(1), section 95 (1), or during the exercise of any of the remedies contemplated in those sections.

(4) An application for relief is not to be taken as an admission by the chargor or any other person applying for relief that—

(a) there has been a breach of a covenant of the charge by the chargor;

(b) by reason of such a breach, the chargee has the right to exercise the remedy in respect of which the application for relief has been made;

(c) all notices that were required to be served by the chargee were properly served; or

(d) the period for remedying the breach specified in the notice served under section 90 was reasonable or had expired,

and the court may grant relief without determining all or any of the matters described in paragraphs (a), (b), (c) or (d).

S. 104. Power of the court in respect of remedies and reliefs.

(1) In considering whether to grant relief as applied for, a court—

(a) shall, have regard to whether the remedy which the chargee proposes to exercise is reasonably necessary to prevent any or any further reduction in the value of the charged land or to reverse any such reduction as has already occurred if the charged land consists of agricultural land or commercial premises, and the remedy proposed is to appoint a receiver, or to take possession of or lease the land or a part thereof;

(b) shall, where the charged land consists of or includes, a dwelling- house, and the remedy proposed is to appoint a receiver, or take possession or lease the dwelling house or a part of it, have regard to the effect that the appointment of a receiver or the taking of possession or leasing the whole or a part of the dwelling house would have on the occupation of the dwelling house by the chargor and dependants and if the effect would be to impose undue disturbance on those owners, whether it is satisfied that—

(i) the chargee has made all reasonable efforts, including the use of other available remedies available, to induce the chargor to comply with the obligations under the charge; and

(ii) the chargor has persistently been in default of the obligations under the charge; and

(iii) if the sale is of land held for a customary land, the chargee has had regard to the age, means, and circumstance including the health and number of dependants of the chargor, and in particular whether—

(aa) the chargor will be rendered landless or homeless;

(bb) the chargor will have any alternative means of providing for the chargor and dependants;

(iv) it is necessary to sell the charged land in order to enable the chargee to recover the money owing under the charge;

(v) in all the circumstances, it is reasonable to approve, or as the case may be, to make the order to sell the charged land.

(2) A court may refuse to authorise an order 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 from taking any action specified by the lessor in a notice served under section 90;

(d) authorise 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.

(3) If under the terms of a charge, the chargor is entitled or is to be permitted to pay the principal sum secured by the charge by installments or otherwise to defer payment of it in whole or in part but provision is also made in the charge instrument or any collateral agreement for earlier payment of the whole sum in the event of any default by the chargor or of a demand by the chargee or otherwise, then for purposes of this section the court may treat as due under the charge in respect of the principal sum secured and of interest on it only the amounts that the chargor would have expected to be required to pay if there had been no such provision for earlier payment.

(4) A court must refuse to authorise or approve a remedy if it appears to the court that—

(a) the default in issue has been remedied;

(b) the threat to the security has been removed;

(c) the chargor has taken the steps that the charger was required to take by the notice served under section 90; and

(d) the chargee has taken or attempted to take some action against the chargor in contravention of section 90 (4).

11. It will be seen that Section 103 of the Land Act, gives an avenue for a chargor to seek relief. However, the relief referred to in Section 103 is relief from the exercise by the chargee of the remedies referred to in Sections 85 (3) (a) and (b) of the Land Act. Section 85 deals with the right to discharge, and to understand the context of subsections (3) (a) and (b), it is prudent that I set out the whole of Section 85 of the Land Act. The same provides as follows :-

S. 85 Right to discharge.

85. (1) Subject to the provisions of this section, the chargor shall, upon payment of all money secured by a charge and the performance of all other conditions and obligations under the charge, be entitled to discharge the charge at any time before the charged land has been sold by the chargee or a receiver under the power of sale.

(2) Any agreement or provision in a charge instrument that is inconsistent with subsection (1) shall be void to the extent that it—

(a) purports to deprive the chargor of the right to discharge;

(b) seeks to fetter the exercise of this right; or

(c) stipulates for a collateral advantage that is unfair and unconscionable or inconsistent with the right to discharge.

(3) A chargee may provide, in a charge instrument, that a chargor who wishes to exercise the right to discharge the charge at any time before the expiry of the term of the charge—

(a) shall give one month's notice of the intention to discharge; or

(b) shall pay not more than one month's interest at the rate at which interest is payable on the principal sum secured by the charge or at any lesser rate which may be agreed, as well as paying all other money secured by the charge.

(4) A discharge of the whole or a part of a charge shall be as prescribed under this Act or any other law.

(5) For the avoidance of doubt, a discharge includes a re-conveyance and a re-assignment of charge or any other instrument used in extinguishing of interests in land conferred by charges.

12. It will be seen that Section 85 of the Land Act, deals with the right to discharge, and it echoes the equitable right of redemption granted under common law. Subsection 3 of Section 85, grants the chargor a right to redeem the property before the expiry of the term of the charge. In other words, the chargor does not have to wait for the term of the loan to run its course before redeeming his property. If he can pay in advance for the loan or financial facility provided, he can redeem the property. In the event that the chargee prevents him from redeeming his property before the term of the charge expires, then the chargor can approach the court for relief, pursuant to Section 103, so that he may be allowed to redeem the charge before expiry of the term. Section 104 of the Land Act, provides the court with guidelines on how to exercise its powers when faced with an application for relief filed pursuant to Section 103.

13. In our case, the plaintiffs are not seeking to pay the money ahead of time and neither are they seeking to redeem their properties before the expiry of the term of the charge. What they want, is a stay of the intended exercise of the chargee's power of sale, and an extension of time to enable them source for funds elsewhere, so as to pay the moneys owing to the Bank. This is not the kind of relief contemplated by Section 85 (3) (a) and (b) and in my view the provisions of Section 103 and 104 of the Land Act, 2012 are inapplicable to the circumstances of this case.

14. The only provisions of the Land Act that I have seen which probably would entitle the plaintiffs to relief are sections 105 and 106 of the Land Act. These clauses 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.

15. The provisions of Section 105 and 106 give the court power to reopen a charge, of whatever amount, so long as that charge is secured on a matrimonial home. Not too long ago, in the case of ***Harroil Petroleum Holding Ltd vs Consolidated Bank Ltd & Another (Eldoret E & L No. 335 of 2013)***, I dealt with an application by a company seeking relief under the provisions of Section 106. I held that the provisions of Section 105 and 106 must be read together, such that relief can only be claimed, if the charge is one secured by a matrimonial home. In ***Harroil***, the charge was secured on a commercial property, and not a matrimonial home, and I declined to grant relief as sought. I still hold the view that for the court to exercise its powers under Section 106 of the Land Act, the property must be one secured by a matrimonial home as laid out in Section 105 of the same Act.

16. Thus in the circumstances of this case, before I grant relief and before I can seek the guidance provided by Section 106, which provide for the mode in which the court ought to exercise its powers, I need first be satisfied that the properties herein constitute a matrimonial home in accordance with Section 105 of the Land Act.

17. There is no averment that the properties Kitale Municipality Block 15 (Koitogos)/ 322 and Karuna/Sosian Block 8 (Uswu)/476 constitutes the matrimonial home of either of the applicants. They therefore fall outside the ambit of the provisions of Section 105 and I am unable to grant relief in respect of these two properties.

18. There is however averment that the property Eldoret Municipality Block 14/ 693 is the matrimonial home of the 1st plaintiff. Before I exercise my discretion to grant relief or not, I need to be satisfied on a balance of probabilities that indeed, this property constitutes the matrimonial home of one or either of the plaintiffs.

19. There is a copy of a Certificate of Marriage annexed to the affidavit of Michael Kimutai Ronoh, the first plaintiff. I can see from that Certificate of Marriage, that Michael Ronoh, got married to Anna Ronoh, on the 12th day of August 1995 under the African Christian Marriage and Divorce Act, (CAP 151), Laws of Kenya. I presume that Anna Rono in the Certificate of Marriage refers to Anna Jerotich Ronoh who is the 2nd plaintiff. I do not quite know how the 3rd plaintiff fits into the picture, and her relationship, if any, with the 1st and/or 2nd plaintiff.

20. Neither party annexed a copy of the certificate of title or certificate of official search to the said property to enable me discern who the registered proprietor of that parcel of land is. The little evidence, which is certainly not conclusive, on who the proprietors of the land in Eldoret Municipality are, is that contained in the newspaper advertisement placed by the auctioneer. I can see from the said advertisement, that the proprietors of the land parcel Eldoret Municipality Block 14/ 693, are Anne Jerotich Jeronoh and Rose Chepchirchir Ronoh. From that proprietorship, it is difficult for me to say that the property appears to be a matrimonial home, for Anne Jerotich Jeronoh and Rose Chepchirchir Ronoh are certainly not man and wife. It was incumbent upon the plaintiffs to produce some evidence, that indeed, the Eldoret property is a matrimonial home of one or some of the plaintiff/s. None has been provided in this instance, and there is no material before me, that would permit me to make a presumption that the said property is indeed a matrimonial home. Since there is no evidence the Eldoret property is a matrimonial home, I decline to invoke the provisions of Section 105 as read with Section 106 of the Land Act, to grant relief touching on this property.

I had already declined issuing orders in respect of the property Karuna/Sosian Block 8 (Uswu) /476, and Kitale Municipality / Block 15 (Koitogos) / 322 since the same do not constitute the matrimonial home of either of the plaintiffs. I have also held that there is no material placed before me that would enable me

reach the conclusion that the property Eldoret Municipality Block 14/693 is a matrimonial home. The entire suit therefore must fail.

For the above reasons, this Originating Summons is dismissed with costs.

DATED, SIGNED AND DELIVERED THIS 24TH DAY OF SEPTEMBER 2013

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET

Read in open Court

In the Presence of:-

Mr. Y.M. Barasa of M/s Wambua Kigamwa & Co Advocates for the applicants

No appearance on the part of M/s Cheptumo & Co for the respondent