



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: SICHALE J.A IN CHAMBERS)**

**CIVIL APPEAL NO. 71 OF 2017**

**BETWEEN**

**ANDREW KARANI IRERI**

**PATRICIA WUGHANGA MWAKINA**

**AND**

**NIC BANK LIMITED ..... RESPONDENT**

*(Being an Appeal from the Ruling and Order given on 2<sup>nd</sup> September, 2016 (Olga Sewe, J) in*

***H. C. C. S. NO. 142 OF 2016***

***COMMERCIAL DIVISION AT NAIROBI***

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**RULING**

This matter came before me on 17<sup>th</sup> March, 2017 for purposes of certifying the applicant's Notice of Motion dated 14<sup>th</sup> March, 2017 and filed on the same day, as urgent. I declined to certify the matter as urgent and hence the parties appeared before me on 4<sup>th</sup> April, 2017 for interpartes hearing pursuant to Rule 47 (5) of this Court's Rules.

The grounds upon which the applicant's motion is anchored is as indicated on the face of the certificate of urgency and the affidavit in support sworn by F. N. Wamalwa, Advocate on 14<sup>th</sup> March 2017. These are: that the respondent is due to sell the applicant's property on 18<sup>th</sup> April 2017; that the High Court erred when it failed to take into consideration that the rates of interest were not reflected on the charge document contrary to Section 84 (1) (2) (3) and Section 88 (1) of the Land Act; failed to find that Hire Purchase debt, Credit Card debt and the overdraft facility could not be part of the charge as these were unsecured debts; that the statutory notice was invalid as the charge did not have an interest rate stipulated therein and finally, that there has been an abrogation of a fundamental process.

The certificate of urgency was opposed through a replying affidavit sworn on 2<sup>nd</sup> April, 2017 by **KELVIN MBAABU**, the Manager Legal Services of the respondent. In the affidavit, the respondent maintained that the issues raised by the applicant are new facts not raised in the High Court; that the letter of offer specified the rate of interest; that the hire purchase debt had been fully paid and was not part of

the debt sought to be recovered; that the respondent did not consolidate the unsecured credit with the secured credit; that the applicants do not deny owing the debt; that vide a letter dated 9<sup>th</sup> February 2016 from the applicant's counsel, the applicants asked to be given time to repay the loan as they had fallen into arrears on account of the applicants having lost their jobs.

During the hearing before me, Mr. Wamalwa learned counsel for the appellant reiterated that there was urgency in this matter as the auction is scheduled for 18<sup>th</sup> April 2017; that the respondent consolidated both the unsecured debt with the secured debt and this would constitute a miscarriage of justice if the charged property would be sold to recover part of the debt which was unsecured; that the rate of interest was not reflected in the charge instrument; that although the rate of interest was stipulated in the letter of offer, the 2<sup>nd</sup> applicant was not a signatory to the letter of offer and finally, that the charged property is matrimonial property.

Mr. Mugisha, learned counsel for the respondent opposed the certification on the basis that the applicants do not deny owing the money; that the secured sums were not consolidated with the unsecured sums; that the 1<sup>st</sup> applicant signed the letter of offer which provided the interest rate; that the 2<sup>nd</sup> applicant who is a spouse to the 1<sup>st</sup> respondent was not required to sign the letter of offer, as she was neither the borrower and/or guarantor.

I have given careful consideration to the submissions by both counsel. It is common ground that the applicant's property is due for auction on 18<sup>th</sup> April 2017. This property was charged to the respondent by the 1<sup>st</sup> applicant. The 2<sup>nd</sup> applicant provided spousal consent pursuant to Section 79 (3) of the Land Act. The reasons advanced by the applicants for the certification of urgency is that the auction of the 1<sup>st</sup> applicant's property is due to take place on 18<sup>th</sup> April, 2017 and that the intended sale is pursuant to a statutory notice demanding both secured and unsecured debts of the applicants. However, this contention was refuted by the respondent who contended that the Hire Purchase debt had been fully repaid. As to the issue that the interest rate was not on the charge instrument, I find that this was not an issue canvassed in the High Court. However, even if it had been canvassed in the High Court, the letter of offer to the 1<sup>st</sup> applicant specified the terms of lending. The letter of offer was made to the 1<sup>st</sup> applicant as the borrower and registered owner of the charged property. I note that the 2<sup>nd</sup> applicant was a spouse and her consent was obtained as mandatorily required. Of greater significance however, is the fact that the debt is not denied. In a letter dated 9<sup>th</sup> February 2016, the applicant's counsel wrote to the respondent counsel and indicated in part as follows:

***“We would be grateful if you in the circumstances prevailed upon your clients to suspend process already commenced for enforcement of your client's statutory powers of sale of the charged property to enable our client dispose of his movable assets and pay loan arrears.***

***It would appear from our client's instructions that our client fell into arrears due to loss of employment more or less the same time as he lost a big transport job for his firm income from both which was the principal source of funds applied by him to the loan account.***

***We are instructed that following change of circumstances, our client now secure in new employment and a good transport contract for his business the projected reduction of arrears is reasonably achievable. We in the premises request on our client's behalf further indulgence as efforts are made to liquidate the arrears.”***

I find that due to the fact that the debt is admitted and remains unpaid, the respondent has a right to exercise its statutory power of sale. It may be that the charged property is matrimonial property but the law does not distinguish matrimonial property from any other charged property. As a Court, I must take into consideration the arguments of each side and it is my considered view that the fact that the charged property is due to be auctioned on 18<sup>th</sup> April, 2017 is no reason to certify the Notice of Motion as urgent. In my view the fact of the auction itself does not constitute urgency, bearing in mind that the respondent's debt which is not denied by the applicants is yet to be re-paid. It cannot be that because the sale is

imminent, then certification has to be granted. I find that the applicants have not established circumstances that would justify the exercise of my discretion in their favour. I dismiss the application for certification of urgency with costs. It is so ordered.

*Dated and delivered at Nairobi this 7<sup>th</sup> day of April, 2017.*

***F. SICHALE***

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***JUDGE OF APPEAL***

*I certify that this is a true copy of the original.*

***DEPUTY REGISTRAR***