



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT NAIROBI

CAUSE NUMBER 63 OF 2019

BETWEEN

SAMMY KANYI.....CLAIMANT

VERSUS

UAP INSURANCE COMPANY LIMITED.....RESPONDENT

RULING

1. In his Application filed on 4th June 2020, the Claimant prays for the following main orders against the Respondent, his former Employer:

- Pending hearing and determination of the Application *inter partes*, the Respondent, whether by itself, employees, servants and/ or agents be and is hereby restrained from appointing auctioneers in respect of advertising for sale, selling, alienating, transferring, trespassing onto, interfering with, disposing of and /or dealing in any manner whatsoever, and howsoever with the Claimant's Apartment No. 102 on 1st Floor Block B, erected on L.R. No. 209/21512 [Original No. 209/5862] or otherwise giving effect to the Statutory Notice dated 16th March 2020.
- [Same order as above, pending hearing and determination of the Claim and Counterclaim filed herein].
- The Statutory Notice be and is hereby set aside.
- The Hon. Court be pleased to hear the Claim on a priority basis.

2. The Application is based on 10 Grounds shown on the face of the Notice of Motion, and an Affidavit of the Claimant, filed on 4th June 2020. The Affidavit does not bear the stamp and signature of a Commissioner for Oaths. In plain language, it is not commissioned.

3. The Application was heard *ex parte* on 4th June 2020, and interim order granted, in terms of the first prayer at paragraph 1 above.

4. The Court ordered that the Application is heard *inter partes*, within 30 days of 4th June 2020. However, it was not until 18th February 2021, almost a year later, that Parties recorded an order for filing and exchange of Submissions on the Application, within a period of 30 days. It was explained by Respondent's Advocate that several of Respondent's Advocate Firm Staff, were infected with Covid-19, disrupting work at their chambers, resulting in delay in responding to the Application.

5. The Respondent filed a Replying Affidavit on 18th February 2021, sworn by its Regional Legal Counsel, Nannette Miingi, opposing the Application.

6. The Claimant submits that he filed, this Claim on 1st February 2019. He challenges termination of his employment by the Respondent. Termination was based on alleged underperformance by the Claimant.

7. The Respondent filed a Statement of Response and Counterclaim dated 11th October 2019. The Counterclaim is for the sum of Kshs. 30,378,846, alleged to be outstanding loan amount from a mortgage facility under a Loan Agreement between the Parties, dated 20th June 2018.

8. The Claimant contends that in light of termination of his employment, he is not liable to pay penalties and interest on the loan. He has however been paying the loan in good faith, pending hearing and determination of the Claim. He states that he paid: Kshs. 675,084 on 6th February 2019; Kshs. 50,000 on 7th July 2020; Kshs. 1,000,000 on 11th January 2021; and Kshs. 2,000,000 on 26th February 2021.

9. The Claimant attributed his delayed payment of instalments to financial hardships he encountered upon loss of employment, which has

been compounded by the effects of Covid-19 on the general economy.

10. The Respondent issued the Claimant a Statutory Notice dated 16th March 2020, for an outstanding sum of Kshs. 20,644,523.72. It is from the same mortgage facility. The Respondent has threatened to sell the Claimant's property unless the sum is paid in full.

11. The Statutory Notice is *sub judice* and unwarranted, as the issues relating to termination and the loan, are pending determination before this Court.

12. The Claimant submits that the Respondent cannot seek 2 simultaneous modes of recovery of the same facility. Having elected to sue by way of Counterclaim, the Respondent cannot issue Statutory Notice under Section 90 [3] of the Land Act.

13. He invokes *Mulla on the Code of Civil Procedure 16th Edition at page 212* and the case of *David Karanja Kamau v. Harrison Wambugu Gaita & Another [2020] e-KLR* where it was held that, a proper reading of Section 90 [3] [e] of the Land Act, therefore shows that the 2nd Defendant as Chargee, was required to make an election, on which of the remedies to go for. The subsection, the Court held, uses the word 'or' which means the remedies are disjunctive not conjunctive, distinct not cumulative. The 2nd Defendant, it was held, could only choose one remedy and not more. The Claimant also cites *China Young Tai Engineering Company Limited v. Ravasam Development Company Limited & Another [2016] e-KLR*, where it was restated that a Chargee cannot enforce more than one remedy at the same time.

14. Relying on Section 104 [2] of the Land Act, the Claimant submits that should the Court disallow his Application, it grants him 12 months, from the date of the Ruling to allow him: *a)* arrange for taking over of the credit facility by another institution; *b)* liquidate his other assets [other than the charged property which is his matrimonial home] and make payment to the Respondent [as per attached schedule of the said assets and their valuation]; and, *c)* arrange for deductions of any outstanding sum from his pension benefits which are yet to be paid.

15. The Claimant lastly urges the Court that his Claim is heard on a priority basis.

16. The Respondent submits that *ex parte* order issued by this Court on 4th June 2020, lapsed on or about 19th June 2020 by dint of **Rule 17 [4] of the E&LRC [Procedure] Rules, 2016**, which states: -

“ *An ex parte injunction may be granted only once, and not more than 14 days and shall not be extended thereafter, except once by consent of the Parties or by the order of the Court for a period not exceeding fourteen days.*”

17. The Respondent submits that the Claimant was employed by the Respondent as General Manager, Intermediary Business on 13th March 2017. He was confirmed on 11th January 2018. He took the loan on 20th June 2018. The total loan was Kshs. 30,378,846 to be paid in instalments of Kshs. 168,771 monthly. In event he lost employment as he did, before completion of payment, the loan became immediately payable.

18. Clause 6 of the Loan Agreement retained the right of the Respondent to institute legal proceedings against the Claimant for full recovery of any unpaid amounts, as well as exercise power of sale or appointment of receivers under any security created in Respondent's favour.

19. The Claimant continued to breach the Agreement. As at February 2021, the loan balance stood at Kshs. 18,856,031.

20. His contract of employment was legally terminated on 7th November 2018 as a result of poor performance. He filed this Claim on 1st February 2019. He filed simultaneously, an Application, barring the Respondent from reverting his loan to market rates. The Parties consented on 19th May 2019 before the Court, that the Claimant continues to pay his loan at staff rates. The Claimant continues however, to default, in disregard of the consent order and the Loan Agreement. The Respondent is therefore entitled to exercise its power of sale in terms of clauses 7.2.2, 7.2.3. of the Charge, clause 6 of the Loan Agreement, and Section 90 [3] [e] of the Land Act.

21. The above clauses, and provision of the Land Act allow the Respondent to pursue recovery through a civil action, as well as exercise of the statutory power of sale. The 2 remedies can be pursued contemporaneously, as agreed between the Parties, under clause 7.2.2.

22. The Claimant shall not suffer double jeopardy as a result of the Respondent's pursuit of the 2 options. What the law bars is effecting or enforcing the remedies concurrently. In simpler language, a Chargee cannot enforce a decree awarding it loan balance, and at the same time go ahead with sale of the charged property.

23. Should the Respondent successfully exercise its statutory power of sale, and recover the loan balance, the Counterclaim will have been overtaken by events, with no prejudice or harm suffered by the Claimant. Conversely, if the Respondent succeeds in its Counterclaim before the charged property is sold and loan recovered, the power of sale shall not be exercisable. The Court, in exercise of its discretion, can reduce this submission into an order.

24. The Respondent submits that the dispute on the outstanding loan does not affect its exercise of the statutory power of sale as held in *Jim Kennedy Kiriro Njeru v. Equity Bank [K] Limited [2019] e-KLR*. Neither does the small fraction of the outstanding amount recently paid by the Claimant, affect the power of sale. The Respondent submits that the recent payments made by the Claimant are aimed at stealing a march, and giving legs to a crippled Application. The Claimant failed for more than 3 years, to service his loan. He defied the orders granted him by the Court, on 9th May 2019.

25. The case of *David Karanja* cited by the Claimant is distinguishable. The Decree-Holder had successfully prosecuted his Claim for outstanding amount. The Respondent herein is not a Decree-Holder. Upon recovering its money through sale of the charged property, the Counterclaim shall become automatically extinguished. The same distinction is made with regard to *China Young Tai Engineering Company Limited*. Prohibition exists where a Chargee seeks for instance, to execute a decree, simultaneous to exercise of statutory power of

sale.

26. Lastly, the Respondent submits that the Claimant has not persuaded the Court to grant relief by way of staggered payments, and related reliefs, over a period of 12 months, under Section 104 [2] of the Land Act. He has not provided evidence that his debt can be taken over by any other institution; he has not shown that he has other saleable assets; and he was paid all his terminal benefits with nothing to be recovered by the Respondent, from terminal benefits. The Respondent prays that the Application is dismissed with costs.

The Court Finds: -

27. The Claimant is a former General Manager- Intermediary Business of the Respondent. He was employed on 13th March 2017. His contract was terminated by the Respondent on account of poor performance. He initiated the Claim herein, alleging termination was unfair.

28. The Respondent has countersued the Claimant for recovery of staff loan the Claimant was advanced to purchase a house, on 20th June 2018.

29. The Respondent at the same time has issued a Statutory Notice, under Section 90 of the Land Act, dated 16th March 2020.

30. The Claimant asked for and was granted an interim order of injunction, on 4th June 2020, restraining the Respondent from acting on the Statutory Notice, pending hearing *inter partes*. Hearing *inter partes*, was to take place within 30 days.

31. It is argued correctly by the Respondent, in the view of this Court, that the interim order ceased to have force, on or around 19th June 2020, by dint of **Rule 17 [4] of the E&LRC [Procedure] Rules, 2016**. The Rule is specific that *ex parte* interim injunction may be granted only once, not for more than 14 days, and shall not be extended thereafter, except once by consent of the Parties, or by order of the Court, for a period not exceeding 14 days.

32. The record does not show that any extension was granted with the consent of the Parties, or by the Court, and even if there was extension, it could not exceed a period of 14 days. It cannot be that an *ex parte* order of injunction is in force, a year after it was issued. The order lapsed on or about 19th June 2020. The order cannot be deemed to have been extended automatically or by default. The law deems it to have expired. The interim order of injunction expired through the operation of the law. The Court need not have made an order, declaring its expiry.

33. The Respondent however does not seem to have proceeded with the action contemplated in the Statutory Notice after the order expired. Nothing much therefore turns, on the fact that the order lapsed in June 2020. The Respondent exercised self-restraint, in the absence of the interim injunctive restraint. There is no merit whatsoever, in the submission of the Claimant, that the order remained in full force, until *inter partes* hearing. Rule 17 [4] of the E&LRC [Procedure] Rules, 2016, does not extend the validity of *ex parte* injunctive orders, beyond the period given by the Rule. The period and mode of extension can only be as prescribed by the Rule. There is nothing like an automatic or default extension.

34. As observed by the Court at the outset, there is no sworn Affidavit from the Claimant, to support his Application. The Affidavit said to have been sworn on 2nd June 2020, in the Court file at the time of writing this Ruling, is not commissioned. The annexures are similarly uncertified. These are not records this Court can rely on. [A screenshot of the Affidavit shall be made available to the Court Assistant upon the release of this Ruling for sharing with the Parties, under Covid-19 Guidelines. The physical file shall also be available at the Registry upon delivery of the Ruling].

35. That said, the Court is persuaded the Statutory Notice issued by the Respondent is legally firm. Clause 6 of the Loan Agreement allows the Respondent to initiate legal proceedings as well as exercise its statutory power of sale, in recovery of the loan balance. The Claimant read the Loan Agreement and executed it, before he was advanced the loan.

36. The loan stood at Kshs. 18,856,031 as at 26th February 2021. The Claimant is no longer an Employee of the Respondent, but was allowed to continue paying the loan, on staff rates. He defaulted, claiming financial hardship and Covid-19 have, prevented him from meeting his loan obligation. The Respondent has not acted on the Statutory Notice, 1 year after the *ex parte* injunction issued.

37. The Claimant has had 12 months from June 2020 to-date, the period he seeks from the Court to redress his loan obligation. Why has he not taken the measures he wishes to take within 12 months of this Ruling, within the 12 months from June 2020, to redress his obligation? The Court would be giving orders bordering on voidance of contractual obligations, were it to grant the orders sought by the Claimant.

38. There is legally no ground shown, to support the position that the Respondent cannot exercise its statutory power of sale, simultaneously with the pursuit of remedy in a civil action.

39. It is granted the power of sale by Section 90 [3] [e] of the Land Act, and the right of a civil action, by Section 90[3][a] of the Land Act.

40. If the Chargor fails to comply with a Statutory Notice within 2 months of service, the Chargee may sue the Chargor for any money due and owing under the charge or sell the charged property.

41. The charge itself, which the Parties executed, states under clause 7.2.2. that the Chargee is entitled to its option to sue for the repayment of secured obligations and enforce the payment thereof and/or exercise the statutory power of sale. The charge is clear, using the terms and/or, which are conjunctive. It does not suggest as advanced by the Claimant, that the remedies are disjunctive not conjunctive, distinct not cumulative. The charge uses the terms and/or, with regard to the remedies available to the Chargee, in event of default. The scope of application of the decisions cited by the Claimant in any event, has clearly been explained in the Submissions filed by the Respondent.

42. These decisions, *David Karanja* and *China Young Tai Limited* are distinguishable. The Courts stated that a Party who has obtained a decree, over the same subject matter, cannot in the same breath, exercise a statutory power of sale. The Respondent herein is not a Decree-Holder; it is a potential Decree-Holder by virtue of its Counterclaim. It is pursuing or searching for a remedy in Court, rather enforcing a remedy. There is no enforceable remedy presently, granted by the Court.

43. There is no Judgment in this Claim. The Respondent is not seeking enforcement of more than one remedy contemporaneously. There is no Judgment granting the remedy sought in the Counterclaim.

44. If one of the modes of recovery of the loan amount is successful before the other, then the other mode shall become redundant and therefore unenforceable. The Claimant shall not suffer double jeopardy as apprehended. Lenders must not be unreasonably encumbered, in pursuing debt recovery, and must be allowed to exercise all the means of recovery granted by the relevant Acts of Parliament and the Loan Documents.

45. The Court is satisfied that the Statutory Notice issued legally. The Counterclaim is validly before the Court. The Loan Agreement, the Charge and the Law, support the course of action, taken by the Respondent. The Claimant has had sufficient time to redress his loan obligation. He was granted the favour of paying the loan at staff rates, although he is no longer part of the Respondent's staff. The proposals he is floating before the Court, can be placed before the Respondent, and considered in an out-of-court negotiation for settlement. They cannot however be imposed on the Parties by the Court.

46. On an early hearing date for the main Claim, the Claimant can apply for this on mention before the Trial Court, once Parties have met all the pre-trial procedures, under Rule 15 of the E&LRC [Procedure] Rules, 2016.

IT IS ORDERED: -

a. The Application filed by the Claimant on 4th June 2020, dated 2nd June 2020 is declined.

b. No order on the costs.

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY, UNDER MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, AT NAIROBI, THIS 2ND DAY OF JULY 2021.

James Rika

Judge