Case Number:	Civil Case E10 of 2021
Date Delivered:	17 Mar 2022
Case Class:	Civil
Court:	High Court at Kitui
Case Action:	Ruling
Judge:	Robert Kipkoech Limo
Citation:	Stella Kavutha Muthoka & another v Kenya Women Microfinance Bank Ltd [2022] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Kitui
Docket Number:	-
History Docket Number:	-
Case Outcome:	Notice of Motion dismissed with costs to the Respondent
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

HIGH COURT CIVIL CASE NO. E10 OF 2021

STELLA KAVUTHA MUTHOKA.....1ST PLAINTIFF/APPLICANT

KENNY MUTHOKA MALUKI.....2ND PLAINTIFF/APPLICANT

VERSUS

KENYA WOMEN MICROFINANCE BANK LTD.....DEFENDANT/RESPONDENT

R U L I N G

1. The Plaintiffs/Applicants herein, have moved this court through a Notice of Motion dated 8th September 2021 for the following relief Orders;

i. Spent

ii. Spent

iii. That this Hon. Court be pleased to grant an injunction restraining the respondent whether by itself, its servants and/or agents or whomsoever else acting on its instructions/or authority from selling by public auction and/or private treaty titles numbers Kitui Municipality/Block III/290 and Kitui Municipality/Block I/90 or dealing in any other manner whatsoever pending the final determination of the suit herein.

iv. That the Respondent be condemned to pay costs of this application.

2. The grounds upon which this application is brought are;

i. That the loan sum of Kshs. 61,901,032.85 is for a term of 120 months (roughly about 10 years and that the applicant has since 11.09.2015 up to date repaid approximately Kshs. 32,098.348 and are still willing, capable to settle the same.

ii. That pursuant to a ruling of the ELC court in Machakos, on 18.6.2021 the Respondent advertised for sale the charged property on 9.9.2021.

iii. That the Respondent's notification of sale dated 15.02.2019 was issued in violation of a court Order and that the Respondent was found guilty and fined Kshs. 100,000 by the then court.

iv. That the Respondent is by law obligated by **Section 90 (2) (b) and 90 (3)** as read with **Section 96 (2) of the Land Act No. 6 of 2012** to issue notice to the applicants indicating the amount that must be paid to rectify the default and a time of not less than 3 months to pay up the default.

The applicants claim they never received any such notice information and or warning from the Respondent.

v. That under **Section 90(2)** as read with **Section 96 (2) of the Land Act**, the Respondent are required to give notice in prescribed form and should not take any action before the date of the notice. The applicants claim they did not receive any statutory notice. The applicants claim they did not receive any statutory notice.

vi. That under **Section 97(2) of the Land Act No. 6 of 2012**, the Respondent was obligated to carry out valuation to ensure a forced sale is undertaken in the current market value of the property.

vii. That the Respondent did not issue a fresh or current statutory notice of its intention to exercise charge's right of sale which notice they claim should have shown or indicated the full amount due and owing for which Public action to be carried out so that the applicants would be kept in the know because the previous notice issue on February 2019 upon which the notification of sale is based may be inaccurate.

viii. That it is dishonest, fraudulent and unconscionable for the Respondent to put up for sale by Public auction the charged properties for an unknown and on unspecified sum of money which the auction is intended to realize or recover or at least without disclosing to the applicants the sums due and owing or in the amount to be recovered or at all.

ix. That the charged properties may be sold by public auction and fetch very little in a forced sale because no fresh valuation has been done.

3. The applicant has supported their application with an affidavit sworn on 8th September 2021 by Kenny Muthoka Maluki (the 2nd Applicant herein) who has basically reiterated the above grounds adding that the respondent hurriedly issued a fresh advertisement of the sale after ruling of the Environment and Land Court on 18.06.2021 which found that it had no jurisdiction to entertain the matter.

4. The applicants fault the Respondent for issuing advertisement of sale without first giving 45 days' statutory notice in compliance with the law.

5. They aver that advertisement in the newspaper indicating that the sale was to be on 9.09.2021 was illegal because the notification of sale was never issued.

6. They further aver that the respondent's agents predicated the public auction of the charged properties on the strength of the notice to redeem and notification of sale dated 15.02.2019 which notice according to the applicants had been overtaken by events and could not be a basis upon which to support a public auction.

7. They term the advert and intended exercise of power of sale of charged property as illegal, and done in bad faith.

8. In their written submissions done through M/s A.M. Kilonzi & Co. Advocate, the applicants contend that the advert for public auction by the respondent violated the law and due process because it was based on a notice issue on 15.02.2019 which notice according to them had been overtaken by events and that the notice issued is not a notice contemplated under ***Sections 90(1), 90(2) (a) and (b), 90(3) and 96(2) of the Land Act.***

9. The applicants submit that the applicant must comply with the law when carrying out any action in its exercise of statutory power of sale. They contend that the Respondent cannot flaunt the law and due process and that it cannot validate what they term illegal action or justify violating the law and due process by pleading the right to recover (redeem) the debt owing. In their view two wrongs cannot be right.

10. According to the applicants there was nothing difficult for the Respondent to issue fresh notices as per the law. They fault them arguing that the exact amount due has not been made clear because while the notice dated 15th February 2019 which the Respondent relies on demanded Kshs. 73,775,629.34 the Head of Legal Services in her replying affidavit avers that the amount due is Kshs. 117,356,053.61. The applicants are questioning the apparent wide disparity stating that the notice does not confirm with the requirements stipulated under ***Section 90(2) of the Land Act***. In that regard, they rely on ***David Gitome Kulinguka versus Equity Bank Ltd. [2013] eKLR***.

11. They have also relied on the decision in ***Jimmy Wafula Simiyu versus Fidelity Commercial Bank Ltd. [2013] eKLR*** to buttress their contention that while the respondent bank has a right of redemption as against the charger, they have a legal obligation to follow the law and due process.

12. The have urged this court to exercise its powers donated by ***Section 104 of the Land Act, 2012*** and stop the Respondent from exercising its power/right to sell their charged properties.

12. The Respondent has opposed to this application vide a Replying Affidavit sworn by its Head of Legal Services Marion Wasike on 16th September 2021.

14. The Respondent avers that it offered and the Applicants agreed to take a loan facility of Kshs 70,000,000. And that the payable monthly installments for repayment of the loan was Kshs 1,381,967/- which comprised of the principal and interest as well as the credit life insurance.

15. It avers that the Applicants however defaulted in repaying the loan which caused the Respondent to issue statutory notices notifying them to rectify the default. That the first 90 days' notice was issued on 28th April 2016 and was followed by a 45 days' notice which was issued on 19th September 2016. That the Applicants failed to rectify the default and the Respondent instructed M/S Garam Investments Auctioneers to issue a notice of redemption which was issued vide letter dated 17th December 2016.

16. That as a result, the Applicants filed a suit in the Environment and Land Court in Machakos being **Machakos ELC cause No. 51 of 2017 Stellar Kavutha Muthoka & Another vs Kenya Women Micro Finance Bank Ltd.** The Applicants sought injunctive reliefs in the matter and the court issued a temporary injunction stating that the notices issued by the Respondent did not inform the Applicants of the money they owed.

17. The Respondent states that it issued fresh notices to the Applicants with the 90 days' notice being issued on 12th June 2018 while the 45 days' notice being issued on 8th October 2018. *(Notices attached at page 19 and 22 of the Respondent's bundle).* These notices were however suspended by the Court but will get back to that issue shortly.

18. The Respondent further avers that despite being aware of the default, the Applicants have not made any efforts to settle their loan arrears with the last payment being made on 10th May 2018. The Respondent faults the Applicants further for failing to prosecute their matter and indicate that they moved the court to have the Applicant's suit struck out for lack of jurisdiction and the Environment and Land Case court in Machakos issued a ruling on 18th June 2021 confirming that it did not have jurisdiction to hear the matter.

19. The Respondent avers that since the court found that it did not have jurisdiction any of the orders it had issued suspending the Respondent's notices were void. *It has exhibited a copy of the Ruling at pages 23- 27 of the Respondent's bundle.*

20. The Respondent avers that this court issued interim injunctive orders on 10th September 2021 but they submit that the same were served after the auctioneers had started the auctioneering process by virtue of statutory notices issued and had conduct of a valuation to determine the value of the charged premises. (It has exhibited the valuation notice at pages 40-71 of the Respondent's bundle)

21. The Respondent faults the Applicants of taking advantage of the court process by seeking injunctive orders and thereafter failing to repay their loan arrears after issuance of court orders. Finally, that the Applicants were able to procure the orders as a result of failing to disclose material facts to the court at the ex-parte stage while they have an outstanding balance of Kshs 117,356,053/- It has exhibited a copy of the statement of accounts annexed at pages 72-85 of the Respondent's bundle.

In its Submissions.

22. In its submissions dated 11th November 2021 and were filed on 18th November 2021, the Respondent submits that the Applicants have not established that they have a prima facie case. It submit that they are entitled to exercise their statutory power of sale based on their statutory notices of 12th June 2018 and 8th October 2018. It contends that the notices are valid despite being suspended by

the Environment and Land Court at Machakos as the court was found to lack jurisdiction to entertain the Applicant's matter.

23. The Respondent relies on the cases of ***Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service [2019] eKLR, Sebastian Kaweto Kalolwe & Anor and Patrick Mulevu Kaweto (2019) eKLR and Mwihaki Karigi v Ruth Waithera Karigi & 6 Others (2018).*** In the 3 decisions the court held that judgments and orders from courts that have been found not to have jurisdiction to issue them are void *ab initio*

24. The Respondent also submits that it was not required to issue fresh notices and that one statutory notice is enough. The Respondent relies on two cases for this submission being **E*xecutive Curtains and Furnishings Limited vs Family Finance Building Society (2007) eKLR*** *and* ***Simon Gitau Mugi & Anor vs K-Rep Bank Limited & Another (2013) eKLR.*** In both cases, it was held that there was no law requiring a lender to issue fresh notices to the borrower every time a borrower paid the outstanding debt in part.

25. On whether the Applicants would suffer irreparable loss that cannot be compensated by way of an award of damages, the Respondent submits that the suit property was offered by the Applicants as security to be sold in the event there was a default. They have relied on two cases being ***Kitur vs Standard Chartered Bank & 2 Others*** *and* ***Hyundai Motors Kenya Limited vs East Africa Development Bank Ltd (2007) eKLR.*** In the two cases, the courts found that a defaulting party who offered his property as security for a loan cannot claim that he would suffer irreparable loss as the security is a commodity for sale or possible sale.

26. On whether the Applicants have proven their case on a balance of probabilities, the Respondent submits that they have not. They have relied on the case of ***Air Travel & Related Studies Ltd vs Equity Bank (K) Ltd (2007) Eklr***

27. In the matter, the court found that the bank had a right to exercise its statutory power of sale following the borrower's default in repaying his loan.

28. The Respondent has also submitted that the Applicants cannot be allowed to attach sentimental value to the charged properties as they offered them as security. It has relied on the case of **John Nduati Kariuki t/a Johester Merchants v National Bank of Kenya Ltd (2006) eKLR** where the court held that a plaintiff could not claim that the suit property had sentimental value for being a matrimonial property after he defaulted in repaying his loan.

29. The Respondent has also submitted that the Applicants have come to court with unclean hands as a result of their default. They have relied on the Court of Appeal decision in ***Orion East Africa Ltd vs Eco Bank Kenya Limted (20150 eKLR*** where the Court found that a defaulting party could not come to court for relief. The Respondent has also placed reliance on the case of ***Kyangaro vs Kenya Commercial Bank Ltd (2004) eKLR*** where the court held a similar opinion in a case of former employee of the banking institution who defaulted in repaying his loan for four years.

30. This court has considered this application and the response made.

The applicants are seeking interlocutory reliefs of injunction to stop the Respondent from exercising its power of sale of charged property pending determination of the suit herein. It is quite clear going by the pleadings filed that the applicants do not dispute that they have faulted on their agreed terms of loan repayments. Their main contention is that due process was not adhered to and have questioned the validity of the notices which the Respondent relied on in their attempt to exercise their right to sale the charged properties. According to the Respondent, due process was followed because notices were issued and the sale by public auction was well advertised.

The issues for determination in this application are:-

(i) Whether there were notices issued by the Respondent and if they were valid.

(ii) Whether the applicants have established a case for an injunction to stop the Respondent from exercising its statutory power of sale.

31. (i) Whether there were valid notices issued by the Respondent

There is no dispute that Respondent issued a redemption notice dated 15th February, 2019 and another dated 12.6.2018 to the applicants. The applicants have in fact annexed one of notices in this application. What is contested in the validity of that notice and whether the same could be used as a basis for the advertisement of sale dated 13.08.2021 issued by Crater View Auctioneers.

32. Before, I delve into the validity of the said notice, I will briefly consider general principles governing granting of injunction which is the gist of the prayer in this application and the entire matter.

33. The conditions for the granting of an injunction as laid down in the case of ***Giella vs Cassman Brown [1973] EA 358*** where the court stated;

i. "The conditions for the grant of an interlocutory injunction are now well settled in East Africa. First, an applicant must show a "prima-facie" case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is doubt, it will decide an application on the balance of convenience."

34. A *prima facie* case was defined in the case of ***Mrao Limited V First American Bank Limited & 2 Others, [2003] KLR 125*** to mean: -

''… a case in which on the material presented to the courta tribunal property directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.

But as I earlier endeavored to show, and I cite ample authority for it, a prima facie is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the Applicant's case upon trial. ***That is clearly*** a standard, which is higher than an arguable case"

35. The Law

The law governing the banks or financial institutions and their customers in respect to charges is mainly found in *Sections 88 to 106 of the Land Act, 2012*.

Turning to the issues at hand ***Section 90 of the said Act*** provide remedies of a charge as follows: -

36. Section 90 of the ***Land Act Cap 6 of 2012*** Remedies of a charge;

''

1. If a charger is in default of any obligation, fails to pay interest or any other periodic payment or any part thereof due under any charge or in the performance or observation of any covenant, express or implied, in any charge, and continues to be in default for one month, the chargee may serve on the charger a notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be.

2. The notice required by subsection (1) shall adequately inform the recipient of the following matters—

a. the nature and extent of the default by the charger;

b. if the default consists of the non-payment of any money due under the charge, the amount that must be paid to rectify the default and the time, being not less than three months, by the end of which the payment in default must have been completed;

c. if the default consists of the failure to perform or observe any covenant, express or implied, in the charge, the thing the chargor must do or desist from doing so as to rectify the default and the time, being not less than two months, by the end of which the default must have been rectified;

d. the consequence that if the default is not rectified within the time specified in the notice, the chargee will proceed to exercise any of the remedies referred to in this section in accordance with the procedures provided for in this sub-part; and

e. the right of the charger in respect of certain remedies to apply to the court for relief against those remedies.

3. If the charger does not comply within ninety days after the date of service of the notice under, subsection (1), the chargee may-

a. sue the charger for any money due and owing under the charge;

b. appoint a receiver of the income of the charged land

c. lease the charged land, or if the charge is of a lease, sublease the land

d. enter into possession of the charged land; or

e. sell the charged land''

37. **Section 96 (2) *of the Land Act***

''Before exercising the power to sell the charged land, the chargee shall serve on the charger a notice to sell in the prescribed form and shall not proceed to complete any contract for the sale of the charged land until at least forty days have elapsed from the date of the service of that notice to sell.''

38. Rule 15 of the Auctioneers Rules which stipulates;

Upon receipt of a court warrant or letter of instruction the auctioneer shall in the case of immovable property;

a. locate the property and serve the notification of sale of the property on the registered owner or an adult member of his family residing or working with him or where a person refuses to sign such notification, the auctioneer shall sign a certificate to that effect.

b. give in writing to the owner of the property a notice of not less than forty-five days within which the owner may redeem the property by payment of the amount set forth in the court warrant or letter of instruction.

c. on expiry of the period of notice without payment arrange sale of the property not earlier than fourteen days after the first newspaper advertisement.

39. The Respondent has submitted that the applicants were served with the requisite notices before the sale and that they could have sold the properties if they had gotten a buyer (s) because the Order stopping them reached them a day after the scheduled sale.

40. The Applicants do not dispute service of statutory notices by the Respondent which triggered the advert of 17th August 2021. Their contention however is that the Respondent is relying on notices that were suspended by the ELC Court. That court was however found not have had jurisdiction to issue the orders suspending the notices

41. The ***Court of Appeal in Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service [2019] eKLR***

while handling the question of orders issued by a court that lacked jurisdiction stated as follows;

…… the principle encapsulated in the time honoured locus classicus case of Macfoy v United Africa Co LTD [1961] 3 All ER, 1169…….

In that case it was held thus: -

"If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse…" (Emphasis ours)

42. Based on the Court of Appeal's decision above, proceedings and orders that emanated from the ***Environment and Land Court in ELC No 51 of 2017*** were void. The Ruling of 4th October 2019 which suspended the Respondents notices dated 15th February 2019, 8th February 2019 and 10th December 2018 was void, and therefore inoperational. The reliance by the Applicant on the Environment and Land Case court's decisions is not sustainable.

43. The Respondent issued the Applicants with 90 days' notice on 12th June 2018 indicating that the Applicants were required to pay Kshs 12,218,547/- (page 19 of Respondent's documents).

44. The Respondents then issued a 40 days' Notice to the Applicants vide a letter dated 8th October 2018 where it indicated that the Applicant owed Kshs 17,706,759.91. (page 21 of Respondent's documents)

45. Crater View Auctioneers then issued the Applicants with a 45 days' redemption notice dated 15th February 2019. (Document -8 attached to the Plaintiff's bundle of Documents dated 8th September 2021).

46. I have already cited the requirements stipulated under *Section 90 of the Land Act, 2012*. My reading of the Statutory Notice dated 12.06.2018 annexed to the Respondent's bundle of documents at page 19 against the provisions of Section 90 of the Land Act, 2012 it was evident that the said notice indicated the nature and extent of default. It indicated the amount the applicants were required to pay to rectify the default and it also included the notification that the Respondent would proceed to realize in the intended sale of the charged properties. That in ***Section 96 (2) of the Land Act*** provides;

''Before exercising the power to sell the charged land, the chargee shall serve on the charger a notice to sell in the prescribed form and shall not proceed to complete any contract for the sale of the charged land until at least forty days have elapsed from the date of the service of that notice to sell.''

47. The Notice under ***Section 96 (2) of the Land Act*** was issued on 8th October 2019. That notice indicated the amount owed to the Respondent and the Respondent's right to exercise its statutory remedy.

48. In ***Beatrice Atieno Onyango v Housing Finance Company Limited & 3 others [2020] eKLR*** while considering notices under ***Section 90 and 96 of the Land Act***, the Court stated;

''Before exercising the statutory power of sale, the Bank must issue a 90-day notice in writing under Section 90(1) of the Land Act. The notice which must state the nature and extent of the default by the charger and if the default consists of the non-payment of any money due under the charge, it must state the amount that must be paid to rectify the default and the time, being not less than three months, by the end of which the payment in default must have been completed. The notice must also state the consequence that if the default is not rectified within the time specified in the notice, the chargee will proceed to exercise any of the remedies referred to in the section, including sale of the property, in accordance with the procedures provided. The notice must also state the right of the charger to apply to the court for relief in respect of certain remedies.''

49. The third notice is provided for, under ***Rule 15 of the Auctioneers Rules*** which stipulates; Upon receipt of a court warrant or

letter of instruction the auctioneer shall in the case of immovable property;

a. locate the property and serve the notification of sale of the property on the registered owner or an adult member of his family residing or working with him or where a person refuses to sign such notification, the auctioneer shall sign a certificate to that effect

b. give in writing to the owner of the property a notice of not less than forty-five days within which the owner may redeem the property by payment of the amount set forth in the court warrant or letter of instruction

c. on expiry of the period of notice without payment arrange sale of the property not earlier than fourteen days after the first newspaper advertisement.

50. The Auctioneers notice cannot be faulted because it was proper and the applicants got the said notice. This court on the basis of evidence presented finds that the notices issued by the Respondent was lawful and valid.

51. Whether the applicants have established a case for the relief (injunction) sought.

This court has already noted the principles of injunction as well laid down in the case of ***Giella versus Cassman Brown (1973) EA***. I have also shown what a prima facie case and have shown that the case must be arguable and demonstrate an infringement of a right or law with probability of success at the end of trial.

52. The Applicants have not disputed service of the notices. Their contention is that the notices were suspended by the Environment and Land Case court's ruling, and that the Respondent's ought to have filed fresh notices indicating the current amount. That contention as I have found out above is a misconception.

53. It is indeed true that the amount in the 2019 Notices is different from the amount indicated in the Respondent's Replying Affidavit of Kshs 117,356,053. This is however an ordinary consequence of the fact that the loan arrears have been attracting interest and continue to do so.

54. The Applicants in this case have not disputed the arrears owed to the Respondent. They have also not indicated whether they have been servicing loan. While dealing with the maxim of clean hands in the case of ***Francis Munyoki Kilonzo & Another vs Vincent Mutua Mutiso [2013] eKLR*** that was relied upon by the Defendant herein, Mutende Judge rendered herself as follows -

''An applicant seeking such orders must come to court with clean hands. The maxim of equity on the principle of equity is expressed as follows-

"No one is entitled to the aid of a court of equity when that deed has become necessary through his or her own fault…a court of equity shall not assist a person in extricating himself or herself from the circumstances that he or she has created…"

55. There is a Kiswahili saying that resonates well with that masim. It goes like this; ''***Dawa ya deni ni kulipa''*** which loosely translated simply means ''***that a solution to a debt is to pay or attempts to repay***''. Had the applicant demonstrated efforts to pay then perhaps equity could have favoured them.

56. I am not persuaded that the applicant has sufficiently demonstrated basis for an injunctive relief against the Respondent. In ***National Bank of Kenya Ltd. versus Shimmers Plaza Ltd [2009] eKLR the Court of Appea***l stated as follows: -

"We venture to say that where the court is inclined to grant an interlocutory order restraining a mortgage from exercising its statutory power of sale solely on the ground that the mortgagee has not issued a valid notice, then in our view, the order of injunction should be limited in duration until such time as the mortgagee shall give a fresh statutory notice in compliance with the law."

57. From the foregoing, this court finds that the applicants have not met the requisite threshold for me to exercise my discretion and

grant the temporary reliefs sought. The long and short of this is that this court finds **no merit** in the ***Notice of Motion*** dated **8th September 2021**. The same is **dismissed** with **costs to the Respondent**.

DATED, SIGNED AND DELIVERED AT KITUI THIS 17TH DAY OF MARCH, 2022

HON. JUSTICE R. K. LIMO

JUDGE