



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CIVIL CASE NO. 45 OF 2018

ROCK VENTURES.....PLAINTIFF/APPLICANT

-VERSUS-

NATIONAL CO-OPERATIVE

HOUSING UNION LIMITED.....1ST DEFENDANT/RESPONDENT

IGARE AUCTIONEERS.....2ND DEFENDANT/RESPONDENT

RULING

The application before me is one dated 5th December 2018. The applicant seeks orders to be made under Section 3A, 63E of the Civil Procedure Act and Order 46(1) of the Civil Procedure Rules and Section 10 of the Valuation Rules.

The Applicant prays:

1. That a temporary injunction be issued against the 1st and 2nd Defendants by themselves, their agents and servants from selling, dealing, interfering or disposing all the piece of land known as title Kajiado/Kaputiei North/58008 and 58009 from being auctioned until the determination of the suit.
2. That the 1st defendant/Respondent be compelled to issue the plaintiff with sub-titles of the sub-divided suit property title Kajiado/Kaputiei North/58008. So that the plaintiff to have authority to release the titles to the 35 sub-divided plots sold to third parties and also sell the remaining 39 plots to be able to raise the monies to offset the credit facility of which there is already a prospective buyer.

The applicant was supported by the affidavit of Michael Wanyoike which averred interalia that the plaintiff and the 1st defendant had entered into an agreement to invest in real estate and pursuant to that mutual arrangement the 1st defendant was to provide the necessary financial resources to purchase various parcels of land. That further in consideration the 1st defendant advanced the plaintiff credit facilities totalling to Ksh. 40,000,000 which was duly utilized in purchasing parcel No. LR No. Kajiado/Kaputiei North 58008 and 58009 sub-divided from the mother title Kajiado/Kaputiei North/ 4974. That the letter of offer with terms and conditions of the credit facilities dated 2/7/2013 marked as MW3. The plaintiff further deponed that some of the terms in the letter of offer were never expressly agreed, more specifically the period of repayment of the loan. The plaintiff further asserted that he has been able to repay Ksh. 31,000,000 out of the 54,000,000 outstanding leaving a balance of Ksh. 23,000,000.

The basis of the claim therefore is solely to seek leave to be given by the 1st defendant to dispose of some parcels of land stated to be 39 plots so as to offset the loan balance. He further deponed that if the 1st defendant is allowed to auction the plots through the 2nd defendant it would result in massive losses to his detriment and prejudice. He attached documentation from one of the intended purchaser similar of that if the sale was to be sanctioned he will clear the loan arrears which had accrued on the loan facilities. The cumulative effect of the plaintiff's affidavit is that if an injunction order is not issued by this court he would suffer irreparable harm not compensated by way of damages.

The 1st defendant/Respondent in their replying affidavit deponed by Stanley Ndungu, the finance Manager denied the applicant's claim for an injunction on the grounds pleaded in the notice of motion and affidavit in support by Michael Wanyoike. He instead asserted that the plaintiff applied for a loan of Ksh. 40,000,000 which was to be expended to purchase 4.047 hectares of land to be hived from Kajiado/Kaputiei North/4974 on 26/4/2013. The 1st defendant finance Manager further deponed that pursuant to the loan agreement as evidence by the loan application and letter of offer marked as SKM1 and SKM2 respectively. The amount requested was released to the plaintiff. He further deponed that based on mutual agreement with the plaintiff, an arrangement was reached to have part of the parcels of land be sub-divided, sold to raise money to repay the loan. He further deponed that the plaintiff offered for sale the sub-divided plots but never deemed it fit to repay the instalments of the loan as stipulated in the agreement. That the time the plaintiff was to exercise the option to

sell the suit property has lapsed and they had to take necessary steps to subject the property to the open market. He further deponed and urged this court to find that all proceedings and correspondence regarding recall of the loan has been adhered to by the 1st defendant.

As a consequence, he deposed to the court that in the event an injunction is granted it would affect the 1st defendant's interest to realize the security relating to the loan repayments.

The application was to be disposed off by way of written submissions. By the time of preparing this ruling I had only the advantage of submissions from the defendant counsel.

The 1st defendant submissions

Mr. Muasya, counsel for the defendants submitted and argued that the application by the plaintiff seeking temporary injunction lacks merit. Learned counsel argued that there is an agreement between the parties which the plaintiff has breached. Counsel further submitted that the agreement for the loan facilities was freely entered into by the parties. Further counsel, argued and submitted that the plaintiff has not denied indebtedness or being in arrears to repay the loan.

More importantly counsel submitted that all efforts to have any payment from the plaintiff has failed despite their concession to allow the plaintiff to exercise the option to sell some of the sub-divided plots.

According to counsel on injunction restraining the defendant from advertising, selling or otherwise by public auction pursuant to the loan agreement would be unfair and unjust to clog the right to redeem the security. Learned counsel to buttress his legal position placed reliance on the following authorities: **Giella v Cassman Brown 1973EA.338 Andrew M. Wanjohi v Equity Banking Society & 7 Others 2006 eKLR.**

Discussion and Analysis

Pursuant to order 40 rule 1 of the Civil Procedure Rules, the court has the power to make orders for grant of a temporary injunction where there is evidence that any property in dispute in a suit is in danger of being wasted, damaged or alternated by any party to the suit wrongfully sold in execution of a decree or that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability...

The court may grant a temporary injunction to restrain such act or make such other orders for the purpose of staying and preventing the wasting, alienation, sale, removal or dispensation of the property until such further orders.

Rule 2 reads as follows: ***“(1) In any suit for restraining the defendant from committing a breach of the contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may at any time after the commencement of suit and either before or after judgement, apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of...”***

The approach to reflect on Order 40 rule (1) and (2) of the Civil Procedure Rules is to balance the competing legal rights of the plaintiff and the defendant as expressed in the dispute. In relation to grant of injunctions such applications turn out on three requirements as stated in the **Land Mark Case of Giella v Cassman Brown & Co. Ltd 1973 EACA 358** that the applicant must satisfy the following tests: ***“(a) whether a prima facie case has been established by the applicants’ to warrant granting such an injunction (b) whether the irreparable harm would be occasioned if the orders sought are not granted (c) whether the balance of convenience tilts in favour of granting the prayers sought.”***

The real question central to this kind of applications on temporary injunctions boils down to whether the applicant has a prima facie case with prospects of success at the trial. A prima facie case was defined in the celebrated case of **Mrao Ltd v First American Bank of Kenya & 2 Others 2003 eKLR** where the court of Appeal held thus:

“a prima facie case 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.”

In deciding on whether the plaintiff has a prima facie case one has to evaluate and examine the affidavit evidence and material on record. It is through such analysis that this court can be able to make a finding that there is a threatened infringement of a right which ought to be protected pending the determination of the suit. However, I am also aware that at this stage of the interlocutory trial I should not delve into the merits of the application which would ultimately be the jurisdiction of the trial court. What the court is expected to inquire is a consideration that the plaintiff's case as set out in the affidavit and notice of motion is not frivolous or vexatious but does raise serious questions to be tried as between the claimants. In my opinion through the case is still at pre-trial stage, the basic facts forming the background of the suit must be looked at as a whole in order to establish the relative strength of the claim.

This proposition was supported by **Lord Denning in Hubbarel v Vosper 1972 2QB84, at 96** where his Lordship held as follows inter alia:

“The remedy of interlocutory injunction is so useful that it should be kept flexible and discretionary and must not be made the subject of strict rules. In considering whether to grant an interlocutory injunction, the right course for a judge is to look at the whole case. He must have regard not only to the strength of the claim but also the strength of the defence and then decide what is best to be done. sometimes it is best to grant an injunction so as to maintain the status quo until trial. At other times, it is best not

to impose a restraint upon the defendant but leave him free to go ahead.”

Going by the above principles on this ground the applicant's application was supported by affidavits evidence. The breach complained of is in regard to recall the entire amount of the loan due and owing by the defendant. The 1st defendant on the other hand contends that the plaintiff is in breach of the loan agreement terms. Further, both parties are in agreement that the operative contract document is one dated 2/7/2013. Clause 4 of the Letter of Offer expressly indicates that a principal amount of Ksh. 40,000,000 has been agreed as credit to be advanced to the plaintiff at a rate of interest of 18.5% per annum. The terms of agreement between the parties were that the plaintiff would disburse the facility and the plaintiff would in turn remit the monthly instalments of Ksh. 1,507,537 with effect from 3/9/2013. During the commencement of the credit facility, the plaintiffs defaulted in their repayments. This fact is not disputed by the plaintiff in their affidavit and material placed before court. The plaintiffs statement of accounts indicating the default have been annexed to the defendants replying affidavit identified as loan ledger card marked as SKM 4.

In this application it is apparent that the plaintiff is suffering from financial disability making him not to honour the obligations agreed upon in the contract with the 1st defendant. These annexures both from the plaintiff and the defendant viewed in their totality created a binding contract on the loan facility of Ksh. 40,000,000. The plaintiff adduced in his affidavit that he has taken positive steps of offering for sale portions of the same property to third parties in order to raise the outstanding loan amount. The 1st defendant in his own counter affidavit has deposed that before the impending action a claim of realization the security they exchanged various correspondences on the matter. According to the 1st defendant which this court has considered in detail, the right to have the plaintiff sell the portions of the sub-divided land was also agreed upon. In his reply the 1st defendant maintained that no single cent or instalment was tendered for the repayment of any portion of the debt outstanding instalment despite evidence of sale and disposal of some of the parcels of land. In essence the 1st defendant is categorical that the plaintiff never paid anything after the sale of some plots except the initial instalments which are duly acknowledged.

Considering all these I only come to inescapable conclusion that parties are bound by the terms of the loan agreement. As it is settled in law that it is not the duty of the court to re-write the contracts for parties. The principles on privity and sanctity of contract entered freely by both parties without any duress, coercion or mistake has been considered as a whole in the following cases. **Ibrahim Seikei T/A Masco Enterprises v Delphis Bank 2004 eKLR** where the court stated thus:

“We must protect the intention of the parties so that every party adheres to his contractual duty to the other. The appellant was advanced the money on the strength of the security he provided to the Bank and he had an obligation to repay the monies under the terms agreed. Banks do not give their monies as a gratuity or love for human kind. I cannot issue an injunction against a party wanting to exercise its statutory power of sale merely because the amount due is in dispute.” (See also National Bank of Kenya Ltd V Pipe Plastic Samkolil K Ltd & Another 200 eKLR)

Whether the 1st defendant is entitled to exercise its right to advertise for sale the property to recover the outstanding debt. By the express of provisions Section 90(1) of the Land Act if a chargee is in default or fails to pay any other periodic instalment or observance of the terms of the mortgage contract the chargor has a remedy to issue notice of compliance as provided for in Section 96(1), (2), (3), (4) and (5) of the Act.

In the instant case, the 1st defendant offered credit facility vide a letter dated 3/7/2013 for Ksh. 40,000,000. The purpose of the facility was to fund purchase of real estate (property). The plaintiff guaranteed the liability limited to the value of the assets to be held as security by the 1st defendant referred as LR Kajiado/Kaputiei North/4974 Clause 6 1:2:3:4 of the letter of offer provided for the terms and conditions of the loan repayments. The loan amount seems to have fallen into arrears contrary to the loan agreement which clearly sets out that monthly instalments shall be every 25th day of the month with effect from 3/10/2013. The principal amount of Ksh. 40,000,000, interest of any outstanding amount continue to accrue interest at 18.5% per annum and above 5% of the agreed rate from the date of default. The 1st defendant on 4/4/2017 sent a notice of demand under section 90(1), (2) of the Land Act seeking repayment of outstanding arrears of Ksh. 22,372,350. In his capacity as the chargee the plaintiff never disbursed funds to regularize the loan facilities.

Further on 17/10/2017 the 1st defendant second notice of 90 days under the loan payment and in default be considered to have waived his rights under the statute and the charge was at liberty to exercise the statutory power of sale as provided for under section 96(1) of the Land Act. The plaintiff tendered no repayment of the principal amount with interest as claimed in the notice.

There is evidence that on 13/9/2018 the 2nd defendant on instructions from the 1st defendant issued 45 days' redemption notice to the plaintiff pursuant to Rule 15(d) of the Auctioneer Rules 1997. It was followed with a notification of sale of the same property dated the same day. These notices issued in compliance with the statute for a chargor exercising his rights of under a legal charge has not been controverted by the affidavit evidence filed by the plaintiff. In our view and as supported by the law the plaintiff and the defendant created an equitable mortgage that complies with section 90(1) of the Land Act.

Applying the loan agreement to the facts of this case and further having heard arguments on this application based on affidavit in support and in opposition thereof I hold a strong view that the plaintiff raises no serious triable issues to invoke the equitable remedy of an injunction. On this ground alone the applicant has no prima facie case to present at the trial. Therefore, the motion seeking temporary injunction is rejected.

Though I have relied on the above ground to dispose off the application I can make brief commentaries on the threshold test of irreparable harm. This test has also been discussed extensively in the case of **Giella v Cassman Brown Supra and American Cyanamid v Ethicon Ltd 1975 IALLER 504**. This requirement as a ground of granting or refusing an injunction is inextricably tied to the first test of a prima facie case. The standard of review articulated in law is that where there is a possibility that adequate compensation or other compensatory remedy will be availed the injury is said to be repairable.

It is worth noting that the 1st defendant has demonstrated that the plaintiff is in breach of the mortgage contract. Scrutiny of the affidavit evidence and attached statements of accounts indicate that the plaintiff is in default leaving the 1st defendant with no option but to exercise his statutory power of sale under section 90(1) of the Land Act. The suit property is to be sold in order to realize its outlay to settle the

amount being demanded from the plaintiff. The 1st defendant has issued the mandatory one-month notice, thereafter recovery process by issuing the 90 days' notice. Further, the 1st defendant has served the plaintiff with the 40 days and 45 days' redemption notice as required in section 96 of the Land Act and Section 16 of Auctioneers Rules. Thus, the plaintiff had already mortgaged the property to the 1st defendant as security for the loan. He has breached the terms of the mortgage for failure to repay the loan.

This matter involves the question whether the 1st defendant statutory power of sale under the statute has ripened. From the evidence and arguments addressed by counsel the nature of the harm to be suffered by that legal process to redeem the security has not been demonstrated by the plaintiff.

In the instant case if at the trial it's found that the 1st defendant action was not valid there is no dispute that the 1st defendant would be in a position to compensate the plaintiff for both the actual and consequential loss.

Finally, the applicant must establish that the balance of convenience favours him as pleaded in the motion. Satisfying this threshold one has to examine the strength of the affidavits and material relied upon by the parties. The 1st defendant is a registered chargor over the suit property LR/Kajiado/Kaputiei North/494 from which new titles on sub-divisions were issued namely LR/Kajiado/Kaputiei North/58008 and 58009. The plaintiff has fallen into arrears and failed to remedy the default. When this court decides an interlocutory injunction the plaintiff has proprietary rights in the legal charge but by one act of conveyance it became to be the property of the 1st defendant as a commodity for sale in case of default on repayments. This certainly gave the 1st defendant an overriding interest in law and equity over the suit properly subordinate to the plaintiff's registrable interest. The balance of convenience in this case seems to favour the 1st defendant when one weighs the risk factors *visa viz* the interest of justice.

Consistent with the above analysis and weighing the factors attached to this notice of motion the application for temporary injunction as whole is declined on the following reasons.

- (a) The amount of the debt is due and remains unpaid
- (b) That validity of the mortgage contract and the power of sale by the chargor has arisen and not in issue as such to invalidate the loan agreement
- (c) Whether there is variance in the amount in the notice with the outstanding loan is not a strong ground for grant of an injunction
- (d) The defendants are also awarded costs.

Dated, delivered and signed in open court at Kajiado this 30th day of January 2019.

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R. NYAKUNDI

JUDGE

Representation

Mr. Thiong'o for Mr. Muasya for the 1st Defendant/Respondent

Mr. Ndiritu for applicant/Plaintiff