



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 27 OF 2017

HALIMA AILA ADO AND ALI YUSUF ADO

Suing jointly as the administrators of the estate of

YUSUF ABDI ALI deceased.....PLAINTIFF/APPLICANTS

VERSUS

FAMILY BANK LIMITED.....DEFENDANT/RESPONDENT

RULING

1. Halima Aila Ado and Ali Yusuf Ado, the plaintiffs herein, are the administrators of the Estate of Yusuf Abdi Ali (deceased). They are wife and son of the deceased respectfully.

2. The plaintiffs have brought a Notice of Motion application dated 20th January 2017. By that application they seek an injunction to restrain Family Bank Limited, the defendant, from selling and/or advertising for sale or transferring property **LR No 209/7963/51** (the property).

3. The affidavit in support of the application was sworn by Halima, the deceased's wife. She deponed that in December 2016 the defendant representative went to her family home at Huruma, that is **LR No. 209/7963/51** (the property) and served upon her the statutory notice of sale of the property. She alleged she was unaware that her deceased's husband had obtained a loan with the defendant. However on being served with the statutory notice she attended the defendant's branch, at Fourways Towers, and she gave one of the defendant's officers the deceased's death certificate. On seeking to get more information about the loan the officer declined to give her any document or information. The officer, on being requested to, declined to postpone the sale of the property. She doubted the authenticity of the loan claimed by the defendant against the deceased's estate. She stated that if indeed a loan was taken by the deceased there must have been an insurance policy against the death of the deceased, which amount should have settled the loan balance.

4. The application was opposed by the defendant through the affidavit of Lawrence Anthony Ouma, a Senior Legal Officer of the defendant.

5. That deponent of the defendant's affidavit stated that the deceased, before his death, filed a case seeking to restrain the defendant from realising its security by sale of the property. That was through case HCC No. 405 of 2014. The injunction application in that case was dismissed by the Ruling of the court of 17th September 2014. That the said Ruling however found that the defendant's statutory notices failed to meet the strict compliance of the law. That it was on that basis that the defendant proceeded to issue a fresh notice on 8th January 2016.

6. The defendant's Senior Legal Officer proceeded to take the court through the various loan facilities offered to the deceased. He also provided the bank statements of the deceased's account which reflect the debit outstanding as at 30th November 2016 of Ksh 30,672,688/=.

ANALYSIS

7. I have considered the parties affidavit evidence, which the parties relied upon. It is abundantly clear that the deceased's wife knew of at least three loan facilities that the deceased obtained from the defendant. This is because she signed spousal consent in respect to those three loans.

8. Knowing the existence of the loans, however, is not the same as knowing how much is outstanding. Why did the defendant not provide information to her of how much was outstanding when she requested. The defendant did not deny her deposition that she was denied information on the outstanding amount.

9. The deceased's wife also inquired of the insurance over the death of her deceased's husband which she inquired why it was not used to clear the debit balance on the account. The defendant absolutely failed to address itself to that inquiry in its replying affidavit. In my own perusal of the facility letter of 14th June 2012 I noted under the 'Condition precedent' in that letter was a requirement for the deceased to provide insurance policies. This is what clause No. 7.2.6 under that heading provided was required from the deceased prior to obtaining the facility:

"Relevant Insurance Policies with the lender's interest noted on the policy as first loss payee".

10. Since the provision of insurance policies was a condition precedent to obtaining the loan it can then be assumed that the defendant provided insurance policies. If they were provided how much of the insurance payment, if any, went towards reducing the loan. For now we do not know because the defendant remained mum about it.

11. I need to also say that the fact the deceased had filed a case in his life time does not bar the administrators to file a case on new facts as the plaintiffs have done here.

12. It is because of the above that I find the plaintiffs have established a prima facie case with probability of success. See **Giella v Cassman Brown and company Limited [1973] E.A. 358**. In that above case the principles of granting an injunction were enunciated as follows:

"i. The Applicant must establish a prima facie case with a high probability of success.

ii. The Applicant must show that if the orders are not granted, then the Applicant will suffer irreparable loss.

iii. If the Court were to decide otherwise, then it should decide on the basis of the balance of convenience."

13. The property is matrimonial home of the plaintiffs. To permit the defendants proceed with its auction would mean the plaintiffs would be left without shelter while they awaited the conclusion of this case. Can such a disruption of family life, where the family may be left in the cold, ever be compensated in monetary terms. I doubt it.

14. It is for the above reason I find that an injunction is well deserving to the plaintiff.

CONCLUSION

15. The following are the orders of the court:

a. An order of injunction is hereby issued pending the hearing and determination of this suit restraining the defendants their servants and agents from selling and or advertising for sale or transferring the property L.R. No. 209/7963/51.

b. The costs of the Notice of Motion dated 20th January 2017 shall be in the cause.

c. Orders accordingly.

DATED, SIGNED and DELIVERED at NAIROBI this 26th day of September, 2019.

M. KASANGO

JUDGE

Ruling read in open court in the presence of

Sophie Court clerk.

..... FOR THE PLAINTIFF

.....FOR THE DEFENDANT