



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL CASE NO. 13 OF 2019 (COMPLEX)

FRED KITHUSI KULA.....1ST APPLICANT

KITHUSI KULA TRADING COMPANY LIMITED.....2ND APPLICANT

VERSUS

HOUSING FINANCE COMPANY LIMITED.....1ST RESPONDENT

THAARA AUCTIONEERS.....2ND RESPONDENT

CORAM: Hon. Justice R. Nyakundi

Munyitha, Mutugi, Umara & Muzna Advocates for the Applicants

Robson Harris Advocates for the Respondents

RULING

The applicants by way of a notice of motion filed in court expressed to be brought under Order 40 Rule 1, 2, 3, 4 & 10, Order 51 Rule 1, Section 1A, 1B and 3A of the Civil Procedure Act and Article 159 (2) of the Constitution sought an injunction against the respondents to restrain them from selling, alienating, transferring or intermeddling with the suit property referred as **LR. Plot No 263 Watamu**. Until the hearing and determination of the suit, the grounds on which the application for injunction is stated to be grounded are as follows:

- 1. The 1st applicant is the registered proprietor of the suit property.***
- 2. There exist a charge registered against the suit property in favour of the 1st respondent.***
- 3. The applicants have fallen into arrears but have constantly continued to pay the monthly installments using the rental income generated from the suit property.***
- 4. The applicants state that there exists an agreement that the rental income of the suit premises is the one to be used for purposes of servicing the loan. This practice/agreement have persistent since 2011. The applicants undertake to continue committing all the rental incomes as per the rental income assignment agreement existing between the plaintiffs and the defendant until the loan is fully settled.***
- 5. The 1st respondent has initiated the process of sale of the suit property in exercise of its powers as a charge. However, no valid statutory notice has been served and the value given is very low and there is need for a fresh valuation of the suit property.***
- 6. From the time the loan was given to the 2nd applicant, the economic conditions have materially changed to the extent that the business community in Watamu are seriously struggling to remain operational and which experience is spread across the Coast region.***
- 7. The applicants are engaged by the County Government of Kilifi for some construction contract and expect to receive a substantial amount within the next 6 months and which amount they wish to commit to the settlement of the liabilities existing between the plaintiff and the 1st respondent.***

In addition to the grounds, the applicants filed an affidavit in support together with annexures on the material to persuade this court that there exist a prima facie case for grant of an injunction.

The 1st respondent through the legal manager **Joseph Lule** filed a lengthy affidavit opposing the application based on the following averments:

1. *That upon the 2nd applicant's request, the 1st respondent advanced the 2nd applicant a loan facility for the sum of Kshs.20,000,000.00/= which facility was secured by a charge dated 21st November 2011 over all that property known as Title Number LR NO. Plot No. 263 (Cr. 44029), Timboni Area, Watamu, Kilifi County registered in the name of the 1st applicant who voluntarily agreed to offer the same as security. (Annexed hereto and marked "JL - 1a", "JL - 1b" and "JL - 1c" are true copies of the Loan Application Form, Letter of Offer and the Charge Instrument respectively).*
2. *That it was a term of the facility that the loan would be repaid over a period of One Hundred and Eighty months in monthly instalments of Kshs.266,349.00/=.*
3. *That the applicants failed, neglected and or ignored to comply with the afore-stated notice prompting the 1st respondent to issue the statutory ninety day notice on 12th November, 2012. (Annexed hereto and marked "JL- 2" is a true copy of the letter dated 16th May, 2018 together with the certificate of postage).*
4. *That the applicants subsequently neglected to comply with the notice by regularizing the account and the 1st respondent issued the statutory forty day notice on 7th March 2013. (Annexed hereto and marked "JL-3" is a true copy of the Notice dated 23rd August, 2017 together with the certificate of postage).*
5. *That the applicants further neglected to comply with the notice by regularizing the account and the 1st respondent prompting the 1st respondent to issue instructions to Garam Auctioneers to realize the property. (Annexed hereto and marked "JL-4" is a bunch of the copies of notices as issued by the said together with the certificate of postage).*
6. *That the 1st respondent subsequently instructed Tharaka Auctioneers to issue Notification of Sale and the Forty Five day Redemption Notice and the Auctioneer acted on the same and issued the said Notice on 9th August 2019. (Annexed hereto and marked "JL-6a", "JL-6b" and "JL-6c" are true copies of the Notification of Sale duly received by the 1st Applicant on 13th August, 2019 and the Redemption Notice together with the Certificate of Postage respectively).*

Analysis

The guidelines for grant of an interlocutory injunction and their applicability are well settled as stated in **Giella v Cassman Brown & Co. Ltd EA 358 – 380** where it was stated:

"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 in doubt, it will decide an application on the balance of convenience. (EA Industries vs Trufoofs [1972] E.A. 420)."

In the precedent setting authority in the **American Cyanamid v Ethicon Ltd [1975] AC 396 Lord Diplock** expounded further the principles for grant of interlocutory injunction in the following passages:

"It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at trial. The governing principle is that the court should first consider whether if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's case appeared to be at that stage."

In an application for injunction, a party seeking exercise of discretion as to demonstrate that he has a legal right or equitable which requires protection by the injunction. (See the case of **Kenleb Cons Ltd v New Gatitu Services Station Ltd & Another, (1990) eKLR**). It also begs of the court to consider the primary basic and overriding objective that the function of any court of law established under Article 50 (1) of the Constitution is to do justice to the parties and determine the dispute and their competing rights on the merits. (See also the principle in **National Bank of Kenya v Peter Oloo Aringo Kisumu High Court Civil Case No. 91 of 1998 (Warsame, AJA on 17th March 2004)**).

Under the provisions of Order 40 (2) of the Civil Procedure Rules a temporary injunction is sought in circumstances where an applicant establishes a legal right or beneficial interest as stated in the **Kenleb case (supra)** in which that property is in dispute in a suit and is in danger of being wasted, damaged, or alienated by any party to the suit or 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 that the plaintiff/applicant will or may be obstructed or delayed in the execution that may be passed against the defendant in the suit.

In light of the above the question of consideration is whether the underlying purpose of an interlocutory injunction as provided for under

Order 40 (1) of the Civil Procedure Rules has been established by the applicant. The first issue to be determined is whether a prima facie case does exist consisting of a serious and arguable points of law and facts which call for the court's determination on the merits. (See the principle in **Mrao Ltd vs First American Bank of Kenya and 2 others [2003] KLR 125**).

At the root of the pending suit is the question whether the statutory power of sale pursuant to the provisions of Section 90 of the Land Act 2012 had ripened and if so whether the particulars of statutory breach and the applicant's mortgagors rights to redeem the property was infringed by the respondents. Although, at the moment the court has in its possession the competing affidavit evidence there is an allegation that in issuing the statutory power of sale the 1st defendant acted fraudulently in order to defeat the claim by the applicant.

Additionally, in the circumstances of the mortgage contract the provision of Section 97 (2) of the Land Act provides for the fiduciary duty of care for the mortgagee to conduct a forced sale valuation report of the suit property before exercising the power of sale, there is no evidence that the suit property said to be auctioned on 31st October, 2019 an attempt or action was taken to obtain the current valuation which may form a basis for inviting the auction bids.

In my view, there are varied serious and arguable issues on the mode of service of the statutory notice which in the instant case is indicated to have alleged to be effected on or around 2012. The time and when the service was effected on the said applicant is therefore a moot question. Whether or not the service of statutory notice effected more than 3 years ago will still be considered to be valid in terms of the Section 90 of the Land Act.

The position of the applicants which has not been controverted by the defendants is that the whole process culminating with the recall of the loan amount is tainted with irregularity and illegality hence the need for grant of an injunction. My observation is therefore it would be proper to grant an interlocutory injunction to restrain the 1st respondent in exercising the power of sale because there are serious triable issues as to the validity of compliance with Section 90, 92, 96 & 97 of the Land Act 2012.

In the result the notice of motion dated 9th of October 2019 is allowed with the following orders to abide:

- 1. That pending the hearing and determination of this suit a temporary injunction do issue restraining the defendants by themselves, their servants, employees, assignees and/or agents or any other persons acting through from auctioning, selling transferring, advertising for sale or interfering in any way with the suit property known as PLOT LR NO. 263 WATAMU pending hearing and determination of the suit.***
- 2. That pending the hearing and determination of this suit a mandatory order of injunction do issue compelling the 1st respondent to withdraw the statutory demand notice and notification of sale in respect of suit property LR NO. 263 (C. R. 44029) TIMBONI AREA WATAMU, KILIFI COUNTY issued by Thaara Auctioneers.***
- 3. That this court does order for a second valuation by a joint valuer appointed by the 1st defendant and the plaintiffs to determine the market value and mortgage value of PLOT LR NO. 263 WATAMU pending hearing and determination of the suit.***
- 4. That a declaration is hereby issued that the proposed auction of Plot LR No. 263 Watamu by the defendants is null and void for failure to comply with the provisions of Section 90 – 96 of the Land Act No. 6 of 2012.***
- 5. That as a consequence of Clause 4 above, the 1st defendant do meet the cost incurred by the 2nd defendant in providing the required professional services with regard to the suit property and the fees chargeable being in compliance with the Auctioneers Act and Rules 2014.***
- 6. That the cost of this notice motion to abide the outcome of the main suit.***

DATED, SIGNED AND DELIVERED AT MALINDI THIS 29TH DAY OF OCTOBER 2019.

.....

R. NYAKUNDI

JUDGE