



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 177 OF 2019

SIMON NGIGI KIMANI..... PLAINTIFF

VERSUS

GULF AFRICAN BANK LIMITED.....1ST DEFENDANT

GARAM INVESTMENTS AUCTIONEERS.....2ND DEFENDANT

RULING

1. Simon Ngigi Kimani, the plaintiff has sued Gulf African Bank Limited, the Bank and Garam Investments Auctioneers, the 2nd defendant.
2. By the plaintiff's claim it is not denied that the bank did afford the plaintiff, at the plaintiff's request, financial facility. It is also not denied by the plaintiff that he has not fully repaid that facility. What the plaintiff however alleges is that the bank has mismanaged his loan facility account. There are no particulars of that mis-management. The plaintiff further alleged that he had reached an agreement, with the bank, on repayment of his loan facility but that the bank had reneged on that agreement in that the bank instructed the 2nd defendant to sell by auction the charged properties of the plaintiff. The plaintiff termed the auction, that was slated on 30th July 2019, as premature.
3. This Ruling relates to the Notice of Motion dated 26th July 2019. The plaintiff swore an affidavit in support of that application. By that affidavit the plaintiff deponed that he had not been served with the requisite statutory notices. The plaintiff further deponed that he has been making payment towards redemption of his properties. Further that the Bank had failed to have the charged properties valued before instructing the 2nd defendant to carry out and sell by auction those properties.
4. The application was opposed by the bank through its affidavit of Sato Lawi.
5. By that affidavit the Bank denied all the allegations levelled by the plaintiff. The bank annexed the statutory notices served upon the plaintiff in response to the plaintiff's allegation that those notices were not served.
6. The bank further stated that there was an auction of the charged properties which was scheduled for 9th April 2019. That sale was postponed at the plaintiff's request but that the plaintiff failed to abide by the condition set for that postponement and consequently the auction sale was set to take place on 30th July 2019.
7. The bank annexed to the affidavit in reply, the valuations undertaken of the plaintiff's charged properties to counter plaintiff's statement that no such valuation was done.
8. The Bank further stated that the plaintiff's bank account was in arrears and was non-performing. In that regard the Bank annexed plaintiff's bank statements.
9. The Bank denied having mis-managed the plaintiff's account. In the Bank's view the plaintiff had been accorded an opportunity to redeem the charged properties which he had failed to do. The Bank is therefore of the view the plaintiff is undeserving of the injunction orders he seeks.

ANALYSIS

10. The plaintiff both through his plaint and the affidavit in support heaped many allegations of wrong doing on the bank. The bank through the affidavit in reply responded to all those allegations and not only denied them but annexed evidence to support its denial. The bank was able to show that the plaintiff was served with requisite statutory notices; was able to show that the charged properties were valued; and also

showed that the plaintiff's loan account was in arrears. All that evidence in support of the bank's denial was not rebutted by the plaintiff.

11. The plaintiff is expected, in order to succeed to surmount three principles of granting an injunction. These principles, which are often cited, were discussed by the Court of Appeal in the case **Naftali Ruthi Kinyua V Patrick Thuita Gachure & another** [2015] eKLR thus:

*“The principles of injunctions are to be found in the case of **Giella vs Cassman Brown Co. Ltd** 1973] EA 358 where it was held that in order to grant the injunction as prayed the court must be satisfied that,*

- *The applicant had established a prima facie case with probability of success;*
- *The applicant stood to suffer irreparable loss which could not be compensated by an award of damages; and*
- *If the court was in doubt, the application would be determined on a balance of convenience.*

*With reference to the establishment of a prima facie case, Lord Diplock in the case of **American Cyanamid vs Ethicon Limited** [1975] AC 396 stated thus,*

“If there is no prima facie case on the point essential to entitle the plaintiff to complain of the defendant's proposed activities, that is the end of any claim to interlocutory relief.”

12. The plaintiff, in my view and on a prima facie basis, has failed to show a prima facie case with probability of success. All the allegation the plaintiff brought before court were all responded to by the Bank, and that response was supported by documents. The plaintiff did not deny the veracity of those documents. Since I find the plaintiff failed to show a prima facie case with probability of success there is no basis for this court to proceed to consider the other principles of granting an injunction: see the case **Naftali Ruthi Kinyua** (supra) where the Court of Appeal cited, with approval, the decision in **American Cyanamid v Ethicon Limited** (1975) AC 396.

13. It follows that the plaintiff's Notice of Motion dated 26th July 2019 fails. Having failed the plaintiff shall bear costs of of the same.

14. The following are the orders of the court:

a. The Notice of Motion dated 26th July 2019 is dismissed with costs to the defendant.

b. At the reading of this Ruling this case shall be referred to Mediation.

DATED, SIGNED and DELIVERED at NAIROBI this 18TH day of DECEMBER, 2019.

MARY KASANGO

JUDGE

Ruling Read and Delivered in Open Court in the presence of:

Sophie..... COURT ASSISTANT

..... FOR THE PLAINTIFF

..... FOR THE DEFENDANTS