



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL SUIT NO.30 OF 2016

FRANCIS KALAMA MULEWA.....PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK.....RESPONDENT

RULING

The Application dated 15th November 2016 seeks the following orders:-

- 1. That orders of injunction do issue restraining the defendant by herself or by her appointed agents WATTS AUCTIONEERS or by any other person acting on her instructions from selling by public auction all that property known as L.R No. KWALE/UKUNDA/3183 until the hearing and determination of this suit.***
- 2. That to mitigate the imminent loss to be occasioned to the plaintiff in the event of a sale by public auction of the plaintiff's property known as L.R No. KWALE/UKUNDA/3183, an order do issue allowing the plaintiff to dispose off his house/residential property standing on all that parcel of land known as L.R no KWALE/UKUNDA/3183 by a private treaty and offset the loan balances of Ksh1,836,640/27 and other issues to be conversed separately.***
- 3. That alternatively the Court be pleased to set a benchmark on sale at a reserve price of Ksh,5,600,00 (Kenya shillings Five million six hundred thousand) and above in the event the sale by public auction is sanctioned by the Court and any monies over and above the loan balances to be released to the plaintiff.***

The application is supported by the applicant's affidavit sworn on the same date. The respondent filed grounds of opposition to the application on 3.4.2017 and a replying affidavit sworn by Susan Njoroge on 5th January, 2017.

Counsel for the applicant maintains that the application does fulfill the conditions for the granting of interlocutory injunction as set out in the case of *GIELLA -V- CASSMAN BROWN* [1973] E.A. 358. It is submitted that a party seeking orders of injunction need not satisfy all the three conditions set out in that case. The applicant has established that he has a prima facie case against the defendant. The plaintiff's case raises triable issues. The plaintiff is the defendant's former employee. He had two loans with the defendant. One loan for Ksh. 932,068/= was secured by the suit land KWALE/UKUNDA/3183 and was based at an interest rate of 14% per annum. A second unsecured staff loan of Ksh 400,000 was issued to the plaintiff. There was a top up which made the loan balance to be Ksh.780,000.

It is submitted for the applicant that the interest applicable for the unsecured loan was 7% per annum. The applicant paid the entire loan secured by the property and by the time his services were terminated, only the unsecured loan was pending full payment. Unknown to the plaintiff, the defendant unilaterally raised the interest to 20% and this offends the provisions of the banking Act, 2016. The secured property is free from the loan and ought to have been discharged.

Counsel contends that the applicant will suffer irreparable damage if the orders of injunction are not granted. Counsel relies on the case of ***MBUTHIA V JIMBA CREDIT COORPRATION LTD (1988) KLR***, where the court held that in matters of land it is usual to grant injunction to protect the parties' profound interest in ownership of land whether as a residential property or as a capital asset of production.

It is further submitted that the balance of convenience is in the applicant's favour. If the defendant is allowed to auction the property in order to recover Ksh.1.8 million, there is an imminent possibility that the same will be sold at a very low price barely to recover the loan balances at the expense and detriment of the plaintiff. This is why the plaintiff would like to be allowed to sell the property by private treaty. The applicant has opted to dispose of his property. Should the court allow the auction to proceed, then the court should set a reserve price of Ksh.5.6 million. Counsel maintain that the plaintiff used to work at Watamu as the branch manager and the loan documents were signed in Watamu. The suit has therefore been properly filed before this court.

Counsel for the defendant opposes the application. It is submitted that the application is res judicata. The plaintiff filed Civil suit No.207 of 2013 before the Employment and Labour Relations Courts. In that suit, the plaintiff sought compensation for his dismissal and also sought orders restraining the respondent from exercising statutory power of sale over the suit property. The applicant's application and suit were dismissed by that court. It is submitted that the E&LR court is a Court of equal status to the High Court and therefore this claim is res judicata. Counsel relies on the case of *MWANGI NJANGU –VS- WAMBUGU & ANOTHER, Nairobi HCCC No.2340 of 1991*, while dealing with the issue of Res Judicata, Justice Kuloba (as he then was) had this to say:

“to allow this suit to go on will allow the plaintiff to embroil the entire Judicial system – by all lower levels – into an interminable litigation warfare over the same one acre of land, between the same parties or their privies for as long as their ingenuity will carry them. They will come in all guises. They will come for declarations at one time, injunction at another or simultaneously damages; transfer of title, nullification thereof, eviction. They will sue in singles, they will sue in plural. They will add anyone coming into contact with this land. Title to this one acre of land will forever be in question. The same question will be gone into over and over again by tribunals of competence. If a litigant were allowed to go for ever re-litigating the same issue with the same opponent, before courts of competent jurisdiction, merely because he gives his case some cosmetic face lift on every occasion he come to court, then I do not see what use the doctrine of res judicata plays.”

Apart from the issue of res Judicata, it is submitted that the applicant has not fulfilled the conditions for the granting of temporary injunction. The applicant has no prima facie case with a probability of success. He took a loan facility with the defendant which at the time of his termination in 2011 had an outstanding balance of Ksh.771,253/47. The plaintiff acknowledges that he is in arrears. That amount has accumulated interest and the outstanding balance is Ksh.1,836,640. The defendant is correctly exercising its statutory power of sale. No irreparable damage will be suffered. The plaintiff has offered to sell the property at Ksh.5.6 million. In essence therefore the purported loss is known. The Court is being urged not to make a fresh contract between the parties.

The application raises issues as to whether it fulfills the conditions for the granting of interlocutory injunctions and whether the application is res judicata.

The application is grounded on the contention that the loan secured on the property was fully paid. What is pending is the unsecured loan. Further, it is contended that the agreed interest rate on the unsecured loan was 7% per annum. The defendant unilaterally increased the rate to 20% per annum. I have gone through the affidavit in support of the application I have seen two letters dated 26.3.2013 and 24.04.2013 by the defendant asking the plaintiff to settle the outstanding loan balance of ksh.784,444/47. The plaintiff wrote to the defendant on 30.8.2012 indicating that he could only pay the loan balance through his terminal benefits. There is no issue being raised that the secured loan was fully paid. No bank statement has been produced to show that the loan was fully settled.

The record shows that the property was advertised to be auctioned on 23.11.2016. The advertisement triggered the filing of this suit. The documents signed for the unsecured loans have not been annexed. The defendant has annexed the charge dated 6th March, 2002 and further charge dated 16th May, 2002.

The plaintiff's pleadings and submissions does confirm that indeed the plaintiff is indebted to the defendant. It is not disputed that there is a loan balance outstanding. In his letter dated 30.8.2012 the plaintiff did confirm that he was indebted to the defendant and wanted to settle the debt through his terminal benefits.

From the pleadings herein, I do find that the respondent is well within its powers to exercise the statutory power of sale. No prima facie case has been established. The plaintiff's contention that he is likely to suffer irreparable damage if the property is auctioned is nothing more than a presumption that the property will be sold below the valued amount. There is a valuation report by Paul Wambua Valuers limited which give the value of the property at Ksh.7.5million. The report gives a forced sale value of Ksh.5.6 million. There is no indication that the defendant was going to sell the property below the forced sale value (reserve price).

The applicant would like to be allowed to sell the property by way of private treaty. There is a letter dated 8.11.2016 from one Amos Ndegwa Tsuma addressed to the plaintiff indicating his willingness to buy the property at Ksh.7 million. The alledged buyer indicates that he is willing to pay a down payment of Kshg.3.5million and pay the balance in two instalments on 30th December, 2016 and 28th February 2017. If that were to be the case, the plaintiff could have simply agreed to those terms as the deposit of Ksh.3.5million is sufficient to pay off the outstanding loan. That would enable the plaintiff to have the property discharged and subsequently sell it to the intended purchaser. I do find that both the plaintiff's prayers that he be allowed to sell the house by private treaty or that the price be reserved at Ksh.5.6million are unfounded and cannot be granted by the Court. The plaintiff cannot dictate the terms of the auction. He can exercise his equity of redemption by receiving the deposit and pay off the loan before the property is auctioned.

There is the issue as to whether the application is res judicata. It is the plaintiff who filed civil suit number 207 of 2013 before the industrial court. The plaintiff also filed an application dated 17th July 2013 seeking interlocutory injunction to restrain the defendant from selling, alienating and in any other way interfering with the property known as L.R. No.KWALE/UKUNDA/3183 pending the determination of that suit. In that suit the plaintiff indicated that he was going to settle the loan balance from his terminal dues after the case is determined. The application was fully heard and dismissed on 14th February, 2013.

Judgement in the plaintiff's case before the Employment and Labour Relations Court was delivered on 13th March 2014. The amount awarded to the plaintiff was to be off-set against the loan balance. The issue of the loan was also deliberated upon. The defendant's second witness in that case was its new Watamu branch manager. She told the Court that the plaintiff took loans and the same were secured on the suit land plot No. Kwale/Ukunda/3183. The issue of unsecured loans was also discussed in that suit. The witness informed the court that the loan balance for the secured loan as at 2.6.2011 was ksh.780,000. It was to be paid by way of monthly instalments of Ksh.18,956 for a period of 48 months until June, 2015.

The employment and Labour Relations Court is meant to deal with labour issues. However, it is the plaintiff himself who submitted himself

to the jurisdiction of that court and presented his claim for injunction in relation to plot number KWALE/UKUNDA/3183. The application was dismissed. No appeal was filed. Instead the plaintiff went to sleep from 13th March, 2014 when the suit was determined until 16th November 2016 when he resurfaced and filed this suit. The resurfacing was triggered by the advertisement in the Nation Newspaper of 7.11.2016 whereby the property was to be sold on 25.11.2016. The plaintiff was fully aware that the prayers of injunction seeking to restrain the defendant from auctioning the suit property were dismissed in Employment and Labour Relations case No.207 of 2013. This suit is a second bite at the cherry. It is nothing more than a cosmetic face lift seeking the same orders that were denied. The Suit number 207 of 2013 involves the same parties and the same issue of selling of plot number KWALE/UKUNDA/3183. This is contrary to the provisions of section 7 of the Civil Procedure Act. The plaintiff is not contending that the Employment and Labour Relations court lacked jurisdiction to determine the issue relating to the charge. I do find that the issues in this suit are quite similar to those in Employment and Labour Relations case No.207 of 2013. The Courts cannot keep on dealing with the same dispute whenever there is intention to sell the property. This claim is res-judicata and cannot be entertained by this court.

In his judgment of 13th March, 2014, Justice O. N. Makau made the following observations:-

“The last issue to consider is whether the respondent should be restrained from selling the suit premises in exercising its statutory power of sale to recover the outstanding loan and whether the court should award damages in respect of the loss he allegedly suffers when his loan balance of Ksh.706,249/81 was converted from staff loan to commercial loan and interest charged from 7% to 20% per annum. The Court has carefully perused and considered various letters of offer and acceptance signed and exchanged by the parties herein between February 2002 and 2009, the charge and further charge in favour of the respondent dated 6.3.2002 and 16.5.2002 respectively. The last letter of offer was dated 2.6.2011 for consolidating the aforesaid secured loans and topping up the outstanding balance by Ksh.485,555 to make a new balance of Ksh.780,000 Clause 6.3 of the said letter of offer cites the security for the loan as KWALE/UKUNDA/3183. The claimant accepted the offer in writing and signed on all pages of the letter.....the court therefore find and holds that the claimant breached the terms of the loan contract and the Court will not come to his aide”

I do therefore find that the issues in dispute have already been dealt with by a court of equal status and are therefore res judicata. The application dated 15.11.2016 lacks merit and is hereby dismissed with costs.

SAID CHITEMBWE

JUDGE

Dated, Signed and Delivered at Malindi this 20TH Day of JUNE,2017

WELDON KORIR

JUDGE