



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

ELC NO. 633 OF 2017

KENNEDY OERI EDMUND.....PLAINTIFF

VERSUS

PROGRESSIVE CREDIT LTD.....ST DEFENDANT

REHEMA JUMEA T/A CARNELIAN

ENTERPRISE AUCTIONEERS.....2ND DEFENDANT

RULING

The application before this court is a Notice of Motion dated 11th April, 2017 and filed on 12th April, 2017 by the Plaintiff brought pursuant to Section 3A of the Civil Procedure Act and Order 40 of the Civil Procedure Rules. The application is based on the following grounds which in summary are that the Plaintiff is the registered owner of property known as NGONG/NGONG/49522 and the 2nd Defendant with instruction from the 1st Defendant has proclaimed to sell by public auction the said property on 18th April, 2017. The Plaintiff is not in arrears of and has not defaulted as alleged by the 1st Defendant.

The application is supported by the affidavit of KENNEDY OERI EDMUND where he deposes that on 4th December, 2015 he signed a loan facility of Kshs. 5, 406, 596 with the 1st Defendant vide a letter of offer of the said date. Further that he has been making payments until 7th February, 2017 when he received a notification of sale from the 2nd Defendant detailing the property to be auctioned to recover alleged arrears of Kshs. 3,324,151.70. He avers that he has not been informed of the alleged arrears and the 1st Defendant has acted in bad faith to defeat his effort of raising the amount to sell his property to people the 1st Defendant has identified.

The 1st Defendant opposed the application and filed a replying affidavit sworn by one BETTY MWONGERA who is its Head of Quality where she deposes that on or about December 2015, the Plaintiff approached it for a loan facility of Kshs. 5, 406, 596/= and was issued with a letter of offer dated 4th December, 2015 which was duly executed by both Plaintiff and 1st Defendant. The Plaintiff charged his property NGONG/NGONG/49522 as security towards the loan. Further that one of the terms of the letter of offer was that the Plaintiff would repay the loan in equal monthly installments of Kshs. 298,858. Contrary to the Letter of Offer, the Plaintiff reneged on his obligation to pay the monthly installments and any monies as and when they fell due. The Plaintiff subsequently entered into a loan repayment agreement again with the 1st Defendant for the payment of the arrears owing but still continued to default in the loan repayment. She avers that due to the persistent default, the 1st Defendant gave the 2nd Defendant instructions to proceed with realization of the security. A notification of sale was issued to the Plaintiff for the sale of property known as NGONG/NGONG/49522 and as at 18th May, 2017 the Plaintiff owes Kshs. 8,611,637.35. Further that Contrary to the Plaintiff's assertions, he was made aware of the monies owing on his account.

The 2nd Defendant opposed the application and filed a replying affidavit sworn by one REHEMA MASUDI JUMEA who is the auctioneer where she deposes that on 25th January, 2017 she received instructions from the 1st Defendant to institute the process of realizing security over property known as LR No. NGONG/NGONG/49522 and pursuant to the said instructions, she wrote to the Plaintiff notifying him of the intended sale by public auction, and forwarded the notification of sale of the property.

The Plaintiff KENNEDY OERI EDMUND filed a further affidavit where he deposed that his property NGONG/NGONG/ 49522 was advertised by public auction on the 18th April, 2017 despite the fact that he was not in arrears as per the Banking deposit slip. He avers that he has done a search over the said title and found a charge registered on the 18th May, 2017 for Kshs. 2, 127,206/-.

On 11th May, 2017 both parties were ordered to file their written submissions to canvass the application, but only the Defendants did so. On the 30th May, 2017 when the application came for hearing, only the Defendants' Counsel was present. The Counsel for the Defendants Ms. Ndegwa highlighted the facts of the case and submitted that the Plaintiff is not deserving of a grant of orders of injunction as he has failed to establish a prima facie case with a probability of success. She relied on several cases including Delphis Bank Limited vs. Recco Builders Limited & Another [2005] eKLR, Mrao Ltd Vs. First American Bank of Kenya Ltd & 2 others [2003] eKLR and Nyanza Fish Processors Limited V Barclays Bank of Kenya Limited [2009] eKLR.

Issues and Determination

Upon perusal of the pleadings filed and materials presented, the main issue for determination is whether the Plaintiff is entitled to the temporary injunction sought.

The Court notes that both parties agree that the Plaintiff and 1st Defendant signed a letter of offer dated December 2015 where the 1st Defendant granted the Plaintiff a loan facility amounting to Kshs. 5, 406, 596 and the Plaintiff offered his property NGONG/NGONG/49522 as security. The Plaintiff alleges that he has been repaying the loan but the receipts of repayment furnished in court are dated 2nd December, 2015, 21st November, 2015, 15th November, 2015, 7th November, 2015, 1st October, 2015, 15th October, 2015 before the loan facility was issued and only one for Kshs. 270,000 is dated 27th January 2016 after the said loan facility was granted. The Plaintiff insists that he has been repaying the loan facility. The Court notes that according to the letter of offer at clause 6, the Plaintiff offered the following properties as security: Business Chattels, Motor Vehicle Registration No. KBL 161 E and a Charge of title deed LR NGONG/NGONG/49522 and KAJIADO/LOODARIAK/4617. Further in clause 2 of the said letter, the Plaintiff was expected to pay through cheques in forty seven(47) monthly installments comprising principal and interest amounting to Kshs. 298,858 commencing 4th January, 2016 upto 4th November, 2019. The Court notes from the payment receipts availed by the Plaintiff he has only paid Kshs. 270,000 on 27th January 2016 after he had been granted the said loan facility. He claims to have been repaying the loan but has not furnished any proof of the same.

On the issue as whether the Plaintiff has established a prima facie case with a probability of success, I am persuaded by the Case of **Mrao Ltd V First American Bank of Kenya Limited & 2 others [2003]** where it was stated that a prima facie case included:

".....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 the instant case the Court finds that the Plaintiff has not demonstrated an infringement of a right as he admits to receiving the loan from the 1st Defendant, but does not show proof to the Court on the all the monies he has so far paid in accordance with the terms of the Letter of Offer dated 4th December, 2014.

In so far as to whether the Plaintiff has demonstrated he will suffer irreparable loss if the injunction sought is not granted. I am persuaded by the Case of **Kitur & Anor v. Standard Chartered Bank & 2 others [2002] eKLR** where the Court cited with approval the Eldoret case of **Sambai Kitur v Standard Chartered Bank & 2 others**, ELD HCCC No. 50 of 2002 when it stated that :

'.....It must be noted that when a Chargor lets loose its property to a Chargee as security for a loan or any other commercial facility on the basis that in the event of a default it be sold by a Chargee, the damages are foreseeable. The security is henceforth a commodity for sale or possible sale without concurrence and consent of the charge. How can he, having defaulted to pay loan arrears prompting a charge to exercise its statutory power of sale, claim that he is likely to suffer loss and injury incapable of compensation by an award of damages? Such an argument is definitely misplaced and has no merit. '

The Court finds that since the Plaintiff defaulted in repaying the loan granted by the 1st Defendant, and has even stated he has been striving to get a buyer for the suit land, he cannot stop the 1st Defendant from realizing the security he had offered as a guarantee to the loan facility so long as due process is adhered to. The Court hence finds that the Plaintiff has not demonstrated the irreparable loss or damage which is incapable of being compensated by an award he will suffer as he willful charged his properties a security to the loan facility.

On the question of balance of convenience, the 1st Defendant has demonstrated that it has severally indulged the Plaintiff and entered into a fresh loan arrangement to enable him repay the loan facility but he failed to do. The balance of convenience suits in favour of the 1st defendant.

The Upshot of the matter is that the Plaintiff has failed to establish a prima facie to warrant an injunction. I dismiss the notice of motion dated the 11th April, 2017 and filed on 12th April, 2017 with costs.

Dated signed and delivered in open court at Kajjido this 31st day of July, 2017.

CHRISTINE OCHIENG

JUDGE