



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

MISC. CIVIL APPLICATION NO. 462 OF 2015

FRANCIS NGARAMA KIRATU.....PLAINTIFF

VERSUS

EQUITY BANK LIMITED..... 1ST DEFENDANT

AUCKLAND AGENCIES.....2ND DEFENDANT

RULING

1. The application for determination is a Notice of Motion dated 25th September 2015, brought under Order 40 Rules 1, 2, 3 & 4 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act, Cap 21 Laws of Kenya and all other enabling provisions of the Law. The Plaintiff herein has sought for the following orders against the Defendants. That ;-
 - a. *Spent*
 - b. *An injunction to restrain the defendants, their agents and/or servants from seizing, repossessing and/or interfering with the plaintiffs possession and use of motor vehicle registration No. KBP 481K until the main suit is heard and determined.*
 - c. *Costs of this application be provided for.*
2. The application is based on the grounds contained in the application supported by the affidavit of the Plaintiff dated 25th September, 2015. It was deponed that the Plaintiff and the 1st Defendant have a bank and customer relationship, where the 1st Defendant extended various loan facilities to the Plaintiff. That on or around 6th May, 2011, the parties entered into a loan agreement where the Plaintiff was advanced credit facility to purchase of vehicle registration number KBP 481K (Toyota Land Cruiser – HZJ79R) (herein after referred to as the “Motor Vehicle”). That the same was jointly registered in the names of the Plaintiff and the 1st Defendant and served as security for the amounts advanced. The Plaintiff further deposed that on or about 17th October, 2011, the Defendant agreed to advance another facility for the purchase of the piece of land known as No. Laikipia/Ol’Arabel/253 which was secured by a legal charge over the said parcel of land. The Plaintiff however, admits that he fell into arrears on the said facilities and approached the 1st Defendant Bank for the restructuring of the said loans. Among the suggestions made, was that the Plaintiff would dispose off the parcel land aforementioned, to defray the loan amounts. The Plaintiff on the other hand alleges that efforts to dispose off the parcel of land has been next to impossible as the 1st Defendant in collusion with the Land Registrar entered the wrong number in the parcel section of the Title i.e No. 777 instead of 253, meaning that the same does not tally with

- the Title Number. That despite numerous requests for the 1st Defendant to have the error corrected and have it rectified, the 1st Defendant has failed to do so to the detriment of the Plaintiff.
3. According to the Plaintiff, this delay has occasioned the continued accrual in interest of the two loan facilities. The Plaintiff further accused the 1st Defendant through the 2nd Defendant of trying to seize and reposes the motor vehicle allegedly for the outstanding debt whose figures are inconsistent, outrageous, inexplicable and untenable. In the opinion of the Plaintiff, he has already shown the willingness to dispose the parcel of land alluded to earlier in this ruling, and liquidate the outstanding loans. That therefore the 1st Defendant should be estopped from possessing the Motor Vehicle which is utilized to transport the Plaintiff's farm produce. The Plaintiff therefore prayed that the court allow the application and the orders sought.
 4. In response to the application, the 1st defendant filed the Replying Affidavit of Joseph Muhia, described as the 1st Defendant's Credit Manager, sworn on 1st October, 2015. The deponent admitted that various loan facilities were extended to the Plaintiff. That a loan facility of Kshs. 3,115,000/= was approved and disbursed to the Plaintiff. The sums advanced were secured by the Motor vehicle and the loan repayment was to be done within 48 months after drawdown. A chattel instrument over the said motor vehicle was also registered as Number 578781 Vol. 98 Folio 188 on 27th September, 2011. One of the terms of the said loan, was that the 1st Defendant could combine accounts and consolidate all securities held for any account to constitute security for all accounts held by the Plaintiff. The 1st Defendant additionally stated the Plaintiff also applied and received another loan facility of Kshs. 13,000,000 for the purchase of the parcel of land known as No. Laikipia/Ol'Arabel/253. A legal charge was also created on the said piece of land to secure the said amounts of money. It was the 1st Defendant's contention that the Plaintiff failed to pay the said loans and interest thereon in the manner agreed upon by the parties. That in view of the default, the 1st Defendant on 14th April, 2013 instructed John Maina Kingori T/A Jegedah Auctioneers to repossess the said motor vehicle. It was however, the contention of the 1st Defendant that this proved impossible as the Plaintiff had removed the subject motor vehicle from Ndaragwa to an unknown location.
 5. Further, the Plaintiff was accused of defying an order made by the Court in **NYAHURURU PM MISC. APPLICATION NO.10 OF 2013 Equity Bank & Another –vs- Francis Ngarama Kiratu** to hand over the vehicle to the said auctioneers. That instead of obeying the said order, the Plaintiff filed an application dated 14th March, 2013 to set aside the orders issued on 23rd April, 2013 and 6th May, 2013. In the ruling to the said application, the learned magistrate granted all orders of stay on the orders issued on 6th May, 2013 but declined staying the orders issued on 23rd April, 2013. That the said auctioneer was however unable to repossess the said motor vehicle because the same was hidden and could not be traced. Equally, the 1st Defendant deponed that the Plaintiff commenced **NYERI ELC No. 40 of 2014** praying for an injunction to restrain it from selling, transferring and /or interfering with the Plaintiff's quiet possession. It was contended that a ruling on whether a temporary injunction could be granted was still pending the court's ruling at the time of hearing the application.
 6. It was also the assertion of the 1st Defendant that the loan facilities in question were consolidated and the same total Kshs. 20,042,192.33/=. That accordingly, if the motor vehicle is repossessed and sold, any amount above the amount due under the motor vehicle will be applied towards reduction of the land purchase loan. That in view of the foregoing, the 1st Defendant is legally entitled to instruct the 2nd Defendant to repossess the motor vehicle and sell it to recover part of the sums owed. The 1st Defendant further denied the allegations that it acted in collusion with the lands office in inserting the incorrect parcel number in the title. In the opinion of the 1st Defendant, the same was likely a typing error by the Lands Registry, which could be corrected by the said office, but the Plaintiff has not demonstrated that he applied for correction or rectification of the title. In view of the foregoing, it was the contention of the 1st Defendant that the Plaintiff has failed to meet the thresholds to attain an injunction as sought. The 1st Defendant therefore urged the court to dismiss the Plaintiff's application with costs.
 7. On 21st October 2015 directions were granted to determine the motion by written submissions. The plaintiff filed his submissions on 4th November 2015 while the 1st and 2nd Defendant filed

- their joint submissions on 10th November, 2015. On 19th February 2016, the parties addressed the court on those submissions. I have considered the pleadings, depositions and rival submissions.
8. This being an application for injunction, it is vital to point out that the principles that guide the court when considering an application for an injunction are set out in the case of **Giella –v- Cassman Brown (1973) EA 358** to the effect that an applicant must establish a prima facie case with a probability of success; that an injunction will not normally be granted unless the applicant might otherwise suffer irreparable loss; and that if the court is in doubt, it will decide the said application on a balance of convenience. Further, it is of note that this being an interlocutory application, care must be exercised to obviate expressing any conclusive views on issues which fall for determination at the main trial.
 9. As such, I find that the issues that fall for determination is whether the Plaintiff has placed enough material before the court to persuade it to grant the interim orders sought. The first question I must therefore answer is whether the Plaintiff has established a prima facie case.
 10. A prima facie case was defined by the Court of Appeal in **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others [2003]KLR 1215** as follows:

“a prima facie case in a civil application includes but is not confined to a “genuine and arguable case.” It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

11. The Plaintiff argued that they had established a prima facie case with a probability of success for reasons that the 1st Defendant did not issue him with a proper statutory notice of sale with regard to the possession and sale of the Motor Vehicle. Further, the Plaintiff faults the 1st Defendant with regard to the letters of instruction to the 2nd Defendant which he claims pertain to the motor vehicle account and not the consolidated loan account as alleged by the 1st Defendant. Before assessing the merits or otherwise of this claims, it is important to note that the issue of notice and the contents of the letters of instruction were not contained in the affidavit in support of the Plaintiff’s application. The same have been introduced vide the Plaintiff’s written submission. This court frowns upon such practice as the same would amount to an ambush to the opposing parties. However, upon examining the Defendants’ submissions, I note that the issues raised outside the affidavit have been sufficiently tackled. Therefore, the 1st Defendant is not prejudiced by the introduction of the said issues in the submission stage.
12. Turning back to whether the Plaintiff has made a prima facie case, I have to agree with the Defendants’ arguments that the issue of disposal of the charged land known as Laikipia/Ol’Arabel/253, should not be mixed up with the issue of repossession of the motor vehicle since the same is now a subject to another suit through **NYERI ELC No. 40 of 2014**. It therefore goes without saying that the court will not assess any argument that touched on the suit piece of land, as the same would amount to sub judice. I say so bearing in mind Section 6 of the Civil Procedure Act, Cap 21 Laws of Kenya which provides that no court shall proceed with the trial of any suit or proceedings between the same parties, or between parties under whom they or any of them claim, litigate under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed. Thus, any issue in connection with Laikipia/Ol’Arabel/253, including the any errors on the title or the intended sale thereof cannot be heard or determined by this court, unless the proceedings in **NYERI ELC No. 40 of 2014 Francis Ngarama Kiratu –vs- Equity Bank Limited** are stayed.
13. Further, I also find that the Plaintiff herein is forum shopping having filed another case in **NYERI ELC No. 40 of 2014** over essentially the same issues. I believe the same must be strongly discouraged by this court because it could lead to court coming up with two contradictory judgments over the same issues. In addition, multiple suits over the same issue not only causes delay in matters, but the same amounts to an abuse of the court process.
14. Without making any firm findings at this stage, it is also important to note that the two securities held by the 1st Defendant with respect to the loan facilities advanced to the Plaintiff, are governed by different regimes and contractual documents. The fact that the loans were consolidated does not defeat the provisions of either the Land Act of 2012 or the Chattels Transfer Act Cap 28 Laws of

Kenya in which the debt instruments were created. In my view, Notice of the sale of either the land in question and the Motor Vehicle must strictly conform to what was agreed upon by the parties bearing in mind the provisions of the Land Act and the Chattels Mortgage Transfer Act respectively. Since the issue in the present application touches on the motor vehicle, this court must assess the instrument used to create the Chattel Mortgage.

15. I have seen the Chattel Instrument dated 27th September, 2011. Specifically Clause 8, where it is stated that when there is a default in repayment of the installments by the Plaintiff the Defendant is entitled to take possession of the chattel in question without any previous or further notice or concurrence of the part of the Plaintiff and sell or dispose the same by way of public auction or private treaty. The issue of a Notice therefore does not arise. In the foregoing, the Plaintiff having admitted being in default of the loan advanced, the Defendant was within its rights in trying to repossess the motor vehicle.
16. Additionally, the fact that there is a dispute as to the outstanding loan balance cannot be a basis of granting an injunction. In the case of **Mrao Ltd (Supra)** the court held as follows ;-

“A mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has begun a redemption action or because the mortgagor objects to the manner in which the sale is being arranged.”

17. In any case, the sale proceeds of the motor vehicle is not meant to cover the entire amount, but part of the debt. If the court were to hinder the repossession and the subsequent sale of the motor vehicle, then the debt herein would continue to accrue interest and grow into insurmountable amounts, meaning the same would outstrip the value of the properties held by the bank as securities.
18. Further, I find that the fact that the court in **NYAHURURU PM MISC. APPLICATION NO.10 OF 2013 Equity Bank & Anor –vs- Francis Ngarama** made an order on 23rd April, 2013 to the effect that the 1st Defendant’s auctioneer be accorded police assistance for purposes of keeping the peace and order while physically repossessing the said motor vehicle; is another indication that the Plaintiff is undeserving of the orders sought. This order neither lapsed nor was it stayed by any court of law. Though the Plaintiff attempted to have the same vacated or stayed, the court in its ruling dated 2nd September, 2014, declined to set aside the order. A party cannot in flagrant breach of a court order hide property that is subject to repossession and thereafter seek an injunction to stop such repossession. Such a party would be adjudged as approaching the court with “unclean hands” and that would disentitle him to an order of injunction.
19. In conclusion, I find that the Plaintiff does not have a prima facie case to warrant an injunction. Having found and held that the Plaintiff has not established a prima facie case with a probability of success I need not consider the other two conditions of irreparable damage and balance of convenience as the conditions for grant of an injunction are sequential such that if the first one fails the other conditions would be inapplicable and would only be considered where the court entertains any doubt as to whether or not a prima facie case has been established and/or demonstrated.
20. On my part I have no doubt that the Plaintiff has not established he has a prima facie case with a probability of success and even if I was wrong on that holding I would still not hold that the plaintiff has demonstrated he would suffer any irreparable harm if the injunction was not granted. The value of the motor vehicle is ascertainable and in my view damages would be an adequate remedy if the court finds that the said repossession and subsequent sale was unlawful.
21. In the premises and for the above reasons I hold and find that the Plaintiff’s application dated 25th September, 2015 lacks any merit and the same is ordered dismissed with costs to the 1st Defendant.

Dated, signed and delivered in court at Nairobi this 19th day of February, 2016.

C. KARIUKI

JUDGE