



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ELC NO. 84 OF 2015

JEPHTHER MARINGO MIYOGO T/A STELEVEN

STATIONERS & COMPUTER SERVICESPLAINTIFF

VERSUS

BANK OF AFRICA KENYA LTD..... 1ST DEFENDANT

CHARLES N. MWAURA T/A MELODY

TRADERS AUCTIONEERS.....2ND DEFENDANT

RULING

The application before me has no merit and must be rejected. Sometimes in June, 2010, the 1st defendant offered to the plaintiff a banking facility in the form of a loan amounting to Kshs.5,000,000/= repayable in sixty (60) equal monthly installments. The loan was offered on the terms and conditions contained in the 1st defendant's letter of offer dated 22nd June 2010. The 1st defendant's offer was accepted by the plaintiff on 18th July 2010. The loan was secured by first legal charges over L.R No. Kisii/Bogiakumu/4206 and L.R No.Wanjare/Bogiakumu/3291 in the sum of Kshs.2,500,000/= each and a deed of assignment of rental income from L.R No. Nakuru Municipality Block 15/53-105 (Kabachia, Phase III). After the said securities were perfected, the 1st defendant disbursed the loan amount to the plaintiff in accordance with the terms of the letter of offer aforesaid. The plaintiff did not repay the loan in accordance with the agreement that he had entered into with the 1stdefendant. As at 27th June 2011, the plaintiff was in arrears in his loan repayment to the tune of Kshs.273,612.55. On 21st July 2011, the 1stdefendant demanded from the plaintiff full payment of the loan amount then outstanding after the plaintiff failed to pay the loan amount. The arrears stood at Kshs.372,904.30 as at that date. On 11th June 2012, the plaintiff wrote to the 1stdefendant through his previous advocates, Robert Ndubi and Company Advocates admitting that he was in arrears in his loan repayments and requested for indulgence from the 1st defendant.

The plaintiff continued in his default in loan repayments to the 1st defendant. On 16th December 2013, the 1st defendant served upon the plaintiff a statutory notice demanding the payment of the full loan amount then outstanding in the sum of Kshs.6,733,377.00 as at 9th December 2013 and warned the plaintiff that unless the said amount was paid within three (3) months from the date of that demand, the 1st defendant would proceed to sell L.R. No. Wanjare/Bogiakumu/3291 and L.R No.Kisii/Wanjare/Bogiakumu/4206 (hereinafter referred to **"the suit properties"** that had been charged to it as security for the said loan. The plaintiff did not pay the sum of Kshs.6,733,377.00 as had been

demanded by the 1st defendant.

On 29th May 2014, the 1st defendant again wrote to the plaintiff demanding the payment of the loan amount that had now accumulated to Ksh.7,308,123.79 as at 26th May 2014. Again the 1st defendant warned the plaintiff that if the said amount was not paid within 40 days, it would proceed to sell the suit properties. This notice was also not heeded. On 19th January 2015, the 1st defendant instructed the 2nd defendant to put up the suit properties for sale by public auction to recover from the plaintiff the loan amount that stood at Kh.7,819,328.49 as at 30th October 2014. Upon receipt of this instruction, the 2nd defendant proceeded to issue the plaintiff with a notification of sale of the suit properties.

The plaintiff brought this suit on 27th February 2015 upon being served with the said notification of sale, seeking a declaration that the notification of sale of the suit property that had been served upon him by the 2nd defendant was null and void, an order that the plaintiff be allowed to pay the loan that had been advanced to him by the 1st defendant and that the plaintiff be furnished with a true statement of the loan account and a permanent injunction to restrain the defendants from selling, disposing of, transferring and/or otherwise dealing with the suit properties in any way whatsoever.

Together with the plaint, the plaintiff filed an application by way of Notice of Motion dated 26th February 2015 seeking an interlocutory injunction to restrain the defendants from selling, disposing of, transferring and/or otherwise dealing with the suit properties pending the hearing and determination of this suit or further orders by the court and an order that a true account of the loan facility that was advanced to him be furnished. This is the application before me.

The plaintiff's application was brought on the grounds that the 1st defendant had advanced to him a loan that was secured by among others legal charges over the suit properties and that he had paid Kshs.621,314.20 to offset the said loan. The plaintiff contended that despite this payment, the 1st defendant had instructed the 2nd defendant to issue him with a notification of sale of the suit properties in exercise of its statutory power of sale. The plaintiff contended that he was willing to repay the loan and that the notification of sale that had been served upon him by the 2nd defendant was defective.

In his affidavit in support of the application, the plaintiff stated that the 1st defendant had advanced to him a loan of kshs.5,000,000/= which was secured by among others legal charges over the suit properties. The plaintiff reiterated that the notification of sale that had been served upon him by the 2nd defendant was defective and that he was ready and willing to repay the loan that was due to the 1st defendant. The plaintiff contested the sum of Kshs.7,819,328.49 that had been demanded from him by the 1st defendant and contended that he only owed the 1st defendant a sum of Kshs.5.8 million. The plaintiff contended that in view of the dispute over the amount owed, the 1st defendant should produce a true account of the loan that was advanced to him.

The application was opposed by the defendants through a replying affidavit that was sworn by one, MONICA KAMAU on 17th April, 2015. MsKamau deposed that the 1st defendant had advanced to the plaintiff a loan in the sum of Kshs.5,000,000/= on terms and conditions that were set out in the letter of offer dated 22nd June 2010 which loan was secured by among others legal charges over the suit properties. Ms. Kamau deposed that the plaintiff defaulted in his loan repayment and sought indulgence from the 1st defendant. The default however persisted and the 1st defendant had no alternative but to serve him with a statutory notice. After the expiry of the statutory notice, the plaintiff was given another notice of 40 days to pay the outstanding loan which notice again he did not heed. Ms. Kamau stated that the 1st defendant thereafter instructed the 2nd defendant to put up the suit properties for sale for the recovery of the outstanding loan amount from the plaintiff. It is pursuant to this instruction that the 2nd defendant proceeded to serve the plaintiff with a notification of sale. MsKamau denied that the loan amount outstanding is Kshs.5.8 million and not Kshs.7,819,328.49. Ms. Kamau annexed to her affidavit among others, correspondence that was exchanged between the 1st defendant and plaintiff and the

statements of the plaintiffs loan accounts. The plaintiff filed a supplementary affidavit on 5th May 2015 in which he deposed that since the filing of the suit, he had paid to the 1st defendant a sum of Kshs.1,000,000/= in reduction of his indebtedness to the 1st defendant and that he had made a proposal on how to clear the balance of the loan amount which proposal had been rejected by the 1st defendant.

On 5th May 2015, the parties agreed to argue the plaintiff's application by way of written submissions. I have considered the plaintiff's application together with the affidavit filed in support hereof. I have also considered the replying affidavit that was filed by the defendants in opposition of the application. The plaintiff has sought two reliefs; an interlocutory injunction and accounts. The principles upon which this court exercises its discretion in applications for interlocutory injunctions are settled. In the case of ***Giellavs. Cassman Brown and Company Ltd. (1973) EA 358***, it was held that an applicant for interlocutory injunction must show that he has a prima facie case with a probability of success and that unless the injunction is granted, the stands to suffer irreparable injury which cannot be adequately compensated for in damages. If the court is in doubt as to the above, the application would be determined on a balance of convenience. In the case of, ***Mrao Ltd Vs. First American Bank of Kenya Ltd(2003)KLR 125***, the court defined a prima facie case as;

“a case in which on the material presented to the court a tribunal property directing itself will include 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”.

The issue which I need to determine is whether the plaintiff has established such a case. Has the plaintiff demonstrated that the defendants have infringed any of his rights with regard to the intended sale of the suit properties? My answer is no. It is admitted that the plaintiff sought and obtained a loan from the 1st defendant which loan was secured by legal charges over the suit properties. It is also admitted that the plaintiff defaulted in the repayment of the loan amount that had been advanced to him by the 1st defendant. It is admitted that as at the time of filing this suit, the plaintiff owed the 1st defendant an amount in excess of Kshs.5,000,000.00. It is not contested that the plaintiff was served by the 1st defendant with all requisite notices before the 2nd defendant was instructed to put up the suit properties for sale by public auction. I am unable to see how the 1st defendant can be said to have infringed on the plaintiff's rights. The plaintiff has claimed that there is a dispute over accounts. The plaintiff has claimed that he owes the 1st defendant a sum of Kshs.5.8 million while the 1st defendant is claiming from him a sum in excess of Kshs.7 million. I am of the view that this issue of accounts has not been raised in good faith. In its statutory notice to the plaintiff dated 16th December 2013, the 1st Defendant gave a breakdown of the amount Kshs.6,733,377/= that was then outstanding on the plaintiff's loan account as at 9th December 2013. There is no evidence that the plaintiff contested this amount. In response to the present application, the 1st defendant has once again furnished statements of the plaintiff's loan account. After these statements were filed in court, the plaintiff sought and was granted leave to file a supplementary affidavit which he did on 5th May 2015. The plaintiff did not at all contest any item on the said statements of account. In any event, the plaintiff has not even paid the admitted sum of Kshs.5.8 million. In view of the foregoing, I am not convinced that there is a genuine dispute between the plaintiff and the 1st defendant over accounts. Even if I am wrong on that finding, it is now settled that the mere fact that there is a dispute between a mortgagee and mortgagor over accounts is not a valid reason to stop a mortgagee from exercising its statutory power of sale. **In Halsbury's laws of England, Volume 32, 4th edition at paragraph 723** the authors have stated that;

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

Apart from the alleged dispute over accounts, the plaintiff has claimed that the notification of sale that was served upon him by the 2nd defendant was defective. The plaintiff has not pointed out in what respect the notification of sale that was served upon him falls short of the statutory requirements and how

he has been prejudiced. In the absence of such particulars, I can see no merit on the plaintiff's claim that the defendants served upon him a defective notification of sale. Even if I had found the notice that was served upon the plaintiff to be defective in any material particular, that alone would not have justified the granting of the injunction sought herein. I would have simply directed the defendants to serve upon the plaintiff a fresh notification of sale before they could proceed with the sale of the suit properties.

For the reasons given above, I am not satisfied that the plaintiff has established a prima facie case against the defendants. In view of that finding, it is not necessary for me to consider whether the plaintiff would suffer irreparable injury if the orders sought are not granted. If I was to consider the issue however, I would have held against the plaintiff. I am in agreement with the decision in the case of **Moses Ngenye Kahindo vs. Agricultural Finance Corporation, HCCC No. 1044 of 2001** that was cited by **Ochieng J.** in the case of **Henry Khaemba Vs. Standard Chartered Bank Ltd. and others (2005) eKLR** where the court stated that:

“A person who charges his property to secure a loan does so knowing only too well that upon default, the property could be sold to recover the loan. It does not therefore lie in the mouth of such person to state that he would suffer an injury which cannot be adequately compensated in damages if the lender realizes the security in question.”

The upshot of the foregoing is that the plaintiff's Notice of Motion application dated 26th February 2015 has no merit. The same is accordingly dismissed with costs to the defendants.

Signed at Nairobi this.....Day of.....2016

S. OKONG'O

JUDGE

Delivered, Dated and Signed at Kisii the 15th day of April 2016

J. M. MUTUNGI

JUDGE

In the Presence

.....for the Plaintiff

.....for the Defendants