



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA
CIVIL CASE NO. 7 OF 2015

MOHAMMED IQBAL DAWOOD ANTULAY..... PLAINTIFF

VERSUS

CO-OP BANK OF KENYA MUMIAS BRANCH

JOSRICK MERCHANTS AUCTIONEERSDEFENDANTS

LEAKEYS AUCTIONEERS

RULING

1. Before the court is an application dated 26th day of January, 2015 brought by way of Notice of Motion pursuant to Order 40 Rules 1,2,3 & 9 of the Civil Procedure Rules and sections 82,90, 84 & 104 of the Land Act and Article 75 Section 35 of the Constitution. Prayers 6 & 2 of the said application are spent. The consideration are prayers 3 & 4 as follows

“3. THAT pending the hearing and determination of the suit an injunction do issue directing the defendants, their agents, servants, employees and/or assigns restraining them from selling, disposing, further advertising and/or any way excusing the 1st defendant’s statutory power of sale over the plaintiffs land parcel number E.Bukusu/S. Kanduyi/11306,E.Bukusu/S.Kanduyi/11326 and E.Bukusu/S. Kanduyi/11441 and costs

2. The application is based on the grounds that the defendants are purporting to exercise power of sale of change which is nonexistent; no memorandum of increase of interest was issued to the plaintiff; no notice of the intended sale has been issued to the plaintiffs spouse; the plaintiff has paid a substantial amount of the loan; the plaintiff has been denied the right to know the amount due that the reserve price has not been set.

3. In his supporting affidavit the applicant states that he has enjoined various loans with the respondent’s bank including over drafts that were initially secured by land parcel E. Bukusu/S. Kanduyi/11306 E.Bukusu/S.Kanduyi/11326 and E.Bukusu/S. Kanduyi/11441, he paid off the facilities and was granted a further loan facility for kshs. 5,125,000 and an overdraft in May 2011.

4. That on obtaining the above loan he never signed any further change nor obtained the Land Control Board consent and that even on obtaining the initial loan it was not explained to him in taking the loan the right to change to property included the mortgagers right to sell the property. According to him therefore no change exists.

5. The applicant have stated further that he has been ill necessitating treatment abroad. And that

the respondent has severally declined to supply him with the loan statement, he does not agree with the sums being demanded, notice of intended sell has not been served on his spouse, two auctioneers were appointed to sell various of the properties, and therefore the intended auction is premature and malicious.

6. The application is opposed by way of a reply affidavit sworn by one Joseph Irungu a credit officer with the respondent who deponed to the fact that the respondent herein advanced to the applicant loan facility and overdraft between the year 2010 and 2011 amounting to Kshs. 6,150,000/- and 2,00,000/- against title number E. Bukusu/S. Kanduyi/11306 E. Bukusu/S.Kanduyi/11326 and E.Bukusu/S.Kanduyi/11441 and N.Wanga/Matungu/1773 and changes were created in favour of the respondent for an aggregate amount of kshs. 7,254,000/=.

7. The applicant is in breach of the terms entered into since 2012 and as a result the respondent issued a notification of default under the CRB regulations; a statutory notice dated 10th September, 2013, a final 40 days notice dated 20th February, 2014 after which the bank exercised its statutory power of sale and instructed the 2nd and 3rd respondents who also issued the requisite statutory notices; the respondent has furnished the respondent with statements when the same were demanded, the change documents were duly executed and relevant Land Control Board consent issued prior to registration of the change documents and therefore the applicant has not proved a prima facie case with probability of success.

8. Having considered the above and the authorities cited by the parties the issue for determination is whether or not to grant the orders injuncting the 1st respondent from exercising statutory power of sale pending hearing and determination of the suit.

9. the law in regard to this issue is well pronounced in the notable case of **Giella vs. Cassman Brown and Co. Ltd. [1973] E.A 353** where the court laid down the principles to be considered in granting an injunction as firstly an applicant must show a prima facie case with a probability of success, secondly that such an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, thirdly where the court is in doubt it will decide the application on a balance of convenience.

10. The applicant does not dispute having enforced the loan and even draft facilities and the fact that he has defaulted in his obligation to pay the debt due to what he says was occasioned by his illness. What he disputes is the amount being claimed. He has also raised issues as follows, lack of notice to his spouse, the facility now due and owing was not secured and that the Land Control Board consent was not obtained.

11. The courts have stated severally the mere fact of a dispute as to the amount owing cannot be a sole reason to stop a mortgage from exercising his right of sale unless the amount claimed to be excessive has been deposited in court.

See case on **John Nduati Kariuki t/a Jonester Merchants vs. National Bank of Kenya Ltd. Civil appeal no. 306 of 2005.**

12. Was there a requirement to issue a notice to the applicant's spouse?

Section 28 (a) of the Land Registration Act No. 30 (Act no. 23 of 2015) gives an overriding spousal interest over matrimonial property. The applicant did not prove or indicate which of the properties intended to be sold is matrimonial property. He who asserts must prove. The court has therefore no proof of the assertion.

13. Were the facilities secured by way of a charge?

There is an admission by the respondent that indeed the properties intended for sale had been changed but he argues that he paid off the loan and draft facilities and that for the 2011

loan and overdraft facility no further change was created.

The letter of offer dated 21st December, 2010 for an overdraft facility of kshs. 1,000,000/- and a loan facility of kshs. 5,150,000/= indicates that the same were secured by,

- i. Exercising legal charge for kshs. 2,075,000/= over L.R. No. E. Bukusu/S. Kanduyi/11306
- ii. Exercising legal charge of kshs. 1,100,00 over L.R. No. E. Bukusu/S.Kanduyi/1136 .
- iii. Existing legal charge for kshs. 1,100,000/= over L.R. NO. E. Bukusu/S. kandugi/11441.
- iv. Personal By Sarumari Hidayat Ullah Khan by excising legal change of kshs. 3,025,000/- over L.R.No. N. Wanga/Matungu/1773.

The letter of offer dated April 2011 for an overdraft facility for kshs. 2,000,000/= was secured by all the properties above.

The applicant acknowledged and signed the offer letter meaning that even if he had paid off the earlier or apportion of the earlier loan the bank granted him further facilities based on the existing changes.

14. Were Land Control Board Consent obtained?

There is no indication that the parcels in question required consent of the board. Secondly the changes were registered with the assumption that all requirements were met. Yet again the applicant has not proved that this was not the case. In any event he ought to have together with the respondents sought for the consent. Can he enjoy the facilities and in default sought to run away due to an error he equally perpetuated?

15. It is evident also that the respondent signed the changes and the redemption clause Section 74 and 79 of the Registered Land Act was acknowledged and understood by the applicant.

16. All the requisite notices were issued and not disputed by the applicant. Consequently with the above I am of the considered view that the application does not merit the threshold, lacks merit and the same dismissed with costs to the respondent.

Dated at Bungoma this 19th day of May 2016.

ALI-ARONI

JUDGE