



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

ENVIRONMENT AND LAND DIVISION

CIVIL SUIT NO. 71 OF 2016

PATRICK KINYUA M'MUKIRI.....PLAINTIFF

VERSUS

SIDIAN BANK LIMITED.....DEFENDANT

R U L I N G

1. This application is dated 9th June, 2016 . It seeks prayers:-

1. THAT this application be certified urgent and be heard ex-parte in the first instance.

2. THAT prayers numbers 1, 3 and 4 hereof be granted ex-parte in the first instance.

3. THAT pending the hearing and determination of this application inter-partes or until further Court orders this Honourable Court be pleased to issue an interlocutory prohibitory injunction restraining the Defendant whether by itself, its agents, servants, representatives, employees, auctioneers and/or anybody else acting or claiming on its behalf from selling or advertising or offering for sale by way of private treaty or public auction, transferring , charging, leasing, pledging or in any other way alienating or disposing of or interfering in any manner whatsoever with the title of the parcel of land L.R. NO. NKUENE/TAITA/595.

4. THAT pending the hearing and determination of this application inter-partes or until further Court orders this Honourable Court be pleased to issue an interlocutory mandatory injunction compelling the Defendant to provide to the Plaintiff copies of proper and accurate statements of the loan account, letter of loan application, letters of offer for the loan, charge instrument, account signatories and all correspondence in respect of the borrower TUSAIDIANE INITIATIVE FOR RURAL DEVELOPMENT.

5. THAT pending the hearing and determination of this suit or until further court orders this Honourable Court be pleased to issue an interlocutory prohibitory injunction restraining the Defendant whether by itself, its agents, servants, representatives, employees, and/or anybody else acting or claiming on its behalf from selling or advertising or offering for sale by way of private treaty or public auction, transferring, charging , leasing, pledging or in any other way alienating or disposing of or interfering in any manner whatsoever with the title of the parcel of land L.R NO. NKEUNE/TAITA/595.

6. ***THAT pending the hearing and determination of this suit or until further court orders this Honourable Court be pleased to issue an interlocutory mandatory injunction compelling the Defendant to provide to the Plaintiff copies of proper and accurate statements of the loan account, letters of loan application, letters of offer for the loan, charge instrument, account signatories and all correspondence in respect of the borrower TUSAIDIANE INITIATIVE FOR RURAL DEVELOPMENT.***

7. ***THAT there be such other order as this Honourable Court deems fit and expedient in the aid of justice.***

8. ***THAT the costs of this application be provided for.***

2. The application is supported by the affidavit of PATRICK KINYUA M'MUKIRI, the Plaintiff and has the following grounds:-

1. ***THAT the plaintiff is the registered owner and proprietor of the parcel of land L.R NO. NKUENE/TAITA/595 (hereinafter "the suit property").***

2. ***THAT on 11th February, 2016 the defendant/respondent herein purported to issue a "statutory notice" to the Plaintiff demanding repayment of monies in the sum of Kshs. 6,929,896.27 advanced to a third party Messrs. TUSAIDIANE INITIATIVE FOR RURAL DEVELOPMENT (hereinafter "TUSAIDIANE") 595. The said statutory notice was received by the Plaintiff vide registered postal mail on or around 23rd February, 2016.***

3. ***THAT yet again, even before the expiry of the said "statutory notice" dated 11th February, 2016 which under section 90(1) of the land Act, No. 6. of 2016 Laws of Kenya should not be less than three (3) months, the Plaintiff was shell shocked when the Defendant sent to the Plaintiff a second notice dated 14th April, 2016 and entitled "chargee's statutory notice to sell" purporting to demand repayment of Kshs. 7,251,010,61 failure to which it would exercise its statutory power of sale and sell the suit property to recover the amounts.***

4. ***THAT the said "Chargee statutory notice to sell" dated 14th April, 2016 was posted under registered postal mail 28th April, 2016, a whole fourteen (14) days of the date of the letter and was received by the Plaintiff vide registered postal mail on 4th June, 2016 long after the period of notice of forty (40) days specified therein had lapsed.***

5. ***THAT the said notices are therefore mala fides, misconceived, unlawful and contrary to inter alia sections 90 (1) and 96 (2) of the land Act. No. 6 of 2016 Laws of Kenya. The same cannot therefore be enforced by the Defendant/Respondent as the basis of exercising its statutory power of sale.***

6. ***THAT further the said notices are ex-facie defective, illegal, inequitable, unconscionable, misconceived, null and void ab initio in that:-***

a. ***The Defendant has to date not disclosed to the Plaintiff the amount of money advanced to TUSAIDIANE and the extent of his liability secured by the suit property.***

b. ***The Defendant had never formally served any notice of default of any periodic payments or any part thereof by TUSAIDIANE upon the plaintiff or at all.***

c. ***The Plaintiff is a guarantor and his liability arises once the borrower defaults which notice of default was never served upon the Plaintiff by the Defendant.***

d. ***The Defendant has never formally demanded the repayment of the alleged debt of Kshs. 6.929,896.27 or at all from the Plaintiff or at all.***

e. The Defendant has to date not furnished the Plaintiff with copies of the statement of account, letter of application for the banking facilities, letter of offer and other necessary correspondence and charge instrument to understand the justification for the monies being demanded despite numerous requests, Insistence and visits to the defendant's offices.

f. The "Chargee statutory notice to sell" notice dated 14th April, 2016 was sent to the Plaintiff even before the expiry of the "statutory notice" dated 11th February, 2016 had expired and was received by the Plaintiff vide registered postal mail on or around 4th June, 2016 long after the period of notice specified therein had lapsed.

g. The said statutory notices and the Defendant's actions are clearly meant to clog or fetter the Plaintiff's right of redemption of the suit property.

7. THAT the suit property is the Plaintiff's retirement home, matrimonial home and family land where the Plaintiff resides with his wife, children and grandchildren and was registered in the name of the Plaintiff to hold in trust for himself and the Plaintiff's family members.

(8) THAT the Plaintiff attaches profound sentimental and economic value into the suit property and if the same is sold by the Defendant, his family and the plaintiff shall be rendered destitute, landless or homeless as they have no other place to call home.

9. THAT unless the Defendant/Respondent is temporarily restrained from relying on the said statutory notices, the Plaintiff stands to suffer grievous prejudice. Indeed any sale based on the said statutory notices shall constitute a violation of the Plaintiff's constitutional right to property and in any event shall be illegal, irregular, null and void ab initio.

10. THAT the Plaintiff has a good prima facie case with high probability of success.

11. THAT the balance of convenience herein is in favour of the Plaintiff as the sale of one's property is a serious matter that deprives one of a right recognized in law and as such should not be allowed to proceed in doubtful circumstances as herein.

12. THAT the plaintiff has reasonable fear that his family and himself shall be greatly prejudiced and imminently shall suffer irreparable loss and damage that is incapable of recompense in damages and this suit will be rendered nugatory if this application is not allowed.

13. THAT there shall be on prejudice to the Defendant if the Injunctive Orders sought are granted as the suit property is charged in favour of the Defendant.

14. THAT it's only fair and just that this application be allowed to, inter alia, conserve the suit property by orders of injunction and preserve the prevailing status quo until this matter is heard and determined .

3. The application was heard exparte on 13/07/2016 and prayers 3 and 4 were granted. Interpartes hearing was fixed to take place on 25/07/2016. Although served with the application, the Defendant did not send a representative to Court. I find that the applicant's prayer that the application be allowed has merit.

4. In the Circumstances, **prayers 5 and 6 in the application are confirmed.**

5. **Costs shall be in the cause.**

6. **It is so ordered.**

DELIVERED IN OPEN COURT AT MERU THIS 25TH DAY OF JULY, 2016 IN THE

PRESENCE OF:-

CC: Daniel/Lilian

P.M. NJOROGE

JUDGE