

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CIVIL APPEAL 31 OF 2015

MICHAEL KINYUA NATHAN.....APPELLANT

VERSUS

KENYA INDUSTRIAL ESTATES LTD.....RESPONDENT

RULING

1. The applicant has applied for a temporary injunction to stop the respondent, its agents or auctioneers from selling by way of public auction the appellant's land reference No. Gaturi/Nembure/7990 pending the hearing and determination of this appeal. He has also sought an order in respect of costs of this application. His application is supported by the grounds on the face of the notice of motion and is anchored in his supporting affidavit.

2. In his grounds in support of the motion, the applicant has stated that he has lodged an arguable appeal against the order. He has also stated that the suit land is in danger of being sold by public auction. Finally, he has stated that if the land is sold this appeal will be rendered nugatory and is likely to suffer irreparable damage, which cannot be compensated by way of damages.

3. In his supporting affidavit the applicant has deponed that on 22nd October 2014 auctioneers advertised the sale of the suit land by public auction due to an alleged default of payment of a loan without being served with the mandatory statutory notices. He has further deponed that he immediately filed a suit against the respondent and an application dated 29th October 2014, in which he sought a temporary injunction against the respondent or its agent from selling the suit land. It is also his further affidavit evidence that his application was dismissed on 28th July 2015 by the lower court for lack of merit and the respondent was allowed to proceed to sell the suit land.

4. Furthermore, he has also deponed that he was aggrieved by the order which dismissed his application, from which he has now lodged this appeal. He has further deponed that he has a good appeal because he was not served with the mandatory statutory notices. Finally, the applicant has deponed that there is no evidence to support the allegation that he was served with the statutory mandatory notice and is likely to suffer irreparable damage, which cannot be compensated by way of damages, unless he is granted a temporary injunction.

5. The respondent has opposed his application in support of which he has filed a replying affidavit dated 25th August 2015, which contains 17 paragraphs. In her affidavit, the respondent has deponed that the loan advanced to the applicant which was in the sum of Kshs 300,000/-, was to be secured by land parcel No. Gaturi/Nembure/7990, as a result of which a charge was registered over this parcel of land. She further deponed that the applicant was to repay the loan in monthly instalments of Kshs 14,550/- for 24 months on every 20th day of the month starting from April 2013. Furthermore, she has deponed that the applicant defaulted in servicing the loan and as at 30th June 2014, there was an outstanding balance of Kshs 295,187.49/- with interest still accruing. She also deponed that following the applicant's default to repay the loan, they instructed a valuer who prepared evaluation report in respect of the suit property, after which they instructed auctioneers to sell the property.

6. In obedience to those instructions, the auctioneers placed a notice of public auction of the suit property in the Daily Nation newspaper of 6th October 2014, by which the applicant was deemed to have notice of the said auction. She has also deponed that non-compliance on the part of the applicant empowered the

respondent to exercise its statutory power of sale. She has finally deponed amongst other matters that the applicant does not have an arguable appeal and that he is aware of the consequences of not complying with the terms of the loan that was advanced to him.

7. I have considered the affidavit evidence of the parties, their written submissions and the authorities cited. I find the following to be the issues for determination. The first one is whether the applicant has made out a case for the grant of a temporary injunction pending the hearing of the this appeal. Secondly, whether or not the applicant stands to suffer irreparable damage if the temporary injunction is not granted. Thirdly, whether or not this appeal will be rendered nugatory. Fourthly, who should bear the costs of this application.

8. I find from the evidence and the applicable law that the applicant is entitled to the grant of a temporary injunction pending the hearing of this appeal. I further find that unless a temporary injunction is granted the applicant is likely to suffer irreparable damage which may not be compensated by damages. I further find that the intended appeal is arguable in view of his grounds of appeal as set out in the memorandum of appeal, which may be rendered nugatory unless a temporary injunction is granted. In the light of the foregoing, I find that the applicant is entitled to a temporary injunction in terms of prayers 2 and 3 of his notice of motion on condition he deposits in court a sum of Kshs 200,000/- within 45 days failing which this order will lapse.

9. The costs of this application will be costs in cause.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this 30th day of August **2016**

In the absence of Mr. Mugambi for the applicant and in the presence of Mr Njagi holding brief for Mr. Muriuki for the respondent

Court clerk Njue

J.M. BWONWONGA

JUDGE

30/08/2016