



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF AT ELDORET

ENVIRONMENT AND LAND CASE NO. 121 OF 2015

JAMES KIPRUTO LAGAT.....1ST PLAINTIFF

ELIZABETH JEBET CHERUTICH.....2ND PLAINTIFF

V E R S U S

FAMILY BANK LIMITED1ST DEFENDANT

JOGEDAH AUCTIONEERING SERVICES.....2ND DEFENDANT

R U L I N G

***James Kipruto Lagat* and *Elizabeth Jebet Cherutich* has come to court against Family Bank Limited and Jogedah Auctioneering Services for a temporary injunction restraining the defendants by themselves, their servants or their agents from selling or otherwise disposing off the plaintiff's land being Uasin Gishu/Kimumu/2516 until determination of the suit.**

The application is based on grounds that the Plaintiffs by themselves do not owe the 1st Defendant any sum of money or at all and that the purported sale by the Defendants is invalid, void and or illegal as the Plaintiffs have never at any time taken a loan directly from the 1st Defendant nor have they ever been notified previously of any claim by the 1st Defendant as required by Section 90 of the Land Act. Therefore the Plaintiff has a *prima facie* case with the likelihood of success.

The application is supported by the affidavit of James Kipruto Lagat who states that the 2nd Plaintiff is his wife and has duly authorized him to depone this affidavit and to file any document needed on her behalf. That sometimes in the year, 2010, a friend called David K. Tanui, a director of Oljorai Contractors Limited (herein the company) approached them with request to guarantee him for a loan which he was to acquire from the 1st Defendant amounting to Kshs.8,000,000/=. The plaintiff's decided to help their said friend by offering their land UASIN GISHU/KIMUMU/2516 to be charged alongside David K. Tanui's land parcel Number SERGOIT KOIWOPTAOI BLOCK 8/133 and 135. There had been no other transaction involving any borrowing between themselves and Family Bank Limited, the 1st Defendant neither had there been transaction or borrowing between themselves and the 1st Defendant.

He was informed by the said David K. Tanui of Oljorai Contractors Ltd, information he verily believed to be true that his company had been regularly servicing the loan as follows:-

1) In January, 2015 an amount of Kshs.50,000/= was deposited into Account Number 085000036486

II) In the month of February, 2015, Kshs.290,000/= was deposited to the account

III) In the month of March, 2015, Kshs.79,200/= was deposited in the loan account

IV) And in this month, Kshs.10,000/= has already been deposited in the loan account

The plaintiff insists that at no time since the execution of the charge had the 1st Defendant intimated to the plaintiffs that there was any problem with the operations of the loan account nor had the 1st defendant informed them what, if any efforts had been made to recover the amount from the borrower. The 1st time he and the 2nd Plaintiff became aware that there were problems with the loan was when they found a notification of sale. They had never been served with any mandatory statutory notice by the 1st Defendant to redeem their property as per law required. He had seen a postal address number box 752 TURBO, used by the 2nd Defendant. He used that address when he acquired the suit land and worked at the Agricultural Development Corporation (AFC) Turbo Office. If the 1st Defendant had posted the Mandatory Statutory Notice to the Turbo address, then that did not reach them and besides when they executed the charge, the subject herein in 2010, they did not use that address.

He also had not received any demand or other notice in respect of the said loan account prior to the receipt of the letter and notification of sale. That his attention was drawn by a friend to an advertisement on page 45 of the daily Nation of Monday 13th 2015. The said advertisement does not make any reference to the guarantee aforesaid. He verily believed that the sale of the property would be wrongful as they do not owe the 1st Defendant the sum of money claimed. The intended sale should also be illegal and void given that they were not served with the statutory 90 days notice.

The 1st Defendant filed a replying affidavit stating that the application is full of half truths and outright lies meant to purely mislead this Honourable Court into granting the orders sought in the application. It is true that the 1st Defendant advanced credit and Banking facilities to Oljorai Contractors Limited (***hereinafter the Borrower***) at the Borrowers and Plaintiffs' instance. The 1st Defendant advanced a loan facility to the Borrower and the Plaintiffs offered their property as security to guarantee the loan facility. The purpose of the charge, was to secure to the 1st defendant payment of the loan amount, costs and interests thereon and it was an express provision of the charge instrument that the applicants would repay the said principal sum together with interest thereon at rates stated therein, failure to which the security would be sold to realize the amount due.

Furthermore, according to clause number 15 of the charge, the Plaintiffs, as chargors, acknowledged the understanding of sections 74 and 79 of the Registered Land Act and further agreed that the 1st Defendant may exercise its statutory powers of sale. In that regard, he was advised by the 1st Defendant's advocates on record, which advise he verily believed to be true, that the Plaintiffs' argument that they do not directly owe the 1st Defendant any sum of money is inconsequential and misplaced. Pursuant to the foregoing the Plaintiffs provided their property, being Title Numer Uasin Gishu/Kimumu/2516 as security for the advancement of the facility by the 1st Defendant to the Borrower. (Hereto annexed is a copy of the Title Deed for TITLE NUMBER UASIN GISHU/KIMUMU/2516 and marked as 'BK 2'). The Plaintiffs willingly charged their property TITLE NUMBER UASIN GISHU/KIMUMU/2516 to the 1st Defendant for a banking facility advanced to the Borrower, which effectively made them chargors whilst the 1st Defendant became the chargee.

Upon being advanced the full amount of the facility applied for, the borrower defaulted in repaying severally the amount advanced and there is an amount due and owing. The Borrower had previously defaulted where upon he requested for a scheduling of the loan balance and the 1st Defendant indulged him and entered a form of understanding. Pursuant to the request, the 1st Defendant the Borrower and Chargor entered into a loan restructuring agreement. By letter dated 14/04/2014, the Borrower again requested for a rescheduling of its monthly repayment from 170,000/= to Kshs.100,000/= due to its diminishing ability, which request was again granted by the 1st Defendant. Despite this magnanimous manner and indulgence by the 1st Defendant, the Borrower still went ahead to default in its obligation of servicing the loan as required by the security documents. Further and without prejudice to the foregoing, clause 14 of the charge outlined modes of effective and proper service against the Plaintiffs, which modes

included leaving the notice or demand at the chargor last known postal address in Kenya, or one displayed on the charged property.

Vide letter dated 16/09/2014, the 1st Defendant made a formal demand to the borrower, requiring the immediate payment of Kshs.218,805/= being the amount in arrears and owing the suit property is registered under the Registered Land Act which requires that a statutory notice be served upon the Chargor prior to any sale of the security. Despite demand being made, the Borrower and the Plaintiffs failed, neglected and refused to make payments and continued being in arrears, whereupon the 1st Defendant sent a statutory notice by way of registered post and there is certificate of postage indicating that it was posted to P.O. Box 7781-30100, ELDORET, the chargors last known address as was required by law, and being the address supplied by the chargors and being the address on the charge documents. Pursuant thereto, the 1st Defendant instructed the 2nd Defendant to seize/repossess and sell the property in accordance with its statutory power of sale.

On 23/02/2015, the 2nd Defendant issued a Notice of Intention to sell the property the subject herein, which notice was sent to the Plaintiffs and copied to the Commissioner of Lands and David Kipchumba Tanui, Director of Oljorai Contractors Limited. On 25/02/2015, the 2nd Defendant served a Notification of Sale pursuant to Rule 15 (b) of the Auctioneers Rules 1997 upon the Plaintiffs through their son who acknowledged receipt of the same.

According to the defendant, the Plaintiffs in this cause have failed to disclose all the foregoing issues and he was advised by the 1st defendant's advocates on record which advice he verily belief to be true that such non disclosure of material facts is in itself fatal to any application for grant of injunctive relief.

He was advised by the 1st Defendant's advocates on record, which advise he verily believed to be true, that the Plaintiffs having agreed that they willingly charged their property, that repayment of the loan advanced having been defaulted, that the statutory right of sale of the 1st defendant having accrued and that due process thereto having been followed, there is no *prima facie* case with a probability of success that warrants issuance of an injunction.

The 1st Defendant stands to suffer irreparable harm if the charged property is not sold since the borrower has demonstrated inability to repay the loan and the Plaintiffs failure to redeem the charged property despite service of the necessary statutory and redemption notices intimating the 1st Defendant's intention to exercise its statutory accrued power of sale. It will be unfair and unjust for this Honourable Court to be an impediment against the realization of the 1st Defendant's statutorily recognized rights as outlined under section 96 of the Land Act.

The balance of convenience in the Plaintiffs' allegations in the application tilts against delivering the grant of the orders sought especially upon exposure of material facts that they failed to disclose to this Honourable Court. He had been advised by their counsel on record that there was no breach of procedure by either the auctioneer or the bank in terms of the exercise of the statutory power of sale over the charged property namely TITLE NO. UASIN GISHU/KIMUMU/2516. He is duly advised by the 1st Defendant's advocates on record which advice he verily believed that the Plaintiffs have approached the equitable jurisdiction of this Honourable Court and as such the Plaintiff outright lies, non disclosure of material facts and failure to carry out their obligations as chargors offends the Principles of equity that:-

a) *He who comes to equity must come with clean hands*

b) *He who comes to equity must do equity.*

Thus, the Court ought not entertain the application for grant of injunctive relief sought by the Plaintiff.

He prays that the Court dismisses the plaintiff's application with costs at its prejudicial and seeks an unfair exploit that contravenes rights of the 1st Defendant as outlined in law, and based on the above facts and the following:-

a) That an injunction cannot issue where there is a debt due, which is admitted, and a statutory notice has been served.

b) That damages, if any loss is proved, are an adequate remedy in case of any loss to be established.

(c) That the applicant has come to court with unclean hands by peddling falsehoods, seeking an equitable remedy while undeserving of the same.

The applicants filed a further affidavit sworn by Elizabeth Jebet Cheruich who states that she applied for and was issued with a postal address box number 7781, Eldoret by the Postal Corporation of Kenya in the year, 2006. She used the said postal address until the year 2011 when she realized that the same postal address had been given out to another person by the postal corporation because of delayed payments. That upon inquiry at the Postal Corporation of Kenya in Eldoret, she was given another postal address being her current address 942 which she still uses. She was therefore not able to get any letters or mail sent to her through the initial address of P.O. Box 7781, Eldoret from the year 2011 when the Box was licensed out to someone else.

That she applied for her current postal address box number 9426 in the year, 2012 and was given the same and was therefore unable to get any letters that were sent to her after the 2011 using postal address 7781, Eldoret. She requested her Advocate on record to seek confirmation from Postal Corporation of the particulars of when the post office box 7781 was given out but the said Corporation has not done so to date. That she swore this affidavit to confirm that she is no longer the user or owner of P.O. Box 7781, Eldoret and have not been able to receive mail through the said address since the year, 2011.

David K. Tanui was enjoined as the 3rd plaintiff and claimed that the 1st respondent had not served the applicant with the mandatory statutory notice of 90 days and that he has been servicing the loan. David Tanui further states that sometimes in the month of March, 2015, the 1st Defendant acting through 2nd defendant sought to auction the property of the Plaintiffs being land Parcel UASIN GISHU/KIMUMU.2516, it was then that the Plaintiffs filed this suit. The 1st Defendant on realizing her mistake in this suit had now instructed JOGEDAH AUCTIONEERING SERVICES to auction his property SERGOIT/KOWOPTAOI Block.8/133. He has never been served with 90 days statutory notice or at all. The Company had been diligently servicing the loan to date and he was surprised that the 1st Defendant would want to realize the security when the loan was being serviced.

This case had not proceeded and was at the preliminary stage. The subject matter for which the 1st Defendants wants to sale his property was the same as in this matter and they can safely be adjudicated together to save in Judicial time. He was seeking for a temporary order of stay of sale of his property SERGOIT/KOWOPTAOI Block. 8/133 pending the hearing and determination of the application. It would be needless to file another suit when this suit can safely be disposed off under this circumstances. A temporary injunction had been given in this matter on 27th of April, 2015 and extended to 30th September, 2015

The 1st Defendant filed a supplementary affidavit stating that the chargors provided their address as P.O. Box 7781-30100, Eldoret as their address in the charge instructions which they executed. The 1st Defendant sent demand notices and consequently issued a attaching notice of sale to the address provided by the Plaintiff and therefore the notices were sent to the plaintiff's last known address. The Plaintiffs did not notify the 1st defendant of any change of address. Therefore, the bank discharged its obligation by sending the notices to the last known address.

Mr. C.D. Nyamweya, learned counsel for the applicants submits that Mr Bernard Kiprotich has not annexed the Authority to swear the affidavit and therefore the affidavit should be struck out. Secondly, he submits that the plaintiff annexed a bundle of bank deposits slips which shows money deposited upto March, 2015 and continues paying upto date, the 1st Defendant has not responded to this deposits which means the 1st defendant is acting mischievously.

Thirdly, the Plaintiffs submit that whereas the Plaintiff provided their address as being 7781-30100, Eldoret, the said postal address was taken away from her without knowledge by the postal corporation and allocated to another person in 2011 and her new number is 9426, Eldoret.

Gumbo and Associates filed submissions whose *gravamen* is that the Plaintiffs have admitted that they owe money in the supporting affidavit of D. K. Tanui at Paragraph 14 as they admit to be in arrears in the loan in issue. According to Gumbo and Associates, where the loan is admitted and it is proved that the amount is due then injunction cannot be granted. The 1st defendant submits that the loan was secured by a charge executed by the Plaintiffs and therefore they are bound on the basis of the execution of the charge. On the issue of service, the 1st Defendant submits that the prerequisite notices were served on the address on the charge document provided by the Plaintiffs themselves. The Notices were just returned unclaimed. The 1st Defendant further submits that he is a reputable institution capable of paying damages. However, they argues that if injunction is issued it will prejudice the 1st defendant as the 1st defendant will not be able to pay the money due and owing. On balance of convenience, the 1st defendant argues that the injustice to be suffered by the defendant far outweighs that that would be suffered by the applicant if injunction is granted. On material non-disclosure, Defendant submits that the applicant failed to disclose the existence of charge document. Further, that the applicants failed to disclose to court that they owed money to the 1st Respondent.

On the issue of absence of authority given to Bernard Kiprotich to swear affidavit on behalf of the 1st Respondent, it is argued that the applicant has not cited any provision of law that requires the legal officer of the 1st Respondent to obtain authority from the 1st Respondent.

It is trite law set out out in the *locus classicus* case of GIELLA VS CASSMAN BROWN AND COMPANY LTD (1973) EA 358 that Injunctions are equitable remedies that are granted at the discretion of the court. The principles for granting such injunctions were laid down in the said celebrated case at page 360 as follows:-

“First, an applicant must show a *prima facie* case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience (E.A. INDUSTRIES -VS- TRUFOODS (1972) EA 420.”

I have considered the application dated 27/4/2015, the supporting affidavit, supplementary affidavits and further affidavits and do find that the Plaintiffs admit that they agreed to guarantee a loan of Kshs.8,000,000/= granted to David K. Tanui by offering their Land Parcel No. Uasin Gishu/Kimumu/2516 to be charged alongside David K. Tanui's Land Parcel No. Sergoit/Koiwoptaoi Block. 8/133 and 135. They did not know that Mr. David K. Tanui had problems in servicing the loan until they received a notification of sale of their property left at their home by the 2nd defendant. They claim not to have been served with the mandatory notice of 90 days. Plaintiffs also claim that the statutory notice of 90 days was sent to the wrong address being 7781 as it had been allocated to another person and that her new address was 942, Eldoret. The correct postal address number 942(6). On its part, the 1st respondent states that the Plaintiffs herein provided their address in the charge document as P. O. Box 7781-30100. Upon default, the 1st defendant sent the prerequisite notice to the address supplied in the charge. It was a district term of the charge instrument which the plaintiffs executed after that all prerequisite documentation and notices would be served on the plaintiff las known address.

I have seen the further affidavit of Elizabeth Jebet Cherutich sworn on 17/7/2015 and filed on 2/9/2015 and do find that the same is intended to mislead the court as there is no evidence either, that the applicants are the owners of the new address, or that the letter by C.D. Nyamweya & Co. Advocates was sent to the postmaster, Eldoret post office. There is no evidence of postage or acknowledgement of receipt. I will disregard the affidavit as of no evidential value as the statements are not supported by any annexure from the postmaster general. There is no dispute that the statutory notice was sent to the last known address of the applicants. The 1st defendant had no duty to investigate the affairs of the plaintiff to ascertain their purported new postal address, consequently the applicants knew that they had used the disputed postal

address in their charge and therefore they had a duty to notify the 1st defendant of the purported change of address.

Whether the Plaintiff owes or does not owe money to the 1st defendant, I have perused the affidavit of David K. Tanui, to however sworn on 2/9/2015 whether he states that he has been serving the loans but does not state how much he has paid so far as at the swearing of the affidavit. It is not the duty of the court to conduct an account. However, it is evident that there is an amount due from the application to the defendant which has not been paid. On the issue of absence of the authority by the 1st defendant's to its Legal officer to swear the replying affidavits, I do find that the applicant has not demonstrated that the same is necessary. Moreover, there is no demonstration that the applicants will suffer any prejudice in the absence of the said authority. From the foregoing, I do find that the plaintiffs have not proved that they have a prima facie case with a probability of success.

The burden of proof that the plaintiff is likely to suffer irreparable harm that cannot be compensated by way of damages lies on the Plaintiffs and not the defendant. The Plaintiffs have not provided any evidence of the irreparable harm that they are likely to suffer if injunction is not granted and that the defendant will be unable to compensate them in damages. I have no doubt that the 1st defendant is a reputable institution with a viable financial base and that is why it lent the 3rd Plaintiff the money owed. On balance of convenience, I do find that it lites towards the 1st defendant as the debt is likely to outstrip the loan and therefore the injustice to be suffered by the 1st defendant outweighs the injustice to be suffered by the Plaintiff. The upshot of the above is that the application is dismissed with costs.

DATED AND DELIVERED AT ELDORET THIS 19TH DAY OF AUGUST, 2016.

ANTONY OMBWAYO

JUDGE