



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI

CIVIL SUIT NO. 22 OF 2013

**PETER MAINA WAIHENYA.....1ST
PLAINTIFF/APPLICANT**

**KARATINA MARKET MALL LTD.....2ND
PLAINTIFF/APPLICANT**

VS

I.C.D.C.LTD.....1ST DEFENDANT/RESPONDENT

**JOSEPH MUNGAI GIKONYO T/A GARAM INVESTMENTS.....2ND
DEFENDANT/RESPONDENT**

RULING

The Plaintiffs Peter Maina Waihenya and Karatina Market Mall Ltd have come to court against Industrial Commercial Development Corporation and Joseph Mungai Kikonyo T/A Garam Investments, hereinafter referred to as Defendant/Respondents for orders that the Defendants/Respondents by themselves, their agents, assignees and, employees and/or anyone else working and/or claiming under or through them be barred by temporary injunction from proclaiming, publishing Notification of Sale and/or sell by public Auction or other wise wasting the Building and any other erectments on Plot No. Karatina/Town/Block 1/182 and/or all that Parcel of Land known as Karatina/Town/Block 1/182 until the final hearing and determination of the main suit.

The application is based on grounds that the Defendants/Respondents have unlawfully jointly colluded, connived and/or conspired to unlawfully proclaim and or publish a notification of sale by Public Auction of the building on Plot NO. KARATINA/TOWN/BLOCK1/182, which belongs to Plaintiffs/Applicants, an unlawful exercise since the building is leased to the 2nd Plaintiff and which lease has not yet expired and that the Plaintiffs are not parties to the transaction giving rise to the proclamation. The application is supported by the affidavit of Peter Maina Waihenya who states that he is the registered proprietor of land parcel Karatina/Township/Block 1/182 and a minority shareholder in a limited liability company known as Waihenya Chemists Company Ltd whose shareholding is set out as follows:-(a) *Peter Maina Waihenya 10* (b) *Joska Okello 500*(c) *Lydia Kagechi Waihenya 490*
TOTAL 1,000

On the 11th December 1990 the Ist Defendant herein lent the said company Waihenya Chemists Company Ltd the sum of Kshs 4.million and over the years the company made various payments to liquidate this loan and paid in excess of Kshs 3 million .That the said loan was secured by the company and additionally by way of guarantee by way of charge of his property LR KARATINA/TOWNSHIP BLOCK1/182. On or about 17th July 2010 he received a statutory three months notice issued by the Defendant threatening to sell his property. On 3rd August 2010 before the expiry of the above stated three

month period he received a Notification of Sale from Garam Auctioneers set for 27th September 2010. The Notification of Sale is premature and contradictory in material particulars as the statutory notice refers to only a sum of Kshs 17,697.82 as due whereas the Notification of Sale form the auctioneers refers to Kshs 17,696,436.94 as due.

The application is opposed by the defendants through Gathara Mahinda & Co. Advocates who filed grounds of opposition whose gist is that the application is Res-judicata and subjudice. He also argues in the grounds that the application has no basis as the principal borrower has an outstanding loan of Kshs 29,052,287.86 as at 31.12.2012 which remains due and owing to the 1st Respondent and continue to accrue interest and other professional fees. He states in the grounds that the tenancy agreement allegedly entered between 1st and 2nd Plaintiff was reached without prior written consent of the 1st Defendant.

The application is further opposed based on the replying affidavit of Peter Mugi Kuruga the debt recovery manager of the 1st Defendant who admits that the property title No. Karatina Town/Block 1/182 is registered in the name of the 1st Plaintiff. He also states that through a loan Agreement dated 11th December, 1998, Waihenya Chemists Limited, the principal debtor, sought a loan facility of Kshs, 4,000,000/ from the 1st defendant against the collateral security of Title No. Karatina Town/Block 1/182 registered in the name of Peter Maina Waihenya. The said loan advance was granted in keeping with terms of the loan agreement. That the 1st Plaintiff also granted personal guarantee to pay the loan amounting to 4,000,000/= advanced to the said company(the principal debtor) and also the collateral security of his Title No. Karatina Town/Block 1/182 to which a Legal Charge was created and registered in favour of the 1st respondent.

It was a term of clause 5 of the charge, that the 1st Plaintiff would not lease, agree to lease, accept surrender of the lease, charge, sell or otherwise part with the possession of the charged property without the written consent to do so from the 1st defendant. The principal borrower, Waihenya Chemists Limited, failed to service the loan regularly as had been expected of it. As a consequence of the continued default in the repayment of the loan, the 1st defendant/respondent was compelled to issue several demand notices which did not elicit any positive response from the borrower. The 1st respondent resorted to sell the charged property after continued default of payment of the loan, in exercises of its statutory power of sale as the same had crystallized and become exercisable contrary to the plaintiffs allegation that exercise was being carried out within the parameter of the law, for a lawful cause. The 1st respondent admits the property Title No. Karatina Town/Block 1/182 had been proclaimed and advertised for sale by Public Auction as stated in paragraph 5 of the supporting affidavit and adds that the Plaintiffs were all along well aware the property was up for sale.

On the issue of the lease, he states that the 1st plaintiff has never sought a consent to lease from the 1st respondent and therefore the I have looked at the loan agreement and established the Plaintiff has properly invoked the clauses in the agreement and has properly exercised the statutory power of sale.

The applicant has not demonstrated that any of his legal rights has been threatened by any unlawful action of the defendants to justice, this court granting an order of temporary injunction.

This court has no powers to renegotiate the agreement between the parties. The upshot of the above, is that applicant has established that he has a prima facie case with a likelihood of success.agreement to lease between the 1st and 2nd plaintiff or any purported extension is null and void and the 1st defendant is not bound by the same.He further states that it is not party to the lease transaction between the 1st and 2nd Plaintiff. Consequently the corporation does not owe any duty/obligation towards the 2nd Plaintiff and therefore would not be expected to perform any obligation under the lease agreement dated 31st December, 2003. The 2nd plaintiff claim against the 1st respondent is witch hunting and should not be allowed to lie. The issue of the 1st Respondent exercise of the statutory right of sale of the Title No. Karatina Town/Block 1/182 cannot be raised or challenged by the 1st Plaintiff in this suit, the same having been heard and determined through **Nairobi HCC No. 540 of 2010** and therefore is res judicata. The 1st plaintiff has enjoined himself in this suit with sheer intention to circumvent the orders dismissing this application for injunction given on 14 th October 2011. The 1st Plaintiff have no

liberty to file a fresh suit over the suit property against the 1st respondent while the Nairobi case HCC No. 540 of 2010 is still subsisting. Equally, the 2nd plaintiff having the prior knowledge of the existence of the said case should have sought leave to be enjoined in the said case instead of filing a fresh suit, to avoid multiplicity of suit and overriding orders.

The Plaintiffs submit that they have proved their case on a balance of probability required by law for the purposes of the application. I think there is no requirement to prove the case on a balance of probability to be granted injunctive orders as in **Giela -vs- Cassman Brown**. It was held that one must show a prima facie case with a probability of success. Moreover, that if the orders sought are not granted, one will suffer irreparable injury not capable of being compensated by damages. If in doubt the balance of convenience will be applied. The Plaintiffs/Applicants argue that the Waihenya Chemist Ltd obtained a lease from 1st Defendant/Respondent. The said Waihenya Chemist Ltd is associated with the 1st Plaintiff but the suit land does not belong to the Waihenya Chemist Ltd as it is owned absolutely by the 1st Plaintiff. The 1st Plaintiff has leased the suit parcel to the 2nd Plaintiff. The applicants correctly argue that upon incorporation of a company, it becomes a legal entity distinct from its members shareholder and directors. He refers to **Salomon -vs- Salomon (1897) AC22**.

Mr. Gathara Mahinda on his part argues that the alleged lease for 5 years also determined by 1st April 2014 has been overtaken by events. I agree with Mr. Mahinda that the lease having been determined by effluxion of time has been overtaken by events and I cannot say any more as even the issue of privity of contract only applies in respect of a contract that has not expired.

It appears that the 1st Respondent was not privy to the agreement between the Plaintiffs and 1st defendant therefore the principle of privity of contract applies as between the 2nd Plaintiff has no locus standi to institute proceedings against the Defendants. Moreover it was a term of the charge that the suit property which is the charged property was not to be subject to a lease, surrender of lease or sale without the written consent of the corporation.

This court also finds that the 1st Plaintiff used its property to guarantee the loan obtained by Waihenya Chemist Ltd and went ahead to charge the property as security.

The argument by the Plaintiffs that a company is a legal entity distinct from its members, shareholders or directors is valid, however in this case, the 1st Plaintiff guaranteed the company known as Waihenya Chemists Ltd and charged the suit property as the security in prospect of the loan hence the suit property is available for sale by the 1st Defendant in exercise of its statutory power to sale.

It was correctly submitted by both parties that the principles of granting injunctions were clearly spelt out in **Geila -vs- Cassman Brown 1973 EA-358**. Thus the party seeking the injunction must show that he has a prima facie case with a probability of success *inter-alia*. I have considered the application, the rival arguments of parties and do find that the applicant has not shown a prima facie case with a probability of success at the trial. The defendant is seeking to exercise a statutory power of sale which has arisen as the 1st Plaintiff guaranteed Waihenya Chemists Ltd who has defaulted to pay the loan. The 1st Plaintiff executed a personal guarantee on the 11.12.2998 to the effect that whenever the principal debtor (Waihenya Chemists Ltd) would default in paying of any installment on the principal sum, outstanding interest thereon and any other sums due and payable by him to the corporation (1st Defendant) for the space of fourteen days, the guarantor (1st Plaintiff) or either of them would within 7 days after demand in writing pay the 1st Defendant the amount of the principal sum for the time being, outstanding interest therein and other monies unpaid. The guarantor executed a charge on land title No. Karatina/Town/Block1/182 measuring 0.0186 hectares with developments thereon all valued at Kshs 6,000,000 by Industrial Commercial Development Corporation valuers.

I have looked at the loan agreement and established the Plaintiff has properly invoked the clauses in the agreement and has properly exercised the statutory power of sale.

The applicant has not demonstrated that any of his legal rights has been threatened by any unlawful action of the defendants to justice, this court granting an order of temporary injunction.

This court has no powers to renegotiate the agreement between the parties. The upshot of the above, is that applicant has not established that he has a prima facie case with a likelihood of success.

The upshot of the above is that the application is dismissed with costs.

SIGNED AND DATED AT ELDORET THISDAY OF..... 2015

OMBWAYO ANTONY

JUDGE

DELIVERED AND DATED AT NYERI THIS 27TH DAY OF JANUARY ,2015

LUCY WAITHAKA

JUDGE