



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS

CIVIL CASE NO. 60 OF 2014

KALKA FLOWERS LIMITED.....PLAINTIFF

VERSUS

EQUITY BANK LIMITED.....RESPONDENT

RULING

1. By way of Notice of Motion dated the 16th day of December, 2014, the Applicant/seeks orders that:-
 - i. The defendant, its agents, and servants be restrained from advertising, selling by public auction or by private treaty, the plaintiff's piece of land known as **Titles Nos. Kajiado/Kisaju/1679 and Kajiado/Kisaju 1743** pending hearing and determination of the suit herein.
2. The application is premised on grounds that:-
 - a. The defendant had initially allowed the plaintiff to sell the suit pieces of land in order to pay off the loan debt, but thereafter unreasonably interfered with the prospective purchasers, resulting with their withdrawal of interest to buy the property.
 - b. After the plaintiff was unable to sell the suit property, another bank, **Jamii Bora Bank Limited** has agreed to re-finance the plaintiff to enable the plaintiff liquidate the debt owed to the defendant, and to restructure its operations.
 - c. Despite the defendant's knowledge of the re-financing plan, the defendant has advertised the suit pieces of land for sale on 17th December, 2014;
 - d. If the plaintiff's pieces of land are sold by the defendant, the plaintiff will suffer irreparable loss and damage.
 - e. It is only fair and just that this Honourable Court do restrain the defendant from selling the plaintiff's pieces of land on 17th December, 2014, and allow the plaintiff to pay off the Defendant's loan debt, and restructure its operations, through the intended refinancing from **Jamii Bora Bank Limited**.
3. In support of the application **Arumugam Pillai Srithar** the Managing Director of the plaintiff deposed that; the plaintiff charged its pieces of land known as Title No. **Kajiado/Kisaju/1679 and Kajiado/Kisaju/1743 (subject property)** to secure repayment of a loan in the sum US\$ 4,244,970 to be

lent to the plaintiff by the defendant; only US\$ 3,900,000 was disbursed which settled a debt owed to **NIC Bank Limited** and some debts owed to the Plaintiff's creditors; no funds were disbursed for improvement to the Plaintiff of the plaintiff's Farm activities; the defendant proceeded to demand repayment of the loan debt; the plaintiff offered to sell the subject property but the defendant interfered with the intended sale; the defendant caused the subject property to be advertised for sale without any prior consultation with either the plaintiff or the prospective buyer. His (deponent) intervention resulted into cancellation of the advertisement; and as a result the intended purchaser stopped negotiations.

4. Following the collapse of the negotiation, she negotiated for alternative funding from **Jamii Bora Bank Limited** which agreed to take over the loan and re-finance the plaintiff's business; despite the fact that the intended transaction was within the knowledge of the defendant it advertised the subject property for sale on 17th December, 2014.

5. At the hearing of the application **Mr. Wanjama**, learned Counsel for the plaintiff submitted that the property was in danger of being sold hence the plaintiff's prayer for a discretionary relief of a temporary injunction. He stated that the money from **Jamii Bora Bank** was to be disbursed in one or two (2) months.

6. **Mr. Kiragu** Counsel for the respondent/defendant pointed out that paragraph 6 of the plaint was admission of the sum owing therefore there was no cause of action. The property having been charged became a chattel that was available for disposition through a statutory power of sale. The plaintiff would not suffer as damages would be adequate to compensate it. However, he went on to propose that the plaintiff pays a sum of Kshs. **150,000,000/=** by 31/12/2014 and the Auctioneers charges and the defendant would not exercise their statutory power of sale. Having not been given instructions by the defendant, **Mr. Wanjama** for the Applicant was non-committal.

7. I have considered pleadings on record, rival submissions by both counsels for the plaintiff and defendant and case law filed by the respondent/defendant.

8. Principles for granting an interlocutory injunction were set out in case of **Giella versus Cassman Brown and Company Limited [1973] E.A. 358** - where it was held that an applicant must show a *prima facie* case with a probability of success; or if the applicant might suffer irreparable injury and when the court is in doubt, it will decide the application on a balance of convenience. In the case of **Mrao Ltd versus First American Bank of Kenya Ltd & 2 others [2003] KLR 125** - it was held that :-

“A prima facie case in civil application includes but is not confined to a “genuine and arguable case”. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttable from the later.”

9. In the instant case as correctly pointed out by counsel for the respondent, in **paragraph 7** of the plaint it is admitted that the plaintiff defaulted in repayment of the loan. The property was advertised for sale. The intended sale was cancelled after the plaintiff got an offer from an intended purchaser to the property. According to the terms and conditions and consequences of default where the chargor does not comply with a notice given under **Section 90** of the **Land Act**, one of the options the chargee has is to sell the property charged. It has not been alleged that the defendant did not comply with the law. This means that the defendant rightly exercised his right to the statutory power of sale.

10. It has not been argued that the applicant has a *prima facie* case. The plaintiff is only pleading with the court to grant him time to pay off the loan and restructure their operations through the intended re-financing from **Jamii Bora Bank Limited**. This was not a term or condition of the agreement. The court in exercising its discretionary power to issue such an injunction must be satisfied that the applicant will likely succeed at trial. A consideration of affidavit evidence adduced clearly shows that the applicant cannot succeed. He has no arguable case. Consequently no *prima facie* case with a probability of success has been established. Consequently, the applicant was supposed to show that it will suffer an injury that cannot be compensated in damages if it succeeds. The claim emanates from a transaction where money

was disbursed. It has been demonstrated that the applicant intended to dispose of the property but there was “*some interference by the respondent*”. If the respondent exercises its right of statutory sale, it would still achieve the same result, which means that compensation in monetary terms will be adequate.

11. The balance of convenience tilts in favor of the respondent

12. From the foregoing the application sought must fail. It is therefore dismissed with costs to the respondent.

13. It is so ordered.

DATED, SIGNED and DELIVERED at MACHAKOS this 20TH day of JANUARY, 2015.

L.N. MUTENDE

JUDGE