



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO. 418 OF 2013

HEZRON MIYUNGO t/a

ROHEMIC PETROLEUM PRODUCTS SERVICES..... PLAINTIFF

VERSUS

K-REP BANK LIMITED DEFENDANT

RULING

1. The plaintiff is the registered proprietor of all those parcels of land known as **LR No. Kisii Municipality/Block I/553** and **LR No. Central Kitutu/DarajaMbili/3425** (hereinafter referred to as “**the plaintiff’s properties**”). On or about 19th October, 2011, the plaintiff applied to the defendant for a banking facility in the form of a loan amounting to Kshs. 10,000,000/= . The defendant approved the plaintiff’s application and offered to the plaintiff a term loan in the sum of Kshs. 10,000,000/= on terms and conditions that were contained in a letter dated 19th October 2011. The plaintiff accepted the terms and conditions on which the said loan was made available to him by the defendant on 21st October 2011. The agreement that was entered into between the plaintiff and the defendant that was contained in the said letter dated 19th October, 2011 provided among others that;

(i) The loan was to be repaid in 60 monthly instalments of ksh. 296,452/= after the expiry of 30 days from draw down and thereafter on the 5th day of every month until payment in full.

(ii) The loan was to be secured by the then already existing legal charges dated 19th October 2010 and 16th March 2011 over LR No. Kisii Municipality/Block I/553 and LR No. Central Kitutu/DarajaMbili/3425 (“the plaintiff’s properties”), respectively and a chattel’s mortgage over motor vehicle registration No. KAZ 342B.

(iii) The loan was also to be secured by new securities comprising of among others, a legal charge over LR No. Kisii Municipality/Block III/298 registered in the name of Francis Nyangau Monari (hereinafter referred to as “Monari’s property”) and a personal guarantee and indemnity by Francis Nyangau Monari

2. Following the perfection of the new securities aforesaid, the defendant advanced to the plaintiff the said loan amount of Kshs. 10,000,000/= on or about 31st December 2011. A sum of Kshs. 4,200,000/= from the said loan amount of Kshs. 10,000,000/= was to be utilized to offset an earlier loan that the plaintiff had taken from the defendant. The plaintiff repaid the loan in accordance with the terms that were agreed upon with the defendant for some time and then he fell into arrears. The defendant served the plaintiff with demand letters and ultimately a statutory notice dated 17th April 2013 demanding the

immediate payment of a sum of kshs. 554,882.09 then in arrears failure to which the defendant would proceed with the sale of the plaintiff's properties and Monari's property (hereinafter together referred to as **"the suit properties"**) after the expiry of 3 months from the date of service of the said notice to recover the entire outstanding loan amount which stood at Ksh.9,144,859.88 as at 17th April, 2013 . The plaintiff did not clear the loan arrears as had been demanded by the defendant. On or about 8th August 2013, the defendant through Garam Investment Auctioneers served the plaintiff with 45 days redemption notice to pay the entire outstanding loan amount in the sum of Kshs. 9,790,624.52 as at 7th August 2013 failure to which the plaintiff's properties would be sold by public auction on 18th October 2013 to recover the said amount. A similar notice was served upon Francis Nyangau Monari in respect of Monari's property.

3. It is this redemption notice and notification of sale of the plaintiff's properties and Monari's property that prompted the plaintiff to file this suit. In his plaint dated 14th October 2013, the plaintiff averred that upon receipt of the redemption notice and notification of sale aforesaid from the auctioneer, he requested the defendant to supply him with the loan account statement so that he may verify the correctness of the amount that was being demanded from him but the defendant refused to do so. The plaintiff averred that he had made payments to the defendant for over 1 ½ years towards the reduction of the loan amount and the defendant had also seized his motor vehicle registration No. KAZ 342, Isuzu Lorry that was the subject of the chattels mortgage that it sold to recover the loan amount that was outstanding. The plaintiff averred that it was not possible that he could still be indebted to the defendant in the sum of Kshs. 9,790,624.52 after the said payments that he had made towards the reduction of the loan and the proceeds from the sale of the said motor vehicle. The plaintiff averred that the defendant has an obligation to provide him with the statement of his loan account. The plaintiff sought judgment against the defendant for; an order to compel the defendant to provide him with the statement of his loan account and an injunction to restrain the defendant from selling, charging, transferring, leasing and/or in any manner dealing with the suit properties.

4. Together with the plaint, the plaintiff filed an application by way of Notice of Motion dated 14th October 2013 seeking a temporary injunction to restrain the defendant from selling, charging, transferring, leasing and/or in any manner dealing with the suit properties pending the hearing and determination of this suit. The plaintiff's application that was supported by the plaintiff's affidavit sworn on 14th October 2013 was brought on the same grounds that I have mentioned above. The plaintiff contended that according to his computation, he has paid to the defendant a sum of Kshs. 5,589,356/= towards the reduction of the loan amount that he received from the defendant. The plaintiff contended that the defendant has only given him a credit of Kshs. 209,376/= in his loan account. The plaintiff contended that there is a dispute over the amount due by the plaintiff to the defendant which dispute the defendant has refused to resolve amicably. The defendant has instead instructed Garam Investment Auctioneers to sell the suit properties by public auction to recover the disputed amount of Kshs. 9,790,624/= which it claims to be due from the defendant. The plaintiff stated that he is determined and ready to pay the amount lawfully due to the defendant on account of the loan that was advanced to him by the defendant. It is for this reason that he has sought the statement of his loan account so that he can verify the exact amount that is due and payable. He contended that if the defendant proceeds to sell the suit properties, he is bound to suffer loss and damage.

5. The plaintiff's application for injunction was opposed by the defendant who filed grounds of opposition and replying affidavit sworn by the defendant's Kisii Branch, manager one, Eric Matoke on 12th November, 2013. In response to the plaintiff's application, the defendant contended that the application has no merit since the plaintiff is truly indebted to the defendant in the sum of kshs. 9,790,624/=. The defendant contended that the plaintiff is guilty of non-disclosure of material facts. The defendant has claimed that the plaintiff failed to disclose to the court his loan account which shows clearly that he is indebted to the defendant in the sum of Kshs. 9,790,624/= as at 7th August, 2013. The defendant contended that the plaintiff has willfully neglected to repay the loan that was advanced to him by the defendant and with the accrual of interest, the loan may rise to a level that the plaintiff would not be able pay a situation that would expose the defendant to irreparable loss. The defendant contended that the plaintiff has not satisfied the conditions for granting interlocutory injunction.

6. When the plaintiff's application came up of hearing before me on 11th November 2013, I directed that the same be argued by way of written submissions. I gave each party thirty (30) days to file its submissions. The defendant filed its submissions on 18th February 2014. When the matter came up for mention on 25th February 2014 the plaintiff had not filed his written submissions. At the request of the plaintiff's advocate, the time for filing submissions was extended for him by 60 days. The matter was fixed for mention on 9th June 2014 to confirm if the plaintiff had filed his written submissions. When the matter came up on 9th June 2014, there was no appearance for the plaintiff. The plaintiff had also not filed his written submissions. The advocate for the defendant informed the court that the parties were negotiating with a view to settle the matter amicably. He asked for a further mention date. The court fixed the matter for further mention on 2nd December, 2014. On 2nd December, 2014, the plaintiff's advocates did not appear in court once again. The defendant's advocate who appeared for the mention informed the court that the negotiations had broken down and that the parties had not reached any settlement. He urged the court to proceed and make a ruling on the plaintiff's application for injunction. As at this date, the plaintiff had not put in his written submissions. The court had no alternative but to fix a date for ruling the non-filing of submissions by the plaintiff notwithstanding.

7. I have considered the plaintiff's application together with the affidavit filed in support thereof. I have also considered the grounds of opposition and replying affidavit filed by the defendant in opposition to the application. The law on interlocutory injunction is now well settled. As was stated in the case of **Giella -vs- Cassman Brown & Co. Ltd [1973] E. A 358**, an applicant for interlocutory injunction must show a prima facie case with a probability of success. He must also demonstrate that he will suffer irreparable injury which cannot be compensated in damages if the injunction is not granted. If the court is in doubt as to the above, the application would be determined on a balance of convenience. It is not in dispute that the defendant granted to the plaintiff a loan facility in the sum of Kshs. 10,000,000/= on terms and conditions that were agreed upon between the parties. It is also not in dispute that the said loan was secured by among others, legal charges over the suit properties.

8. It is also not in dispute that the plaintiff defaulted in his loan repayment to the defendant. It is also common ground that the defendant served upon the plaintiff several notices demanding payment before the suit properties were advertised for sale by the auctioneers. The plaintiff's only complaint is that there is a dispute as to the amount due by him to the defendant in that, whereas he has paid to the defendant in excess of Kshs. 5,500,000/=, the defendant has only given him a credit for Kshs. 209,376/= in his loan account. The contents of the defendant's affidavit in reply to the plaintiff's affidavit in support of the application herein leave no doubt that the plaintiff's contention has no basis. The statement of the plaintiff's loan account annexed to the defendant's replying affidavit shows clearly that the plaintiff was indebted to the defendant in the sum of kshs. 9,522,442.89/= as at 5th August 2013. The plaintiff has not challenged this statement of account. The plaintiff was granted leave on 11th November, 2013 to file a further affidavit in reply to the defendant's replying affidavit but failed to take advantage of the opportunity.

9. Due to the foregoing, I am not persuaded that the plaintiff has established a prima facie case with a probability of success against the defendant. As I have stated above, it is not disputed that the loan that was advanced to the plaintiff by the defendant remains outstanding. There is also no dispute that the Plaintiff has failed to repay the said loan after demand was made upon him to do so and that all requisite notices were served upon the plaintiff before the suit properties that were charged to the defendant to secure the said loan were put up for sale. The defendant cannot be faulted for exercising its rights under the charges that were executed in its favour by the plaintiff and Francis Nyangau Monari to secure the loan that was advanced to the plaintiff. Having reached the conclusion that the plaintiff has failed to establish a prima facie case against the defendant, it would be unnecessary for me to consider whether the plaintiff would suffer irreparable harm if the orders ought are not granted.

10. Due to the foregoing, I find no merit in the plaintiff's application dated 14th October 2013. The same is dismissed with costs to the defendant.

Delivered, signed and dated at KISII this 20th day of February, 2015.

S. OKONG'O

JUDGE

In the presence of:-

Mr. Bigogo h/b for Onsongo for the plaintiff

N/A for the defendant

Mr. Mobisa Court Clerk

S. OKONG'O

JUDGE