



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND COURT
ELC. CASE NO. 242 OF 2014
GEORGE KAMANDE WAINAINA.....PLAINTIFF
VERSUS
BANK OF BARODA (K) LIMITED.....1ST DEFENDANT
SPORTLIGHT INTERCEPTS KENYA LIMITED.....2ND DEFENDANT

RULING

Coming up before me for determination is the Notice of Motion dated 5th March 2014 in which the Plaintiff/Applicant seeks for orders of temporary injunction to be issued restraining the Defendants/Respondents from advertising, selling by public auction, trespassing into or otherwise transferring or dealing with the property known as L.R. No. Makuyu/Kimorori/Block 111/4055 (hereinafter referred to as the “suit property”) pending the hearing and determination of this Application and suit.

The Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of the Plaintiff, George Kamande Wainaina, sworn on 5th March 2014 in which he averred that he is the registered proprietor of the suit property which he charged in favour of the 1st Defendant/Respondent for a loan facility of Kshs. 22 million on 11th September 2011 and a further charge for an additional loan facility of Kshs. 6 million on 2nd February 2012 all adding to a principal sum of Kshs. 28 million. He averred further that the suit property is currently under construction of a commercial building. He further confirmed that he has been making payments to the 1st Defendant/Respondent towards the settlement of the loan facilities as due and owing from the date of advancement of the loan facilities up until the year 2013 when he experienced financial constraints and ill health. He further averred that he had on various occasions approached the 1st Defendant/Respondent to discuss proposals of payment which were not considered leading to the 1st Defendant/Respondent instructing the 2nd Defendant/Respondent to issue a Notification of Sale by Public Auction. He stated further that he was issued with a Statutory Notice by the Defendants/Respondents indicating that the sale of the suit property is scheduled for 28th March 2014. He further averred that the 1st Defendant/Respondent erred by instructing the 2nd Defendant/Respondent to issue an Auctioneer’s Notification of Sale before issuing him with a 90 day Statutory Notice under **section 90** of the **Land Act, No. 6 of 2012** was unconstitutional and illegal and further that the Statutory Notice issued to him was not in compliance with the requirements of **section 90(2)(b) of the Land Act**. He also stated that the suit property was not valued in accordance with

section 97(1) and (2) of the Land Act prior to purporting to exercise its power of sale. He further mentioned that the suit property is ancestral land and holds great value to the entire family.

The Application is contested. The 1st Defendant/Respondent filed its Replying Affidavit sworn by Arya Prakash Das on 17th March 2014 in which he averred that he is the Manager in the 1st Defendant/Respondent. He further averred that it is true that the 1st Defendant advanced to the Plaintiff/Applicant a loan facility of the sum of Kshs. 28 million against which the Plaintiff charged the suit property in favour of the 1st Defendant. He further averred that the Plaintiff/Applicant defaulted and or refused to service the aforementioned facility as agreed prompting the 1st Defendant to declare the accounts in respect of the facility as non-performing on 1st March 2013. He further averred that on that date, the sums due on the respective accounts were Kshs. 22,991,707.98 and Kshs. 6,477,521/-. He further averred that the 1st Defendant has been willing to accommodate the Plaintiff/Applicant whereupon the Plaintiff/Applicant failed to honour an agreement to pay the sum of Kshs. 3million on or before 31st May 2013 and a similar amount on or before 30th June 2013. He further averred that this was after serving upon the Plaintiff/Applicant with a Statutory Demand Notice dated 8th April 2013. He further averred that subsequently, correspondence was exchanged between the 1st Defendant and the Plaintiff which culminated in the Plaintiff giving the 1st Defendant cheques for Kshs. 3, 350,000/- towards repayment of accrued interest all of which were dishonoured. He further averred that as a result, the 1st Defendant sent to the Plaintiff/Applicant a fresh Statutory Demand Notice pursuant to section 90 of the Land Act calling for the outstanding sums. He further averred that in light of the foregoing, there is no law that would compel the 1st Defendant to accept any repayment proposal if the same is not feasible in the 1st Defendant's evaluation. He confirmed that contrary to the Plaintiff's averments, the 1st Defendant did serve upon the Plaintiff/Applicant the Statutory Notice of Intention to Sell dated 21st November 2013. He further added that the 1st Defendant also commissioned a valuation of the suit property as provided for under **section 97(1) and (2) of the Land Act**.

The issue that I am called upon to determine is whether or not to grant the Plaintiff/Applicant the order of temporary injunction which he seeks. In deciding whether or not to grant the temporary injunction, I wish to refer to and rely on the precedent set out in the case of **GIELLA versus CASSMAN BROWN (1973) EA 358** in which the conditions for the grant of an interlocutory injunction were settled as follows:

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally 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.”

Has the Plaintiff made out a prima facie case with a probability of success? In the case of **MRAO versus FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS (2003) KLR 125**, a prima facie case was described as follows:

“a prima facie case in a 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 rebuttal from the latter.”

This seems to me to be a pretty straightforward matter for determination. The Plaintiff/Applicant concedes to having received loan facilities from the 1st Defendant amounting to the sum of Kshs. 28 million. The Plaintiff/Applicant also admits to having fallen into financial constraints and has failed to service the loan facilities as required. On its part, the 1st Defendant/Respondent has stated that it has been willing to accommodate the Plaintiff/Applicant to settle the outstanding but that the Plaintiff/Applicant has failed to honour its repayment proposals. The Plaintiff/Applicant has averred that the 1st Defendant

has failed to follow the laid down legal provisions specifically **section 90** and **97(1) and (2)** of the Land Act in its effort to exercise its statutory power of sale of the suit. However, I believe the 1st Defendant/Respondent adequately and conclusively demonstrated that it did in fact send to the Plaintiff the statutory notification of its intention to sell the suit property as required in section 90 of the Land Act and further that it commissioned a valuation of the suit property to be carried out as required in **section 97(1) and (2) of the Land Act**. So far as I can tell, the Plaintiff/Applicant's claim is therefore baseless. I therefore find that the Plaintiff/Applicant has not succeeded to show that it has a genuine and arguable case or a prima facie case with high chances of success at the main trial.

Since the Plaintiff has failed to prove the first ground in the grounds set down in the celebrated case of **Giella versus Cassman Brown**, this Honourable Court need not venture into the other grounds. This position was upheld in the Court of Appeal case of **Kenya Commercial Finance Co. Ltd versus Afraha Education Society (2001) 1 EA 86** as follows:

“The sequence of steps to be followed in the enquiry into whether to grant an interlocutory injunction is ... sequential so that the second condition can only be addressed if the first one is satisfied...”

In light of the foregoing, I hereby dismiss this Application with costs to the Defendants.

DELIVERED AND SIGNED IN NAIROBI THIS 10TH DAY OF APRIL 2015.

MARY M. GITUMBI

JUDGE