



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITALE
CIVIL SUIT NO. 19 OF 2012

JAMES MUDASIA..... PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LTD..... 1ST DEFENDANT

PETER MADHENDA MWAKISAGHU..... 2ND DEFENDANT

PAMELA KAVAJI MAJANGA..... 3RD DEFENDANT

R U L I N G

1. The plaintiff, **James Mudasia**, is a resident of Namanjalala-Kwanza in the County of Trans-Nzoia. Vide the plaint dated 20th February, 2012, he pleaded that in the month on November, 2007, his niece, **Pamela Kavaji Najanga**, who is the third defendant herein requested him to use his title-deed for land parcel **No. Kwanza/Namanjalaa/Block 4/201**, as security to secure a loan facility from the first defendant **Kenya Commercial Bank Ltd**, for purposes of expanding a joint business empire with the second defendant, **Peter Madhenda Mwakisaghu**.

2. Both the second and third defendants promised to clear the loan and return to him (plaintiff) the title-deed within six (6) months from November, 2007 but upon expiry of the said period they informed him that the process of releasing the title-deed would take sometime. He was thereafter on the 13th December, 2011, served with a forty-five (45) days redemption notice which was issued by the first defendant to the second and third defendants requiring them to pay the sum of Kshs.2,990,201/79, failing which the aforementioned parcel of land would be sold by public auction.

3. The plaintiff averred that none of the three defendants notified him of the failure by the second and third defendants to service the loan secured on his parcel of land and that the notice of redemption was an ambush intended to unjustly enrich the second and third defendants. He contended that the first defendant was wholly negligent in failing to notify him in advance by way of notices of the second and third defendants' failure to service the loan facility. He also contended that the second and third defendants acted fraudulently by "inter-alia" misleading him and colluding with the employees of the first defendant in ensuring that necessary notices were withheld from him.

4. The plaintiff further contended that the intended disposal of the material parcel of land measuring 2.136 Hectares is unlawful and prays for such a declaration and a permanent injunction restraining the first defendant by itself, its servants/agents or otherwise from advertising for sale, disposing off, transferring or in any other manner interfering with the said title. He also prays for a mandatory injunction compelling the second and third defendants to pay the loan secured on his property and release the title-deed to him and/or withdraw his said property as security.

5. There was filed contemporaneously with the plaint, a notice of motion dated 20th February, 2012, in which the plaintiff seeks temporary injunction orders to restrain the first defendant by itself, its servants/agents or otherwise from advertising for sale, disposing off by public action or private treaty or in any other manner interfering with the plaintiff's title deed No. Kwanza/Namanjalala/Block 4/201, pending the hearing and determination of this suit.

The grounds in support of the motion are in the body of the notice and are further supported by the averments contained in the supporting affidavit dated 20th February, 2012, deponed by the plaintiff.

6. The motion is opposed on the basis of the facts contained in a replying affidavit dated 22nd October, 2012, deponed by the first defendant's Credit Support Manager, **David Mutuike**, who averred that the first defendant offered to the second and third defendants a credit facility of Kshs.2,325,000/= in the form of a guarantee in favour of Total (K) Ltd to enable them use personal cheque, to purchase petrol and petroleum related products from Total (K) Ltd which facility was granted subject "inter-alia" to terms and conditions including legal charges over three parcels of land including the material parcel of land belonging to the plaintiff.

7. That, the offer was accepted by the second and third defendants and the credit facility was thus secured by the charge over the material parcel of land. The plaintiff executed both the Charge and the Deed of Guarantee and Indemnity in accordance with the terms and conditions set down by the first defendant for the grant of the financial facility to the borrowers but on the 30th March, 2010, Total (K) Ltd wrote to the first defendant recalling the bank guarantee and demanding the immediate payment of the sum of Kshs.2,136,324/75 as being the amount owed by the second and third defendants under the said guarantee. Thereafter, on the 11th May, 2010, the first defendant advised the second and third defendants that the subject guarantee had been enforced by Total (K) Ltd due to their failure to settle their account for petroleum products supplied to them as a result of which that account was debited on the 22nd April, 2010, and had been overdrawn to the tune of Kshs.2,152,140/49.

8. The first defendant's Credit Support Manager went on to aver that a demand for full payment of the amount above-mentioned was made to the second and third defendants failing which legal action would be instituted against them. The necessary letter was copied to the plaintiff. That, on the 24th May, 2010, the second and third defendants wrote to the first defendant acknowledging that sum of Kshs.2,152,410/49 which had been overdrawn on their bank account against the bank guarantee. They then proposed to pay the overdrawn amounts by monthly installment of Kshs.50,000/= but they failed to do so as promised. That, on the 18th August, 2011, the first defendant issued a statutory notice to the plaintiff of its intention to sell his charged property, which notice was copied to the borrowers and on the 8th December, 2011, the first defendant wrote to Messrs Igare Auctioneers instructing them to serve upon the plaintiff the requisite redemption notices and/or notifications of sale with a view to realizing the subject property, which notices were served on 13th December, 2012.

9. It is the first defendant's contention that by virtue of the charge over the subject property it acquired a valid and legal interest over the subject property as charge there of for purposes of realizing the security under the charge. That the plaintiff was served with all the requisite notices to enable the first defendant to properly and lawfully exercise its statutory power of sale and as such the intended sale of the subject property is proper, procedural and lawful.

10. The Notice of Motion was argued by way of written submissions which were duly filed herein by both the plaintiff/applicant and the first defendant/respondent and have been duly considered by this court in the light of the supporting grounds and those in opposition to the application. **Order 40 Rules (1) and (2) of the CPR**, provides for instances in which the equitable remedy of temporary injunction may be granted. These include where the property in dispute is a suit property in danger of being wasted, damaged and alienated by any party to the suit or wrongfully sold in execution of a decree.

11. Herein, the suit property is in danger of being disposed off by the first defendant in exercise of its statutory power of sale arising from a legal charge executed over the property by the plaintiff together with the Deed of Guarantee and Indemnity dated 15th April, 2008 and 10th January, 2009, respectively.

The question is whether a temporary injunction should issue restraining the first defendant from exercising its statutory power of sale by public auction of the suit property.

Basically, the principles for grant of a temporary injunction were set out in the favour and still relevant case of **Giella -vs- Camoran Bworn & Co. Ltd (1973 EA 358)**.

12. It was therein stated that 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 damage. Thirdly, if the court is in doubt, it will decide on application on the balance of convenience.

A prima facie case would be established where the evidential material available to the court at the hearing of the application for a temporary injunction discloses that the applicant has real prospect of succeeding in his claim for a permanent injunction at the main trial. The court must thus be satisfied that the claim is not frivolous or vexatious, that is to say, that there is a serious question to be tried (see, **American Cyanamid -vs- Alnico Ltd (1975) AC 396**).

13. Herein, it is evident that the plaintiff freely accepted to have the suit property used as security to enable the second and third defendants access credit facilities from the first defendant. A charge was thereafter created over the property in favour of the first defendant which thereby acquired an interest in the property.

The first defendant was, notably, not privy to the agreement and/or promises made between the plaintiff and the second and third defendants. It could not therefore be roped into such agreements and promises to prevent it from exercising its statutory power of sale derived from the charge.

14. Indeed, the plaintiff does not dispute the first defendant's right to exercise its power of sale under the charge but he appears in this application to be pleading for mercy and understanding of the court for having been misled by the second and third defendants.

The mercy of the court would not be forthcoming as the law does not provide for the grant of an injunction on the moral principles of mercy.

15. Although it was within the first defendant's right to exercise its statutory powers of sale, it was obligated to do so in a proper and fair manner and in accordance with the terms and conditions of the charge and the accompanying Deed of Guarantee and Identity executed between itself and the plaintiff. It was admitted by the plaintiff that the first defendant's intention to exercise its power of sale was communicated to him through service upon him of the necessary statutory notices. There was first the statutory notice dated 18th May, 2011, and later the redemption notice dated 13th December, 2011.

16. In the statutory notice the demand was made to the plaintiff and two other persons and was for the sum of Kshs.2,929,413/45 cts. In the redemption notice the demand was made to the plaintiff alone for the Kshs.2,990,201/79. However, the charge together with the Deed of Guarantee and Indemnity were for the sum of Kshs.515,000/= thereby indicating that the notices served upon the plaintiff did not accord with the two instruments aforementioned such that the plaintiff was being called upon to pay a high amount of over Ksh. Two (2) million yet his guarantee was for Kshs.515,000/=.

17. The demand by the first defendant for a higher amount other than that guaranteed by the plaintiff would mean that the notices issued by the first defendant in the attempt to exercise its statutory power of sale were faulty or invalid unless of course an explanation is given to show otherwise. Such an explanation of such a serious issue can only be given at a full trial of the suit.

18. However, in recognition of the first defendant's statutory rights and the fact that the plaintiff voluntarily accepted to guarantee the repayment of the credit facility extended by the first defendant to the second and third defendant, it would be prudent, fair and just for this court exercise its discretion by granting a temporary injunction limited to such time that the first defendant shall issue a just and lawful

statutory notice and by extension a just and lawful redemption notice (see, **National Bank of Kenya Ltd -vs- Shimmers Plaza Ltd [2009] eKLR**)

The application is therefore granted in terms of prayer (2) but to the extent herein above stated i.e. upon such time that lawful just notices shall issue. The plaintiff shall have the costs of this application.

J.R. KARANJA

JUDGE

28/5/2015

(Read and signed this 28th day of May, 2015)

Holding brief for M. Kibele for 1st defendant/respondent.