



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**ENVIRONMENT AND LAND CASE NO. 299 OF 2014**

**BELCOM AGENCIES LIMITED ..... 1<sup>ST</sup> PLAINTIFF**

**ABEL MORANGA ONGWACHO ..... 2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**ECOBANK KENYA LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**ONESMUS MACHARIA T/A WATTS AUCTION ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The plaintiffs brought this suit against the defendants on 11<sup>th</sup> August 2014 seeking; a declaration that the intended sale of all those parcels of land known as LR Nos. Kisii Municipality/Block I/562, Kisii Municipality /Block I/563, Kisii Municipality/Block I/566 and Kisii Municipality/Block I/567 (hereinafter together referred to as “the suit properties”) is illegal, irregular, being conducted in bad faith and as such null and void and, a permanent injunction to restrain the defendants from disposing off by public auction or otherwise, the suit properties or interfering in any way howsoever, with the plaintiffs quiet and lawful use, occupation and ownership of the said properties.
2. In the plaint dated 5<sup>th</sup> August 2014, the plaintiffs averred that the 1<sup>st</sup> defendant had advanced to the 1<sup>st</sup> plaintiff a term loan in the sum of kshs. 7,000,000/=in the year 2009 which was secured by a charge over the suit properties which are registered in the name of the 2<sup>nd</sup> plaintiff. The plaintiffs averred further that the said loan was made available to the 1<sup>st</sup> plaintiff on terms and conditions that were contained in the letter of offer and the instrument of charge that was executed by the 2<sup>nd</sup> defendant over the suit properties to secure the same. The plaintiffs averred that they repaid the loan in accordance with the agreement reached with the 1<sup>st</sup> defendant save on occasions when they were unable to make payment due to factors beyond their control. The plaintiffs averred that inspite of the foregoing, the defendants had put up the suit properties for sale by public auction, an action which is unlawful and has been taken in bad faith.
3. The plaintiffs averred that the 1<sup>st</sup> defendant did not serve them with a statutory notice before putting up the suit properties for sale and no valuation had been carried out on the suit properties for the purposes of the intended sale. The plaintiffs averred further that through the intended auction the 1<sup>st</sup> defendant seeks to recover kshs. 63,151,229/= against a term loan of kshs. 7,000,000/= that it advanced to the 1<sup>st</sup> defendant an amount which is not due by the plaintiffs and which is also not secured by a charge over the suit properties. The plaintiffs have averred further

- that the 2<sup>nd</sup> defendant has neither served the plaintiffs with the necessary notices under the Auctioneers Act nor advertised the suit properties for sale. The plaintiffs averred further that the said sum of kshs. 63,151,229/= which the 1<sup>st</sup> defendant seeks to recover through the auctioning of the suit properties is the subject of another case namely, Kisii HCCC No. 255 of 2011 in which the 1<sup>st</sup> defendant is seeking the recovery of the same amount.
4. Together with the plaint, the plaintiffs brought an application by way of Notice of Motion dated 5<sup>th</sup> August 2014 under certificate of urgency seeking the following prayers:-
    - i. **That this application be certified urgent and heard ex parte in the first instance.**
    - ii. **That pending the hearing and determination of this application, there be an order of temporary injunction restraining the defendants whether by themselves, their agents, servants and such other persons acting or claiming through them, from selling, alienating, disposing and/or in any other way interfering with the plaintiff's quiet use and occupation of the suit property herein designated as Kisii Municipality/Block I/562, Kisii Municipality Block I/563, Kisii Municipality/Block I/566 and Kisii Municipality/Block I/567.**
    - iii. **That pending the hearing and final determination of this suit, there be an order of permanent injunction restraining the defendants whether by themselves, their agents, servants and such other persons acting or claiming through them, from selling, alienating, disposing and/or in any other way interfering with the 1<sup>st</sup> plaintiff quiet use and occupation of the suit property herein designated as Kisii Municipality/Block I/562, Kisii Municipality Block I/563, Kisii Municipality/Block I/566 and Kisii Municipality/Block I/567.**
    - iv. **That the costs of this application be provided for.**

The plaintiffs' application which was supported by the affidavit of the 1<sup>st</sup> plaintiff was brought on the grounds that the defendants had put up the suit properties for sale without serving the plaintiffs with the requisite notices and that the 1<sup>st</sup> defendant sought to recover an amount that was not secured by the charge over the suit properties and which amount is the subject of separate proceedings between the parties.

5. The plaintiffs contended that the intended sale is unlawful, irregular and premature and that they would suffer irreparable injury if the injunction is not granted. The plaintiffs contended also that the 1<sup>st</sup> defendant had levied unlawful interest on the 1<sup>st</sup> plaintiff's accounts thereby inflating the outstanding amount payable. The 1<sup>st</sup> plaintiff annexed to his affidavit in support of the application, a copy of the letter of offer of the loan of kshs. 7,000,000/= dated 28<sup>th</sup> August 2009, a copy of the instrument of charge dated 28<sup>th</sup> October 2009, a copy of statement of account No. CL-15-40000056 dated 22<sup>nd</sup> September 2010, a copy of a report dated 28<sup>th</sup> July 2014 by interest rates advisory centre, a copy of a letter dated 11<sup>th</sup> March 2014 by the firm of Nyachae & Ashitiva Advocates, a copy of notification of sale dated 23<sup>rd</sup> June 2014, a copy of the 45 days redemption notice dated 23<sup>rd</sup> June 2014 and copies of pleadings in Kisii HCCC No. 255 of 2011, Ecobank Kenya Ltd –vs- Belcom Agencies Ltd & Another.
6. The plaintiffs' application dated 5<sup>th</sup> August 2014 came up for hearing ex parte on 11<sup>th</sup> August 2014 when the same was certified as urgent and prayer 2 thereof granted conditionally on an interim basis. The condition that was imposed by the court was that the plaintiffs were to deposit with the 1<sup>st</sup> defendant a sum of kshs. 1,500,000/= as a security for the amount that was due by the plaintiffs to the 1<sup>st</sup> defendant within 30 days of the order. The plaintiffs were not satisfied with this condition upon which they were granted an interim temporary injunction. They did not therefore comply with the said condition within the time that was prescribed by the court. Instead, the plaintiffs' filed an application dated 22<sup>nd</sup> August 2014 on 24<sup>th</sup> August 2014 seeking to set aside the said condition on the grounds among others that the same was unfair, punitive and unwarranted. The plaintiffs' two applications; one for a temporary injunction and the other for setting aside the condition on which the interim injunction was granted were opposed by the defendants through separate replying affidavits that were both sworn by the 1<sup>st</sup> defendant's legal officer, Jack Kimathi on 3<sup>rd</sup> September 2014 and filed in court on 4<sup>th</sup> September 2014.

7. The two applications came up for hearing on 16<sup>th</sup> October 2014 when the advocates for the parties informed the court that the parties were engaged in without prejudice negotiations with a view to settle the matter out of court. In the circumstances, the said applications were adjourned to give the parties time to negotiate. All went quiet until 8<sup>th</sup> April 2015 when the plaintiffs resurfaced with yet another application for injunction dated 7<sup>th</sup> April 2015. This is the application which is the subject of this ruling. In the application, the plaintiffs sought the following orders:-
- i. **That this application be certified urgent and heard ex parte in the first instance.**
  - ii. **That pending the hearing and determination of this application, there be an order of temporary injunction restraining the defendants whether by themselves, their agents, servants and such other persons acting or claiming through them, from selling, alienating, disposing and/or in any other way interfering with the plaintiff's quiet use and occupation of the suit property herein designated as Kisii Municipality/Block I/562, Kisii Municipality Block I/563, Kisii Municipality/Block I/566 and Kisii Municipality/Block I/567.**
  - iii. **That pending the hearing and final determination of the applications dated 5<sup>th</sup> August 2014 and 22<sup>nd</sup> August 2014, hitherto filed by the plaintiff applicant but pending prosecutions, pursuant to the court's direction given on 16<sup>th</sup> October 2014, there be an order of permanent injunction restraining the defendants whether by themselves, their agents, servants and such other persons acting or claiming through them, from selling, alienating, disposing and/or any other way interfering with the 1<sup>st</sup> plaintiff's quiet use and occupation of the suit property herein designated as Kisii Municipality/Block I/562, Kisii Municipality Block I/563, Kisii Municipality/Block I/566 and Kisii Municipality/Block I/567.**
  - iv. **That the costs of this application be provided for.**
8. This latest application was brought on the grounds that, the defendants had withdrawn the notification of sale that they had earlier served upon the plaintiffs that prompted the filing of this suit which amounted to an admission that the said notification of sale was unlawful. The plaintiffs have contended that the defendants having admitted that the notification of sale aforesaid was unlawful; the plaintiffs' application dated 5<sup>th</sup> August 2014 is for granting. The plaintiffs have contended that while the said application dated 5<sup>th</sup> August 2014 and the subsequent one dated 22<sup>nd</sup> August 2014 that was filed to contest the condition that was imposed by the court when granting an interim temporary injunction are still pending hearing on merit, the defendants have yet again served the plaintiffs with fresh notification of sale dated 9<sup>th</sup> February 2015 and proceeded to advertise the suit properties for sale. The plaintiffs have contended that the service of fresh notification of sale upon them and advertising of the suit properties for sale have been done irregularly and amounts to an abuse of the process of the court. The plaintiffs have contended that although the court had given the parties time to negotiate, the plaintiffs did not put any meaningful settlement proposal on the table. Instead, they have resorted to selling the suit properties while the plaintiffs' two applications which are challenging the intended sale is still pending.
9. The plaintiffs have contended that it would only be fair in the circumstances for the intended sale to be stopped pending the hearing and determination of the plaintiffs pending applications. In his affidavit sworn on 7<sup>th</sup> April 2015 in support of the application, the 2<sup>nd</sup> plaintiff reiterated what I have set out hereinabove. The 2<sup>nd</sup> defendant stated that the defendants' advocates on record notified him through a letter dated 23<sup>rd</sup> September 2014 that the defendants had decided to withdraw the notification of sale dated 23<sup>rd</sup> June, 2014 that was served upon him earlier a move that he interpreted to mean that the defendants had acknowledged the illegality of the said notification of sale and that they had decided to concede to the claim herein.
10. The 2<sup>nd</sup> plaintiff has contended further that during the mention of the plaintiffs pending applications on 16<sup>th</sup> October 2014, the defendants' advocates made an undertaking that the defendants would not put up the suit properties for sale pending the outcome of the negotiations that the parties had initiated. The 2<sup>nd</sup> plaintiff has stated that instead of putting up a substantive settlement proposal for consideration by the plaintiffs, the defendants have served the plaintiffs with a fresh notification of sale and have advertised the suit properties for sale by public auction.

The 2<sup>nd</sup> plaintiff have termed this second notification of sale malicious and a serious abuse of the process of the court as the same is intended to frustrate the pending applications and this suit as a whole. The 2<sup>nd</sup> plaintiff has contended that since the defendants seem not to be interested anymore in negotiations, the plaintiffs should be afforded an opportunity to argue the pending applications. The 2<sup>nd</sup> plaintiff annexed to his affidavit, a copy of a letter dated 23<sup>rd</sup> September 2014 through which the earlier notification of sale dated 23<sup>rd</sup> June 2014 was withdrawn, copies of fresh notification of sale dated 9<sup>th</sup> February 2015 and the 45 days redemption notice dated 9<sup>th</sup> February 2015 and a copy of the newspaper advertisement of the suit property for sale on 17<sup>th</sup> April 2015.

11. The plaintiffs' application was opposed by the defendants through grounds of opposition dated 13<sup>th</sup> April 2015. In the said grounds of opposition, the defendants contended that the plaintiffs' application is *res judicata* owing to the fact that the plaintiffs had filed a similar application which is pending hearing. The defendants contended further that the plaintiffs have not satisfied the conditions for granting the injunctive relief sought. The defendants termed the plaintiffs' application unmeritorious, frivolous and an abuse of the process of the court.
12. When the plaintiffs' application dated 7<sup>th</sup> April 2015 came up for hearing on 14<sup>th</sup> April 2015, the advocates for the parties agreed to argue the same by way of written submissions. In the meantime, the court issued interim orders restraining the sale of the suit properties pending the determination of the application. Both parties filed their written submissions on 14<sup>th</sup> May 2015. Strangely, the defendants purported to file a replying affidavit together with their written submissions without leave of the court. Since that affidavit was filed irregularly and the plaintiffs' advocates had no notice thereof while preparing their submissions, I would not consider the same as it would be unjust to do so.
13. I have considered the plaintiffs' application together with the affidavit filed in support thereof. I have also considered the defendants' grounds of opposition. Finally, I have considered the submissions by the parties' respective advocates and the authorities cited in support thereof. I must state at the outset that what is before me is not the plaintiffs' application for temporary injunction to restrain the sale of the suit properties pending the hearing and determination of this suit. That application which was dated 5<sup>th</sup> August 2014 is pending hearing and determination before this court and the same will be heard on merit at an opportune time. As I have stated above, in that application, the plaintiffs were granted a conditional interim temporary injunction which condition was not met. The plaintiffs filed a subsequent application dated 22<sup>nd</sup> August 2014 to set the said condition which is also pending.
14. The application under consideration is seeking a temporary injunction to restrain the defendants from selling the suit properties pending the hearing and determination of the two previous applications aforesaid. I have found it difficult to understand the logic behind the present application. The plaintiffs already have an application pending in which they have sought an injunction to restrain the defendants from selling the suit properties. I don't see the rationale behind the plaintiffs' decision to bring yet another application for injunction to restrain the sale of the suit properties pending the hearing of a pending injunction application in which the plaintiffs had also sought an interim order of injunction which the court granted *ex parte* albeit conditionally. I am of the view that the present application is an attempt by the plaintiffs to circumvent the orders that were given by the court herein on 11<sup>th</sup> August 2014 through which the plaintiffs were granted an interim temporary injunction conditionally and which condition they failed to comply with resulting in the order being discharged.
15. That said I would now proceed to consider the application on merit. Although this court has the power to grant the orders sought by the plaintiffs, I am not satisfied that the grounds put forward by the plaintiffs justify the granting of the orders sought. If I understand the plaintiffs argument well, the plaintiffs' contention is that; when their two pending applications came up for hearing on 16<sup>th</sup> October 2014, the court implored the parties and the parties agreed to enter into negotiations with a view to reaching an out of court settlement in this matter. The plaintiffs have contended further that the defendants advocates on record gave an undertaking to court on that day that the suit properties would not be sold pending the outcome of the negotiations that the parties had agreed to undertake. The plaintiffs' complaint is that the defendants have gone back on their

- undertaking to court and have advertised the suit properties for sale.
16. The plaintiffs' second complaint is that this suit was brought as a result of an illegal and irregular notification of sale dated 23<sup>rd</sup> June 2014 that the defendants had served upon them and that while the determination of the issue of the legality of the said notification of sale is pending, the defendants proceeded to withdraw the same and to issue afresh notice. The plaintiffs' contention is that the withdrawal of the said notification of sale is an admission that the same was illegal thereby lending credence to the plaintiffs' suit herein and the pending application for injunction. The plaintiffs' contention is that the defendants should not be allowed to sell the suit properties on the strength of the new notification of sale before the determination of the legality of the earlier notification of sale that they have withdrawn.
  17. What I need to determine therefore is whether the defendants have breached the undertaking if any which they had given to court on 16<sup>th</sup> October 2014 and whether the defendants acted illegally or unlawfully in issuing a fresh notification of sale while this suit and the applications filed herein are pending. Lastly, I would consider whether it would serve the interest of justice to grant the orders sought by the plaintiffs. From the court record, what transpired on 16<sup>th</sup> October 2014 is that; Mr. Ondego, advocate who appeared for the plaintiffs informed the court that the plaintiffs had been approached by the 1<sup>st</sup> defendant and given an out of court settlement proposal which the plaintiffs wanted time to consider. He asked the court for a mention date by which time the plaintiffs would have considered the proposal and made a decision on the same.
  18. On his part, Mr. Kimani advocate who appeared for the defendants informed the court that the proposal that the defendants had made was on a without prejudice basis. He stated that the defendants were not averse to pursuing an out of court settlement. He did not therefore object to the mention date that was requested by the plaintiffs. The court after hearing from the said advocates fixed the matter for mention on 28<sup>th</sup> November 2014 to confirm if any progress had been made towards settling the matter out of court. It is not clear as to what happened on 28<sup>th</sup> November 2014 as the proceedings of that day do not appear to be on record.
  19. It is clear from what I have set out above that the defendants did not give any undertaking whether to the court or to the plaintiffs that they will not sell the suit properties pending the outcome of the settlement negotiations. There is also no evidence that the court had given any direction regarding the need to discuss and settle the dispute herein out of court. Due to the foregoing, it is not correct as contended by the plaintiffs that by issuing a fresh notification of sale and advertising the suit property for sale, the defendants have gone back on the undertaking that they made on 16<sup>th</sup> October 2014 and acted contrary to the directions that the court had given on that day.
  20. On the issue of the notification of sale, it is true that the defendants had initially served the plaintiffs with a notification of sale dated 23<sup>rd</sup> June 2014. The said notification of sale is annexed to the affidavit of the 2<sup>nd</sup> defendant sworn on 5<sup>th</sup> August 2014 as annexure "AM06". It is also true that the validity of the said notification of sale is in dispute in this suit. It is also not disputed that the defendants served the plaintiffs with a fresh notification of sale dated 9<sup>th</sup> February 2015 while this suit is pending and proceeded thereafter to advertise the suit property for sale. The issue that arises for determination is whether the defendants were precluded from issuing and serving the plaintiffs with a fresh notification of sale and from advertising the suit property for sale while this suit and the plaintiffs' two applications referred to herein above are pending. Under rule 15 of the Auctioneers Rules 1997, the auctioneer upon receipt of instructions is supposed to record the instruction on the register kept for that purpose and thereafter prepare a notification of sale and serve the same upon the registered owner of the property in respect of which he has been instructed to sell.
  21. There is no caveat in the auctioneers' rules aforesaid against issuing afresh notification of sale where a sale has not taken place pursuant to an earlier notice or where an earlier notice is found to be wanting in any material respect. I don't think also that a chargee is precluded from instructing an auctioneer to issue a fresh notification of sale where a notice which had been issued earlier is subject to challenge in court unless the court has ordered otherwise. According to the notification of sale dated 23<sup>rd</sup> June 2014, the suit properties were to be sold by public auction on 27<sup>th</sup> August 2014. That sale did not take place because the plaintiffs came to court on 11<sup>th</sup> August 2014 and obtained a temporary injunction restraining the same. The plaintiffs thereafter failed to meet the

- condition under which the injunction was granted and as such the same was discharged. If the defendants wanted to put up the suit properties for sale again which is the case herein, I am unable to see how they can be faulted for serving the plaintiffs with a fresh notification of sale.
22. In my view, the interim temporary injunction that was granted to the plaintiffs herein on 11<sup>th</sup> August 2014 having lapsed as aforesaid, the defendants were at liberty to sell the suit properties the existence of this suit and the two applications pending herein notwithstanding. This court has not made any further orders in the pending applications restraining the sale of the suit properties until the said applications are heard and determined. Due to the foregoing, I see no merit in the plaintiffs' argument that the defendants acted unlawfully and a manner reminiscent of an abuse of the process of the court in serving them with a fresh notification of sale and proceeding to advertise the suit properties for sale. I don't know what else the plaintiffs expected after they failed to fulfill the condition under which a temporary injunction was granted to them and left the said injunction to lapse.
23. That last issue that I need to consider is whether it would be in the interest of justice to grant the orders sought by the plaintiffs. According to annexure, "AMO4" to the 2<sup>nd</sup> plaintiff's affidavit sworn on 5<sup>th</sup> August 2014 that was filed herein in support of the plaintiffs' application dated 5<sup>th</sup> August 2014, the plaintiffs were indebted to the defendants in the sum of kshs. 35,049,407.75 on current account No. 10200013 as at 1<sup>st</sup> July 2014 and kshs. 9,791,123.59 on loan account No. 154000056 as at 31<sup>st</sup> October 2012. This makes a total outstanding amount of kshs. 44,840,536.34. This amount is undisputed by the plaintiffs because it was arrived at by the Interest Rate Advisory Centre which was engaged by the plaintiffs to recalculate the interest and other charges that were debited to the two accounts by the defendants.
24. According to the affidavit of the defendants' legal officer, Jack Kimathi sworn herein on 3<sup>rd</sup> September 2014 in opposition to the plaintiffs' application dated 22<sup>nd</sup> August 2014, the plaintiffs are not servicing their two accounts aforesaid. The default is so bad that the last time the plaintiffs made any payment into their loan account No. 15-4000056 was on 28<sup>th</sup> October 2010. This fact is not denied by the plaintiffs. It is upon realization that the plaintiffs are indebted to the defendants to some extent that the plaintiffs were ordered by the court to deposit a security in the sum of kshs. 1,500,000/= as a condition for granting them an interim temporary injunction. The deposit of kshs. 1,500,000/= that was ordered by the court was only a small fraction of the admitted debt of kshs. 44,840,536.34 mentioned above of which the sum of kshs. 9,791,128.59 has been admitted by the plaintiffs to be secured by a charge over the suit properties the same having arisen from the kshs. 7,000,000/= demand loan. The plaintiffs found this condition onerous and failed to comply with the same. Instead, they applied to set the same aside. That application is still pending herein and the little said on the same the better.
25. As things stand now, the plaintiffs owe the defendants an admitted sum of kshs. 9,791,128.59 as at 31<sup>st</sup> October 2012 which they are not servicing and which is admittedly secured by a charge over the suit properties. Justice is a double edged sword. It cuts both ways. It would be unconscionable in the circumstances to grant the orders sought by the plaintiffs herein. The conduct of the plaintiffs does not deserve the exercise of this court's discretion in their favour. Injunction is an equitable remedy. He who comes to equity must come with clean hands and must also do equity. I have found the plaintiffs conduct inconsistent with these equitable principles.
26. The plaintiffs' application would not succeed even if the same is considered on the principles that were enunciated in the case of **Giella –vs- Cassman Brown [1973] E. A 358** that was cited by both parties in their submissions. I am not persuaded by the plaintiffs that their two pending applications dated 5<sup>th</sup> August 2014 and 22<sup>nd</sup> August 2014 have good prospects of success in view of what I have stated above. Having reached this conclusion, it is not necessary to consider whether the plaintiffs would suffer irreparable harm if the orders sought are not granted. As was stated in the case of **Kenya Commercial Finance Co. Ltd –vs- Afraha Education Society [2001] 1 E. A 87** that was cited by the defendants in their submissions, the conditions in the case of **Giella –vs- Cassman Brown (Supra)** for granting temporary injunction "**are sequential so that the second condition can only be addressed if the first one is satisfied and when the court is in doubt then the third condition can be addressed.**"
27. In conclusion, it is my finding that the plaintiffs' application dated 7<sup>th</sup> April, 2015 has no merit. The same is dismissed with costs to the defendants.

**Delivered, Dated and Signed at Kisii this 24<sup>th</sup> day of July, 2015.**

**S.OKONG'O**

**JUDGE**

**In the presence of;**

Mr. Momanyi h/b for Ouma for the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs

N/A for the 1<sup>st</sup> and 2<sup>nd</sup> defendants

Milcent Maore Court Assistant

**S.OKONG'O**

**JUDGE**