

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CIVIL APPEAL CASE NO. 15 OF 2014

LEONARD GICHUKI APPELLANT

VERSUS

KENYA INDUSTRIAL ESTATES LTD..... RESPONDENT

RULING

1. The appellant Leonard Gichuki , by an application dated 28th July 2014 seeks to injunction the respondent Kenya Industrial Estates Limited either by itself, servants or agents from selling, disposing, wasting and or interfering with parcel of land known as **E. Bukusu/S. Kanduyi/7340** pending hearing and determination of the suit. The application is brought under Section 1A B, 4 and 3A of the Civil Procedure Act and Order 40 Rule 1(a) of the Civil Procedure Act.
2. The application is based on the following grounds; the applicant was merely a guarantor of one Francis Kamau; the said Kamau having defaulted in payment of his loan with the defendant; the defendant went for the applicant's property; upon which the applicant was forced to charge his title to prevent his property being sold as a result of the default, the applicant sued the Loanee in SPMCC NO. 542 of 2000 in a bid to recover the debt; the defendant is acting in bad faith; the loan is currently Kshs. 250,000/-; the property subject matter herein is the only property of the applicant; the application is brought in good faith.
3. The respondent objected to the application by filing a lengthy replying affidavit to the effect that; the applicant guaranteed a loan advance to one Francis Kamau who defaulted and could not be traced which forced them to seek his guarantor the applicant herein to make good the loan and when the applicant defaulted they attached the applicant's personal goods; the applicant in order to avoid his goods being sold offered his title which was charged in favour of the respondent to allow him service the loan in installments; the amount at the time was Kshs. 153,993/= but due to nonpayment the sum has accumulated to the sum of Kshs. 227,863.45/=; the last payment by the applicant having being made in 2008; they issued a statutory notice together with a notification of sale; the property was advertised and was due for sale all done in compliance with the requirements of the law; further that the applicant has not come to court with clean hands; the application does not meet the necessary threshold.
4. I have considered the application, the supporting affidavit and the replying affidavit and authorities cited; the issue of determination herein is whether or not the applicant has met the necessary threshold for issuance of an injunction.
5. The parties are in agreement that the applicant herein guaranteed one Francis Kamau a loan he received from the responded which loan stands unpaid to date which sum is being sought for by the respondent. The loanee defaulted and cannot be traced and the applicant being a guarantor of the loan is being pursued as a result. It is not in contention either that in fulfilling his obligation as a guarantor the applicant charged his property to the respondent to allow him to service the outstanding amount by way of installments. The respondent contends which has not been disputed that, the applicant last serviced the loan in 2008 and which loan stood at kshs. 227,863.45/= as at August, 2014 and the amount continues to accrue.
6. The applicant contended that he was not served with the statutory notice, however the respondent has annexed copies of the statutory notice, 45 days notification of sale and the newspaper advertisement all in compliance with the requirements of the Law.

7. The conditions necessary for granting an injunction is settled law and I need not go beyond the notable case of ***Giella Vs. Cassman Brown and Company [1973] EA 358*** where the court held;

“The conditions for the granting of an injunction are now settled law in East Africa. 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 an irreparable injury, which would not adequately be compensated by an amount of damages. Thirdly if the court, is in doubt it will decide an application on a balance of probabilities.”

8. In my considered view the applicant in this case has not shown a prima facie case with a probability of success. The fact that this is the only property he owns; that he was a mere guarantor do not help his case. He undertook an obligation that called for him to fulfill and in order to settle the debt over a period of time he charged his only property, this he did conscious of his obligation towards the respondent. I do not find that this is a proper case to issue an injunction. None of the three requirements set up above have been met, and for the above reasons the application is dismissed with costs.

Dated at Bungoma this 29th day of SEPTEMBER 2015.

ALI-ARONI

JUDGE.