



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT MALINDI

LAND CASE NO. 133 OF 2013

SAMUEL GICHERU NJORA.....PLAINTIFF/APPLICANT

=VERSUS=

EQUITORIAL COMMERCIAL BANK LTD.....DEFENDANT/RESPONDENT

R U L I N G

Introduction

1. The Application before me is the one dated 5th August 2013. In the Application, the Plaintiff/Applicant is seeking for the following reliefs:

(a) That an order of temporary injunction do issue to restrain the Defendant whether by itself, and its servants, agents or Auctioneers or any other person action on the authority of the Defendant from proceeding with the intended sale by public auction scheduled for 12th August 2013 from re-advertising, selling, alienating howsoever at any time or by completing by conveyance to transfer or any sale concluded by public auction or leasing, letting, evicting or otherwise howsoever interfering with the Plaintiff's ownership of title and/or interest of the property known as Title Number 215 Section III Mainland North, Kilifi, pending the hearing and determination of the suit herein.

(b) That the costs of and occasioned by this application be provided for.

2. The Application has been opposed by the Defendants.

The Plaintiff's/Applicant's case:

3. According to the deposition of the Applicant, he is the proprietor and registered owner of land known as Title number 215 Section III Mainland North, Kilifi (the suit property).

4. The Plaintiff deponed that on 30th May 2011, he acquired an overdraft facility from the Defendant for the sum of Kshs.5,000,000; that as security for the said loan, he offered and charged the suit proper. The Plaintiff was unable to repay the loan in full as was expected and on 31st January 2013, the Defendant issued to him a Statutory Notice whereafter he entered into a series of negotiations with the bank with a view of offsetting the debt.

5. To offset the debt, the Plaintiff proposed to subdivide and dispose of a portion of the property by sale through a private treaty which process was commenced by the Plaintiff on 14th April 2013; that he obtained a potential purchaser for the said property and entered into a sale agreement dated 10th July 2013.
6. However, it was deponed, the Defendant instructed Garam Investments Auctioneers to sell the suit property by public auction; that the negotiations between the Plaintiff and the intended purchaser are at an advanced stage, that the purchaser has made it categorically clear that he would only go ahead with the transaction after the bank stays the intended auction and that there is a collusion between the bank officers to sell the suit property at a throw away price.

Defendant's/Applicant's case

7. The Defendant filed its Replying Affidavit on 9th September 2013. The Defendant's legal officer, Brian Asin, deponed that the Plaintiff is in breach of the overdraft facility that was entered into between himself and the bank; that there is no other agreement between the parties save as contained in the letters of offer, the charge documents and the loan agreement which were voluntarily executed by the parties and as such, they are binding on the parties herein.
8. The Defendant's Legal Officer has further deponed that on 2nd May 2013, on a "without prejudice" basis, he requested the Applicants to give the time-lines within which he was to repay the loan which timelines the Applicant failed to give; that the said letter is not admissible before this court and that no agreement had been reached between the Bank and the Applicant concerning selling the charge property by way of private treaty.
9. The parties filed their respective written submissions and authorities which I have considered.

Analysis and findings:

10. It is not in dispute that the Plaintiff is indebted to the Defendant. It is also not in dispute that the Defendant served upon the Plaintiff the Statutory Notice of sale dated 31st January 2013 informing the Plaintiff that unless the sum of Kshs.7,88,467.43 was paid in full within three months, the Defendant was to exercise its statutory power of sale of the suit property.
11. Upon receipt of the said statutory notice, the Plaintiff wrote to the Defendant on 14th April 2013 requesting for the consent of the Defendant to sell part of the suit property, that is, half an acre, by way of private treaty.
12. The Defendant responded to the Plaintiff's letter on a "without prejudice" basis "agreeing in principal" to the request. The Defendant further requested the Plaintiff to provide it with the time lines within which the transaction was to be concluded, which request was not adhered to by the Plaintiff.
13. The Defendant subsequently instructed Garam Investments to sell the property by way of public auction and a notification of sale by Garam Investments dated 10th June 2013 was issued. The Plaintiff has acknowledged receipt of the said notification of sale.
14. The only issue that I am supposed to determine is whether in view of the communication between the Plaintiff and the Defendant, the Defendant is estopped from denying the Plaintiff the chance to sell part of the suit property by way of private treaty.
15. The Plaintiff's advocate submitted that the Defendant intentionally or by omission caused the Plaintiff to believe that it had approved his proposal to sell the suit property by private treaty vide its letter dated 2nd May, 2013. The Defendant relied on the provisions of Section 120 of the Evidence Act to buttress his argument.
16. On the other hand, the Defendant's advocate submitted that the Plaintiff did not reply to its letter of 2nd May 2013 in which it requested the Plaintiff to give time lines within which the Plaintiff was to repay the loan and that in any case, the said letter does not amount to representation envisaged under Section 120 of the Evidence Act. The Defendant advocate further submitted that communication made on a without prejudice basis is not admissible in evidence where a settlement is not reached.
17. I agree with the Plaintiff's advocate submissions that the "without prejudice" rule is founded on public policy to enable parties to negotiate freely and if negotiations fail, neither party can rely on

admissions made by the other. The rationale of the “without prejudice” rule is to encourage parties to negotiate freely and frankly without fearing that any statements made in the course of negotiations may be used against them later in any court proceedings. (*See Rush & Tumpkins Ltd Vs Greater London council & Another (1988) 3 ALL ER 737 and Ronnie Rodgers Mulumbe -Vs- Erasto Muga (2005) eKLR*).

18. Consequently, the Plaintiff cannot rely on the Defendant's letter of 2nd May, 2013 which was written on a “without prejudice” basis to argue that the Defendant had allowed him to sell the property by way of private treaty. That letter is not admissible in these proceedings.
19. Having received the letter of 2nd May, 2013 from the Defendant, it was upon the Plaintiff to respond to it and have a concrete agreement entered into between himself and the bank on the issue of selling the property by private treaty.
20. In view of the fact that no agreement was entered into between the Plaintiff and the Defendant to have part of the suit property sold by way of private treaty, this court cannot re-write the contract that was entered into by the parties by way of the first legal charge dated 25th July 2011 and the further legal charge dated 6th June 2012.
21. It is trite law that if a party signs a contractual agreement containing terms of the contract, he is bound by those terms. (*See Securicor Courier (K) Ltd vs Benson David Onyango & Another (2008) eKLR and Curtis Vs Chemical Cleaning & Dyeing & Co. Ltd (1951) 1 ALL ER*).
22. In the circumstances and for the reasons I have given above, I find that the Plaintiff has not established a prima facie case with chances of success. I therefore dismiss the Plaintiff's Application dated 5th August 2013 with costs.

Dated and delivered in Malindi this 24th Day of **February**, 2014.

O. A. Angote

Judge