



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERICHO
CIVIL CASE NO.42 OF 2013

SAMWEL KIPRONO SANG
(T/A KERICHO TECHNICAL INSTITUTE).....PLAINTIFF
VERSUS
INDUSTRIAL AND COMMERCIAL
DEVELOPMENT CORPORATION.....DEFENDANT

RULING

This ruling is the outcome of the Motion dated 1st July 2013 taken out by **Samwel Kiprono Sang** T/a **Kericho Technical Institute** hereinafter referred to as the Applicant. In the aforesaid Motion the applicant prayed for the following orders:

1. **THAT** this Honourable Court may be pleased to certify this application as urgent and dispense with service in the first instant.
2. **THAT** this Honourable Court may be pleased to issue a temporary injunction to restrain the defendant by itself, its servants agents, employees and otherwise howsoever from selling, advertising and/or in any manner dealing with the Plaintiff/Applicant properties land reference no. Kericho Municipality/Block No.5/586 and 589 pending the hearing and determination of this application inter-parties.
3. **THAT** this Honourable Court may be pleased to issue a permanent injunction to restrain the defendant by itself, its servants agents, employees and otherwise howsoever from selling, advertising and/or in any manner dealing with the Plaintiff/Applicant's properties land reference No. Kericho Municipality/Block No.5/586 and 589 pending the hearing and determination of this suit.
4. **THAT** costs do abide.

The Motion is supported by the affidavit of the Applicant sworn on 1st July 2013. When served with the Motion, Industrial and Commercial Development Corporation (I.C.D.C), hereinafter referred to as the Respondent opposed the same by filing the replying affidavit of Grace Magunga, the Respondent's Corporation Secretary. When the Motion came up for interpartes hearing, learned counsels appearing in

this dispute recorded a consent order to have the same disposed of by affidavit evidence and written submissions.

I have considered the grounds set out on the face of the Motion and the facts deponed in the rival affidavits and submissions. The brief facts of this dispute appear to be largely straightforward. On the 6th day of January 2010, the Plaintiff secured financial accommodation from the Defendant in the sum of Kshs.10,000,000 by pledging L.R.no.Kericho Municipality/Block5/586 and L.R.no.Kericho Municipality/Block5/589 as collaterals. A charge was registered against each title. It was part of the agreement that the Plaintiff would repay the aforesaid sum plus interest at the rate of 16% p.a by equal monthly installments of Kshs.243,181. The loan amount was to be used to equip the laboratory of Kericho Technical Institute, an institution owned by the Plaintiff. In the month of April 2011, the Plaintiff began to default in loan repayments due to financial difficulties thus prompting the Plaintiff to dialogue with the Defendant to reschedule the loan repayment. It would appear the Defendant listened to further requests from the Plaintiff having defaulted to fulfill the previous promises on loan repayment but on 28th May 2013, the Defendant declined those requests when the loan arrears hit over Kshs.4,800,400. On 12th March 2013, the Defendant issued a Statutory notice of intention to exercise its Statutory notice of sale. This turn of events prompted the Plaintiff to obtain a court order to restrain the Defendant from exercising its statutory power of sale pending the hearing interpartes of the application dated 1st July 2013. The Plaintiff is now before this court seeking for an order of injunction to restrain the Defendant from exercising its Statutory power of sale pending the hearing and determination of the suit. In the substantive suit, the Plaintiff will be seeking for judgment in the following terms:

- a. **A permanent injunction against the defendant by itself its servants, agents, employees and otherwise howsoever from selling, advertising, and/or in any manner dealing with the Plaintiff's properties land reference Nos. Kericho Municipality Block No.5/586 and 589.**
- b. **An order that readjustment and fresh calculations of interest accruing as the initial interest rates agreed by the charge.**
- c. **General damages.**
- d. **Costs of the suit.**
- e. **Any othe relief that this Honourable Court may deem fit to order.**

Having given in brief the history behind the Motion, let me now turn my attention to the merits or otherwise of the application. It is the submission of the Plaintiff that his application meets the requirements for the grant of the order of injunction. The classical case which laid down the applicable Principles in such applications is the case of **Giella =Vs= Cassman Brown (1973) E.A 356** whereof the Court of Appeal for Eastern Africa held *inter-alia* as follows:

- i. **An applicant must show a prima facie case with a probability of success.**
- ii. **An injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury.**
- iii. **When the court is in doubt, it will decide the application on the balance of convenience.**

I will apply the above Principles to this case to test whether or not the order should be granted. It is the submission of the Plaintiff that he has a *prima facie* case with high chances of success. The Plaintiff claimed that at the trial, he will be able to show that the Defendant breached the terms of the charge document by altering the rate of interest without giving prior notice to the Plaintiff thus breaching **Section 84** of the **Land Act no.6 of 2012**. It is also argued by the Plaintiff that he will present evidence from the Interest Rates Advisory Centre to show that at the time of issuing the notice to exercise its statutory power of sale, the Plaintiff had not fallen into arrears as alleged by the Defendant. The Defendant on the other hand urged this court to find that the Plaintiff has not shown a *prima facie* case with any chance of

success. The Defendant pointed out that the Plaintiff executed a charge document dated 25th March 2010, which gave the Defendant the right to vary the rate of interest without prior notice to Plaintiff hence the Plaintiff's complaint is hopeless. The Defendant further argued that it complied with all the conditions set out in the charge agreement. There is no doubt that the Defendant does not deny having issued notice to exercise its Statutory power of Sale under **Section 74** of the **Registered Land Act (now repealed)** which is equivalent to **Section 90(3)** of the **Land Act no.6 of 2012 (chapter 280 Laws of Kenya)**. The Defendant further admits that it varied interest rate from 16% p.a to 19% p.a as per clause 1 of the charge instrument. The subject matter of this dispute is the loan agreement i.e charge instrument dated 31st March 2010. The agreement was executed pursuant to the provisions of the **Registered Land Act (cap 300 Laws of Kenya)** now repealed. Pursuant to the provisions of **Section 162** of the **Land Act no.6 of 2012**, the Provisions of the repealed Act shall continue to apply. The notice issued to the Plaintiff by the Defendant is dated 12th March 2013, pursuant to the Provisions of **Section 90(3)** of the **Land Act no.6 of 2012**. The aforesaid notice gave the Plaintiff three months notice to liquidate the outstanding debt in the sum of Kshs.10,335,504/39 with interest in default the defendant would exercise its statutory power of sale. The question here is whether the Defendant was entitled to issue such a notice under the Land Act no.6 of 2012 or under the Registered Land Act (cap. 300 Laws of Kenya) now repealed. In the aforesaid notice, the rate of interest is stated to be 16%. On 9th March 2012, the Defendant again served the Plaintiff with a notice of increase of interest rate from 16% to 19% p.a and had it back-dated to 1st March 2012. The Defendant stated that it was prompted to increase the interest rate because of increased costs of sourcing of funds for lending. The monthly installment payable increased from Kshs.243,181 to 259,405/51. In clause 1 of the loan agreement the Defendant was given unfettered discretion to vary the rate of interest without giving prior notice to the Plaintiff. The same clause also protected the defendant from any liability if it did not give any notice. The Plaintiff has complained that the Defendant was required by law to give notice. In my view, the questions posed by this suit appear to be simple and straightforward. **First**, Whether or not the Defendant breached the terms of the loan agreement in an attempt to exercise its statutory power of sale? **Secondly**, What is the applicable law? Is it Registered Land Act or Land Act no.6 of 2012? **Thirdly**, was the Defendant bound to give prior notice before varying the interest rate? **Fourthly**, did the variation of interest rate affect the Plaintiff's equity of redemption under **Section 72(1)** of the **Registered Land Act**. In its submissions, the Defendant argued that since the dispute revolve around the question over interest, no injunction can issue. In my view, that submission cannot lie because the issues raised go beyond the simple question of rate of interest or dispute over accounts. In fact, the most serious question is whether the unfettered discretion given to the Defendant to vary the rate of interest in clause 1 of the charge instrument has negatively affected the Plaintiff's equity of redemption and if so whether the aforesaid clause is in conflict with **Section 72(1)** of the **Registered Land Act**? It would appear, that, the Defendant has cited the Provisions of **Section 90** of the **Land Act no.6 of 2012** in issuing the notice of intention to exercise its statutory power of sale. If, I presume for a while that the applicable law in this saga is the Land Act no.6 of 2012, then clause 1 of the charge instrument may be regarded as in conflict with **Section 84(1)** of the **Land Act no.6 of 2012**. The aforesaid provision requires the chargor to give 30 days notice of increase or reduction of interest to the chargee. It is obvious in my analysis that the Plaintiff has a *prima facie* case with high chances of success. He has therefore fulfilled the first principle.

The second principle is to the effect that an applicant must show that unless the order of injunction is given he would suffer irreparable loss. It is the submission of the Applicant that if the order of injunction is not given, he will lose the charged properties which are situated in prime areas of Kericho town. The Defendant was of the view that the Plaintiff's loss can be ascertained in monetary terms. I agree, that, the loss anticipated by the Plaintiff can be ascertained in monetary terms. However, the issues raised herein are serious questions of law which may take away the Plaintiff's statutory equity of redemption. That statutory right and protection cannot in essence be quantified in monetary terms. The fact that the charged properties which are located in prime locations in Kericho town may be lost by sale in public auction, it cannot be said that the applicant will not suffer irreparable loss. It is a matter of common notoriety that it is difficult to acquire property within the environs the properties are located. That is enough evidence to grant the order. Even if some were to be secured, the value may be beyond the reach of the applicant. I find that the applicant has shown that he will suffer irreparable loss if the order of injunction is refused.

The third principle is only applicable where the court is in doubt. Since I am not in doubt, I will not belabour to consider the principle of convenience.

In the end, I find the Motion dated 1st July 2013 to be well founded. It is allowed in terms of prayer 3 save that the order should be a temporary order of injunction pending the hearing and determination of the suit. Costs of the application shall abide the outcome of the suit.

Dated, Signed and delivered in open court this 4th day of April, 2014.

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J.K.SERGON

JUDGE

In the presence of:

N/A Achola for Plaintiff/Applicant

N/A Mamboleo for Defendant/Respondent but with leave