



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO. 512 OF 2012

JOSEPH MARENGE OSAWA PLAINTIFF

VERSUS

AGRICULTURAL FINANCE CORPORATION DEFENDANT

RULING

1. What is before me is the plaintiff's application that was brought by way of Notice of Motion dated 8th November 2012. In the application, the plaintiff sought an order of injunction to restrain the defendant from alienating, selling, transferring, clogging, and further transferring and/or in any other manner dealing with all that parcel of land known as LR No. Kanyamkago/Kanyamgundho/951 (hereinafter referred to as "**the suit property**") pending the hearing and determination of this suit. The plaintiff's application was supported by the affidavit sworn by the plaintiff on 8th November 2012 and the grounds set out on the face of the application. The application was brought on the grounds that the plaintiff is the registered proprietor of the suit property and that in the year 2007; the plaintiff applied for and was advanced a loan in the sum of Kshs. 520,000.00 by the defendant on terms and conditions that were set out in the defendant's letter of offer dated 17th April 2007. The loan advanced by the defendant to the plaintiff was secured by a legal charge over the suit property which was to secure the principal sum of Kshs. 520,000.00 together with interest.

2. The plaintiff has claimed that he has paid substantial amount of money towards the said loan that was advanced to him by the defendant. The plaintiff's complaint against the defendant which has given rise to this suit is that the defendant intends to sell the said property in exercise of its statutory power of sale without serving him with a statutory notice. The plaintiff has claimed that the defendant sent to him a purported statutory notice dated 10th August 2012 on 6th November 2012 calling upon him to redeem the suit property by 9th November 2012. The plaintiff claims that the defendant gave him only 3 days to redeem the suit property in default of which the defendant was to put up the suit property for sale to recover the outstanding loan amount. The plaintiff has contended that on account of the said defective statutory notice, he has a prima facie case against the defendant. The plaintiff has contended further that he stands to suffer irreparable injury unless the temporary injunction sought is granted. The plaintiff annexed to his affidavit in support of the application as exhibits, a copy of a certificate of official search in respect of the suit property, a copy of a letter of offer of the loan dated 17th April 2007, a copy of the statutory notice dated 10th August 2012, and copies of receipts for the payment that the plaintiff has made to the 2nd defendant.

3. The plaintiff's application was opposed by the defendant. The defendant filed a replying affidavit sworn by its corporation secretary, Rose A. Ochanda on 13th December 2012. In its response to the application, the defendant contended that; the plaintiff was granted a loan in the sum of Kshs. 520,000.00

which loan was secured by a charge over the suit property. The plaintiff defaulted in his loan repayments. Several demand letters were sent to the plaintiff to regularize his loan repayment but the plaintiff failed to do so. The defendant then had no alternative but to serve upon the plaintiff a statutory notice to pay the entire amount of the loan failure to which the defendant would take steps to enforce its rights under the charge. The defendant contended that contrary to the plaintiff's claim that he received the statutory notice on 6th November 2012 the same was actually served upon him personally on 10th August 2012 the same day it was issued. The defendant contended that no good grounds have been advanced by the plaintiff to warrant to granting of the orders sought. The defendant annexed to the replying affidavit of Rose A. Ochanda as exhibits, a copy of the letter of offer of the loan to the plaintiff dated 17th April 2007, a copy of the title deed for the suit property, a copy of a certificate of official search dated 21st February 2007, a copy of the instrument of charge dated 17th April 2007, a copy of certificate of official search for the suit property dated 10th May 2007, copies of demand letters sent to the plaintiff by the defendant and a copy of the statutory notice dated 10th August 2012.

4. On 25th July 2013 the advocates for the parties agreed to argue the application by way of written submissions. The plaintiff filed his submissions on 9th October 2013 while the defendant filed its submissions on 14th November 2013. I have considered the plaintiff's application together with the affidavit filed in support thereof. I have also considered the affidavit in reply filed by the defendant in opposition to the application. Finally, I have considered the written submissions filed by the advocates for the parties and the case law cited. As was held in the case of **Giella vs. Cassman Brown & Co. Ltd [1973] E. A 358** that was cited by the defendant, an applicant for interlocutory injunction must demonstrate that he has a prima facie case with a probability of success against the respondent and that unless the order is granted, he will suffer irreparable harm. In the event that the court is in doubt as to the above, the application would be determined on a balance of convenience. In the application before me, it is not in dispute that the plaintiff borrowed a sum of Kshs. 520,000.00 from the defendant. It is also not in dispute that the plaintiff charged the suit property to the defendant as a security to secure the said loan. It is further not in dispute that the plaintiff defaulted in his loan repayment to the defendant. The plaintiff's only complaint against the defendant in his plaint and the application before me is that the defendant intends to realize its charge over the suit property without giving plaintiff the requisite statutory notice. The plaintiff in his submission tried to introduce other issues but I would not consider the same because they are not pleaded. The law is settled that parties are bound by their pleadings. It is only on the pleading record that issues for determination by the court arise. The parties cannot be allowed to raise issues through submissions.

5. What I need to determine in the application before me is whether the plaintiff has proved or demonstrated on a prima facie basis that he was not served with a valid statutory notice. The plaintiff's complaint is that the defendant's statutory notice dated 10th August 2012 was not served upon him until 6th November 2012 and that he was only given up to 9th November 2012 to redeem the suit property failure to which the same would be put up for sale by the defendant. The defendant in their affidavit in reply to the application herein did place before the court a copy of the statutory notice dated 10th August 2012 which was served upon the plaintiff personally on the same date and on which the plaintiff personally endorsed this signature in acknowledgment of receipt thereof. I have compared the statutory notice that is annexed to the affidavit of Rose A. Ochanda sworn on 25th March 2013 and the one annexed or purported to have been annexed to the plaintiff's affidavit sworn on 8th November 2012. A careful perusal of the copy of the statutory notice that was presented to court by the plaintiff leaves no doubt that the plaintiff while photocopying the said notice for presentation to court did cover that part of the notice on which he had acknowledged receipt of the said notice on 10th August 2012. This action is outrageous and scandalous. It is an open act of deceit, concealment and fraud against the court.

6. It is my finding based on the foregoing that the plaintiff had obtained ex parte orders that were granted herein on 13th November 2012 through intentional concealment of material facts to the court namely that the plaintiff was served with a statutory notice on 10th August 2012. Having made this finding, I am not obliged to consider the plaintiff's application on merit. A party whose hands are tainted with deceit and fraud is not deserving of an equitable remedy of injunction. Even if the application is considered on

merit, I am not satisfied that the plaintiff has met the conditions for granting an interlocutory injunction. The plaintiff's case is based solely on non-service of statutory notice. The defendant has placed evidence before the court to the effect that the plaintiff was not only served with the said notice but also that he was served in good time. The plaintiff's case that was based on irregular service of statutory notice has no chances of success. The plaintiff having failed to demonstrate a prima facie case with a probability of success, I am not obliged to consider whether or not the plaintiff stands to suffer irreparable harm unless the orders sought are granted. If I was to consider this issue, I would have held against the plaintiff. I am entirely in agreement with the decision of Ringera J. (as he then was) in the case of, **Moses Ngenye Kahindo vs. Agricultural Finance Corporation, Milimani Nairobi HCCC No. 1044 of 2001 (Unreported)** that was cited by the defendant in which he stated that:

".....a person who charges his property to secure a loan does so knowing only too well that upon default, the property could be sold to recover the loan. It does not lie in the mouth of such a person to state that he would suffer an injury which cannot adequately be compensated in damages if the lender realizes the security in question...."

7. I have said enough to show that the plaintiff's application dated 8th November 2012 has no merit. The same is hereby dismissed with costs to the defendant.

Delivered, dated and signed at Kisii this 16th day of May 2014.

S. OKONG'O

JUDGE

In the presence of:-

N/A for the Plaintiff

N/A for the Defendant

Mr. Mobisa Court Clerk

S. OKONG'O

JUDGE