



No. 342

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

ENVIRONMENT AND LAND CASE NO. 399 OF 2013

FRANCIS NYANGAU MONARI.....PLAINTIFF

VERSUS

K-REP BANK LIMITED.....1ST DEFENDANT

HEZRON MIYUNGO T/A ROHEMIC PETROLEUM PRODUCTS SERVICES.....2ND
DEFENDANT

RULING

1. By a banking facility letter dated 19th October, 2011, the 1st defendant made available to the 2nd defendant a loan facility in the sum of kshs. 10,000,000/= on terms and conditions that were contained in the said letter. The said facility was to be secured by among others, a legal charge over all that parcel known as **LR No. Kisii Municipality/Block III/298** (hereinafter referred to as “**the suit property**”) registered in the name of the plaintiff and a personal guarantee and indemnity by the plaintiff. Pursuant to the terms of the said facility letter, the plaintiff executed a legal charge dated 14th November 2011 in favour of the 1st defendant over the suit property to secure an aggregate maximum principal amount of kshs. 10,000,000/= that was made available by the 1st defendant to the 2nd defendant. The plaintiff also executed a deed of guarantee and indemnity of the same date in favour of the 1st defendant under which the plaintiff undertook to pay on demand by the 1st defendant, all monies that were due or shall become due by the 2nd defendant to the 1st defendant together with interest and other charges up to a maximum of kshs. 10,000,000/=.

2. Following the perfection of the securities that the 2nd defendant was to avail to the 1st defendant pursuant to the facility letter aforesaid which included the charge over the suit property and the guarantee and indemnity by the plaintiff aforesaid, the 1st defendant made available to the 2nd defendant the said loan facility in the sum of kshs. 10,000,000/=. According to the facility letter aforesaid, the 2nd defendant was supposed to repay the loan in 60 monthly installments of kshs. 296,452.00 each. The 2nd defendant fell into arrears in his loan repayments to the 1st defendant and in exercise of its statutory power of sale, the 1st defendant advertised the suit property for sale by public auction on 18th October 2013 through Garam Investments Auctioneers. This is what prompted this suit and the application before me.

3. In his plaint dated 30th September 2013, the plaintiff has averred that the intended sale is premature,

irregular, illegal and fraudulent. The plaintiff has contended that the 1st defendant has failed to issue to the plaintiff the requisite statutory notice prior to the advertisement of the suit property for sale. The plaintiff has contended further that the 1st defendant has failed to carry out a valuation of the suit property to ascertain its current market value before advertising the same for sale by public auction. The plaintiff has also accused the 1st defendant of colluding with the 2nd defendant to defraud the plaintiff of the suit property. Together with the plaint, the plaintiff filed an application by way of Notice of Motion dated 30th September 2013 seeking a temporary injunction to restrain the 1st defendant from alienating, selling by public auction or private treaty, transferring, clogging, further transferring and/or in any other manner dealing with the suit property pending the hearing and determination of this suit. In the alternative, the plaintiff sought an order that the status quo in relation to the suit property be maintained pending the hearing and determination of this suit.

4. In his affidavit sworn on 30th September 2013 in support of the application, the plaintiff reiterated the contents of the plaint which, I have highlighted above. The plaintiff admitted that the suit property was charged to the 1st defendant to secure a loan that was advanced by the 1st defendant to the 2nd defendant. The plaintiff admitted that the 2nd defendant defaulted in his loan repayment obligations as a result of which the 1st defendant has taken steps to realize its security over the suit property by putting up the suit property for sale by public auction. The plaintiff has contended that the intended sale of the suit property is pre-mature, irregular and illegal for want of compliance with mandatory and statutory requirements. The plaintiff has contended that the 1st defendant has failed to serve a statutory notice and to undertake forced sale valuation of the suit property before advertising the same for sale by public auction. The plaintiff has contended that if the intended sale of the suit property which is illegal is allowed to continue, the suit property would be sold thereby defeating and/or extinguishing his right of redemption. The plaintiff urged the court to stop the intended sale of the suit property so that the court can interrogate at the trial whether the 1st defendant's right to exercise statutory power of sale has accrued.

5. The plaintiff annexed to his affidavit in support of the application; copies of certificate of official search dated 18th March 2013 in respect of the suit property, a statutory notice dated 24th June 2013 issued pursuant to section 96 (2) of the Land Act, 2012, notification of sale dated 8th August 2013 and an advisement of the suit property for sale in the Daily Nation newspaper of 23rd September 2013. The plaintiff's application was opposed by the 1st defendant through a replying affidavit sworn by the 1st defendant's Kisii Branch Manager, Erick Motoke and Statement of grounds of opposition dated 12th November 2013. The 1st defendant has termed the plaintiffs application as lacking in merit and an abuse of the process of the court. The 1st defendant has contended that the plaintiff has withheld material facts from the court and that the application has been brought in bad faith for the sole purpose of delaying the 1st defendant from recovering its lawful debt.

6. The 1st defendant has contended that the plaintiff is justly and truly indebted to the 1st defendant in the sum of kshs. 9,790,624.52 as at 7th August 2013 and that the plaintiff was duly served with the necessary statutory notice before the suit property was put up for sale. The 1st defendant annexed to its replying affidavit; a copy of the legal charge dated 14th November 2011 that was executed by the plaintiff in favour of the 1st defendant, a copy of the 2nd defendant's statement of account with the 1st defendant reflecting a closing debit balance of kshs.9,952,191.67 as at 5th October 2013, a copy of a statutory notice dated 17th April 2013 that was addressed to the plaintiff and the 2nd defendant, a copy of certificate of posting of the said notice and a copy of notice to sell dated 24th June 2013 addressed to the plaintiff and the 2nd defendant.

7. I have considered the plaintiff's application together with the affidavit sworn in support thereof. I have considered the grounds of opposition and replying affidavit filed by the 1st defendant in opposition to the application. On 11th November 2013, I directed that the plaintiff's application be argued by way of written submissions. The advocates for both parties filed their respective submissions and I have

considered the same together with the case law and statutory provisions cited therein. In the cases of **Giella –vs- Casman Brown & Co. Ltd [1973] E. A 358** and **Aikman –vs- Muchoki [1984] KLR 353** It was held that the conditions for grant of interlocutory injunction are; the probability of success of the applicant's claim, the likelihood of irreparable harm which would not be compensated for by damages and if in doubt, the court should decide the matter on a balance of convenience. The onus was on the plaintiff to satisfy the foregoing conditions for grant of the injunction sought. In my view, the plaintiff's complaint is twofold.

8. The plaintiff has not denied that he executed a charge over the suit property to secure a loan that was advanced by the 1st defendant to the 2nd defendant. The plaintiff has not denied that the 2nd defendant has defaulted in his loan repayment to the 1st defendant and as such the realization by the 1st defendant of its security over the suit property is inevitable. The plaintiff's complaint is about the process of realization of the 1st defendant's security. In as much as the 1st defendant has a right to exercise its statutory power of sale, the plaintiff's contention is that the 1st defendant must follow the due process in doing so. The plaintiff's contention is that before the suit property was advertised for sale, the 1st defendant had a statutory obligation to serve upon the plaintiff a statutory demand notice under section 90 (1) of the Land Act, 2012 demanding the payment of the amount due by the plaintiff to the 1st defendant under the charge and notifying the plaintiff that if the outstanding amount is not paid the 1st defendant would put up the suit property for sale. The plaintiff has contended further that the 1st defendant has failed to value the suit property to ascertain its current market and forced sale value as required by the Auctioneers Rules 1997 prior to putting up the suit property for sale.

9. On the material placed before me by both parties, I find no merit in the contentions put forward herein by the plaintiff against the intended sale of the suit property by the 1st defendant. The 1st defendant has annexed to its replying affidavit a copy of the statutory demand notice dated 17th April 2013 that was served upon the plaintiff in accordance with the provisions of section 90 (1) of the Land Act, 2012. The 1st defendant has also annexed a copy of a certificate of posting in proof of the fact that the said statutory notice was served upon the plaintiff by registered post on 18th April 2013. The postal address to which the said notice was sent is the address of the service that was given by the plaintiff in the charge document.

10. I am satisfied that the plaintiff was duly served with the statutory notice as required under section 90 (1) of the Land Act, 2012 aforesaid. On the issue of the valuation of the suit property, this is a requirement under the Auctioneers Rules, 1997. The auctioneer is under a duty to ensure that the reserve price for the property to be sold in exercise of statutory power of sale is based on a valuation carried out within one (1) year of the date of sale. The auctioneer is supposed to indicate the market value of the property in the notification of sale. The plaintiff has contended that the suit property was last valued in the year 2011 when it was charged to the 1st defendant and that the plaintiff has not conducted any other valuation to ascertain the current value of the property. I have noted in the notification of sale that was served upon the plaintiff by the auctioneer which is attached to the plaintiff's affidavit that the value of the suit property is given as kshs. 50,000,000/=. In the said notification of sale, the auctioneer has indicated that the value is based on the last valuation.

11. There is no indication as to when the last valuation of the suit property was carried out by the 1st defendant. The plaintiff has contended that the last valuation was carried out in the year 2011. The plaintiff has however not furnished any evidence that the value of kshs.50,000,000/= indicated in the notification of sale was based on the valuation report that was carried out in the year 2011. I have noted that the 1st defendant has not responded expressly to this issue of valuation. The onus was however upon the plaintiff to prove that the 1st defendant intends to sell the suit property on the basis of a valuation that was carried out in the year 2011. The plaintiff has in my view failed to discharge this onus.

12. Due to the foregoing, I am not satisfied that the plaintiff has demonstrated that he has a prima facie case against the 1st defendant with a probability of success. This being my finding, I am not obliged to

consider whether the plaintiff stands to suffer irreparable harm if the orders sought are not granted. In conclusion, I find no merit in the plaintiff's application dated 30th September 2013. The same is dismissed accordingly with costs to the 1st defendant.

Delivered, signed and dated at KISII this 31ST of October, 2014.

S. OKONG'O

JUDGE

In the presence of:-

Mr. Oguttu-Mboya for the plaintiff

Mr. Soire h/b for Maosa for the defendants

Mr. Mobisa Court Clerk

S. OKONG'O

JUDGE