



No. 336

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO. 3 OF 2012

PHILIP CASPER O. NYAMARI
PLAINTIFF

VERSUS

ECOBANK KENYA LIMITED **1ST DEFENDANT**

S.M GATHOGO T/A VALLEY AUCTIONEERS **2ND DEFENDANT**

RULING

1. The plaintiff brought this suit against the defendants on 10th January 2012 seeking; a permanent injunction to restrain the defendants from selling all that parcel of land known as **LR No. Central Kitutu/Mwamosioma/1329** (hereinafter referred to as “**the suit property**”) and an order that the plaintiff be allowed to contact one, Dickson Nyakioga Mobisa to whom the plaintiff had stood surety and ask him to service his loan with the 1st defendant. In his plaint dated 5th January 2012, the plaintiff averred that he was all material times and still is the registered proprietor of the suit property. The plaintiff averred that, sometimes in the month of May, 2010 he charged the suit property in favour of the 1st defendant to secure a loan that was advanced by the 1st defendant to one, **Dickson Nyakioga Mobisa** (hereinafter referred to only as “**Mobisa**”) in the sum of kshs. 700,000/=. The plaintiff averred further that he was not at all aware that Mobisa was not servicing his loan with the 1st defendant until 5th January 2012 when he received a notice from the 2nd defendant that he would sell the suit property by public auction on behalf of the 1st defendant on 24th January, 2012. The plaintiff averred that apart from the said notification of sale, the 1st defendant had not served the plaintiff with any notice of default by Mobisa in the repayment of the loan and of the 1st defendant’s intention to realize the security that was given by the plaintiff.

2. Together with the plaint, the plaintiff filed an application by way of Notice of Motion dated 5th January 2012 seeking a permanent injunction to restrain the defendants from selling the suit property pending the hearing and determination of this suit. The application was supported by the affidavit of the plaintiff sworn on 5th January 2012 in which he reiterated the contents of the plaint that I have highlighted hereinabove. The plaintiff annexed to his affidavit; a copy of a certificate of official search dated 9th January 2012 in respect of the title of the suit property, a copy of a forty five (45) days redemption notice dated 21st November 2011 that was served upon the plaintiff by the 2nd defendant and a copy of the notification of sale dated 21st November 2011 that was also served upon the plaintiff by the 2nd defendant. The plaintiff maintained that the 1st defendant failed to notify him of Mobisa’s default before it instructed the 2nd defendant to put up the suit property for sale by public auction. The plaintiff’s

application was heard ex parte by Sitati J. on 19th January 2012 who granted to the plaintiff an interim injunction which, effectively stopped the public auction of the suit property that was scheduled for 24th January 2012. The said interim injunction has remained in force to date.

3. The plaintiff's application was opposed by the 1st defendant through a replying affidavit sworn by Maurice Rapada. The 1st defendant contended that the plaintiff was served with all the requisite notices before the suit property was advertised for sale by the 2nd defendant. The 1st defendant annexed to the affidavit of the said Maurice Rapada, a copy of statutory notice dated 9th July 2011 that was addressed to the plaintiff and in which the 1st defendant notified the plaintiff of Mobisa's default in his loan repayment obligations to the 1st defendant and called upon the plaintiff to pay the amount then outstanding in the sum of kshs. 670,088.45 together with interest within three (3) months from the date of service of the said notice in default of which the 1st defendant would sell the suit property to recover the said loan amount.

4. The 1st defendant also exhibited copies the 45 days redemption notice and notification of sale both dated 21st November 2011 that were served upon the plaintiff and Mobisa after the plaintiff failed to heed the demand in the statutory notice aforesaid. The 1st defendant contended that there is an amount of kshs. 733,365.47 still due and owing by the plaintiff and Mobisa to the 1st defendant which amount is not disputed. The 1st defendant has contended that with the debt that was secured by the charge over the suit property still outstanding and not disputed and the requisite notices having been duly served upon the plaintiff and Mobisa, there is no basis upon which the orders sought herein can be granted.

5. On 8th March 2012, the advocates for the parties agreed to argue the plaintiff's application by way of written submissions. The plaintiff filed his written submissions on 16th May 2013 while the 1st defendant filed his submissions on 6th July 2012. I have considered the plaintiffs application together with the replying affidavit filed by the 1st defendant in opposition thereto. The principles upon which this court grants a temporary injunctions are now well settled. As was stated in the case of **Giella –vs- Cassman Brown & Co. Ltd [1973] E. A 358**; an applicant for a temporary injunction must establish a prima facie case with a probability of success against the respondent and must also demonstrate that he stands to suffer irreparable harm unless the order sought is not granted.

6. In the event that the court is in doubt as to the foregoing, the application would be determined on a balance of convenience. There is no dispute that the plaintiff charged the suit property in favour of the 1st defendant to secure a loan of kshs. 700,000/= that was advanced by the 1st defendant to Mobisa. There is no dispute that Mobisa defaulted in his loan repayment obligations to the 1st defendant to the extent that as at 31st October 2011 a sum of kshs. 699,159.11 was due and owing by Mobisa to the 1st defendant which amount had risen to kshs. 733,365.47 as at 28th February 2012 when the 1st defendant responded to the application herein. Mobisa having defaulted in his loan repayment obligation to the 1st defendant, the 1st defendant was entitled under the law to exercise its statutory power of sale over the suit property that was provided by the plaintiff as security for the repayment of the said loan. What is in dispute in the application before me is whether the 1st defendant complied with the statutory requirements before putting up the suit property for sale by public auction in exercise of its said statutory power of sale.

7. The 1st defendant was required under section 74 of the Registered Land act, Cap 300 Laws of Kenya (now repealed) to serve the plaintiff with a statutory notice demanding the payment of the debt that was secured by this suit property within three (3) months from the date of service of the said notice before instructing an auctioneer to put up the property for sale by public auction. Once the auctioneer was instructed, the auctioneer was also required under the Auctioneers Rules, 1997 to serve the plaintiff with a forty five (45) days notice to redeem the suit property by making payment of the debt due to the 1st defendant in default of which the suit property would be put up for sale. Finally, the auctioneer was required to give the plaintiff a notice of sale of the suit property specifying among others the date, the time and the place where the sale of the suit property was going to take place. The plaintiff has admitted

having been served with a redemption notice and a notification of sale by the 2nd defendant but has denied service of the statutory notice.

8. In the 1st defendant's replying affidavit that was sworn by Maurice Rapada on 28th February, 2012 referred to herein above, the 1st defendant annexed a copy of a statutory notice dated 9th July 2011 which the 1st defendant claimed to have served upon the plaintiff by way of registered post in compliance with section 74 of the Registered Land Act, Cap. 300 Laws of Kenya (now repealed). The said statutory notice is indicated to have been served upon the plaintiff through Post Office Box Number 531-40200 Kisii. On being served with the 1st defendant's replying affidavit to which the said statutory notice was annexed as aforesaid, the plaintiff sought leave to file a supplementary affidavit to respond to the issues that had been raised in the said affidavit which leave was granted on 8th March 2012. The plaintiff however did not file the said supplementary affidavit. The 1st defendant's contention that it served a statutory notice upon the plaintiff at his last known postal address by registered post was therefore not controverted. The plaintiff did not contest the postal address that was used by the 1st defendant or receipt of the said notice.

9. In the circumstances, I have no reason to doubt the 1st defendant's contention that the plaintiff was duly served with a statutory notice. The 1st defendant having demonstrated that; the suit property was charged to it by the plaintiff as a security for a loan that was advanced to Mobisa, Mobisa has defaulted in the repayment of the said loan, it has served upon the plaintiff and Mobisa all the requisite notices calling for the payment of the loan amount outstanding and the payment has not been forthcoming, I am not persuaded that the plaintiff has established a prima facie case against the defendants with a probability of success. This court cannot stop a chargor from exercising its statutory power of sale merely because the chargor requires time to persuade the principal debtor to pay the amount that had been secured under the charge.

10. Having come to the conclusion that the plaintiff has failed to establish a prima facie case with a probability of success, I am not obliged to consider whether the plaintiff has met other conditions for granting a temporary injunction. In conclusion therefore, I find no merit in the plaintiff's application dated 5th January, 2012. The same is accordingly dismissed 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. Sagwe h/b for Ombati for the plaintiff

N/A for the defendants

Mr. Mobisa Court Clerk

S. OKONG'O

JUDGE