



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISII**

**ENVIRONMENT AND LAND CIVIL CASE NO. 52 OF 2014**

**NAHSHON OTOTO MOTURI T/A**

**MIGORI FLOUR MILLS.....PLAINTIFF**

**VERSUS**

**KENYA INDUSTRIAL ESTATES LIMITED.....DEFENDANT**

**RULING**

1. The plaintiff brought this suit against the defendant on 13<sup>th</sup> February 2014 seeking; a declaration that he has fully repaid the loan that was granted to him by the defendant and an order for the discharge of charge over all that parcel of land known as **LR No. Suna East/Wasweta I/3521** (hereinafter referred to as **“the suit property”**). Together with the plaint, the plaintiff filed an application by way of Notice of Motion dated 13<sup>th</sup> February 2014 seeking a temporary injunction to restrain the defendant from advertising for sale, selling and/or disposing of the suit property pending the hearing and determination of this suit. The plaintiff’s application was brought on the grounds that the plaintiff has paid in full the loan amount that the defendant had advanced to the plaintiff on the security of a charge over the suit property and that instead of the defendant discharging the suit property, the defendant has made a fresh demand upon the plaintiff for the sum of kshs. 677,360/= which the defendant has claimed to be an outstanding loan amount due by the plaintiff to the defendant.

The plaintiff has contended that the defendant has threatened that unless the said amount is paid, the defendant will proceed with the sale of the suit property in exercise of its statutory power of sale. The plaintiff has contended that he has paid the loan amount due to the defendant in full and as such the fresh demand by the defendant is unlawful and baseless. In his affidavit in support of the application, the plaintiff deposed that he took a loan from the defendant in the year 1987 in the sum of kshs. 159,500/= which loan he defaulted in repaying. Following the said default, the defendant instructed auctioneers in the year 2011 to sell the suit property that was charged to the defendant to secure the said loan. The said auctioneers served the plaintiff with 45 days redemption notice and notification of sale in which they indicated that the amount that was due and owing by the plaintiff to the defendant was kshs. 472,946/= as at 13<sup>th</sup> October 2011. On receipt of the redemption notice and notification of sale aforesaid, the plaintiff entered into negotiations with the defendant through which he was granted time to pay the amount then outstanding together with auctioneers charges. Pursuant to that arrangement, the plaintiff paid to the defendant a sum of kshs. 586,826/= which to the plaintiff was in full and final settlement of his indebtedness to the defendant. This payment was made on 9<sup>th</sup> January 2012. On 9<sup>th</sup> February 2012, the plaintiff paid to the defendant a further sum of kshs. 5,000/= being the fees for discharge of charge over the suit property.

3. The plaintiff has deposed that on 30<sup>th</sup> September 2013, he sent a letter to the defendant through his previous advocates demanding a discharge of charge over the suit property and that instead of discharging the suit property, the defendant served him with a statutory notice dated 2<sup>nd</sup> December 2013 demanding the payment of a further sum of kshs. 434,527/= which the defendant claimed to be due to it on the plaintiff's account No. 5230062 with the defendant. In the said demand letter, the defendant threatened to sell the suit property within 3 months from the date of service thereof if no payment is made to it as demanded. The plaintiff has contended that the statutory demand that has been served upon him by the defendant is bad in law the amount that had been demanded earlier by the defendant having been paid in full.

4. The plaintiff's application was opposed by the defendant through a replying affidavit sworn by the defendant's legal services manager, Edna Adala on 17<sup>th</sup> April 2014. In her affidavit, she deposed that the defendant advanced to the plaintiff two (2) loan amounts. The first loan was in the sum of kshs. 159,500/= that was advanced to the plaintiff pursuant to a loan agreement dated 10<sup>th</sup> August 1987. The second loan amount was in the sum of kshs. 200,000/= that was advanced to the plaintiff pursuant to a loan agreement dated 18<sup>th</sup> October 1990. The two (2) loan amounts were secured by a chattels mortgage and a charge over the suit property. The loan amount that was advanced on 10<sup>th</sup> August 1987 was drawn down and was repayable through the plaintiff's account number 5030990-0062 with the defendant while the loan amount that was advanced to the plaintiff on 18<sup>th</sup> October 1990 was drawn down and was repayable through the plaintiff's account number 5030990-0131 with the defendant. The defendant's said legal manager has contended that the plaintiff defaulted in the repayment of the two (2) loans that resulted in him being served with a statutory notice and the redemption notice and notification of sale aforesaid.

5. The defendant has contended that the demand for payment that was made upon the plaintiff in the year 2011 related to the loan that was advanced to the plaintiff on 18<sup>th</sup> October 1990 through loan account no. 5030990-0131 aforesaid. The defendant has contended therefore that the sum of kshs. 586,826/= that was paid by the plaintiff was in settlement of the amount that was due on that account. The defendant has contended that the settlement of the amount that was due on account no. 5030990-0131 left the amount that was advanced to the plaintiff on 10<sup>th</sup> August 1987 through account no. 5030990-0062 still outstanding and that the statutory notice dated 4<sup>th</sup> February 2014 complained of by the plaintiff related to the amount that was due and owing to the defendant under the plaintiff's loan account no. 5030990-0062 in which there was an amount of kshs. 434,516/= due and owing as at 31<sup>st</sup> January 2014. The defendant contended that this amount is still due and payable and that the defendant is entitled to sell the suit property for the recovery of the same.

6. In his further affidavit sworn on 30<sup>th</sup> October 2014, the plaintiff contended that the loan that was advanced to him on 10<sup>th</sup> August 1987 was not secured by a charge over the suit property. The plaintiff contended further that the defendant has not given him credit for the payment that he had made on account number 5030990-0062. The defendant's said legal services manager also swore a supplementary affidavit in which she deposed that the loan that was advanced to the plaintiff on 18<sup>th</sup> October 1990 was secured by a further charge over the suit property.

7. On 21<sup>st</sup> May 2014, I directed that the plaintiff's application be argued by way of written submissions. The plaintiff filed his submissions on 20<sup>th</sup> October 2014 while the defendant did so on 10<sup>th</sup> November 2014. In their submissions, the plaintiff's advocates submitted that the defendant having demanded and received a sum of kshs. 586,826/= from the plaintiff, the defendant is stopped from demanding further payments.

8. In their submissions in reply, the defendant's advocates reiterated the contents of the two (2) affidavits filed herein by the defendant in opposition to the application and submitted that the plaintiff has not met the conditions for granting a temporary injunction. The defendant's advocates submitted that the loan amount that was advanced to the defendant on 10<sup>th</sup> August 1987 through account no. 5030990-0062

remains due and payable by the plaintiff to the defendant and that the defendant has a statutory right to sell the suit property for the recovery of the same. The defendant's advocates have submitted that the doctrine of estoppel relied on by the plaintiff is not applicable. The defendant's advocates have submitted that the defendant did not make any representation to the plaintiff that the amount that was paid to settle the loan that was outstanding on account no. 50309900-0131 would be in full and final settlement of the amount due under account no. 50309900-0062. The defendant's advocates submitted further that estoppel can only be used as a shield and not as a sword.

9. I have considered the plaintiff's application and the affidavits filed in support thereof. I have also considered the defendant's affidavits filed in opposition to the application. Finally, I have considered the submissions by both parties and the authorities cited in support thereof. The law on temporary injunction is 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 against the respondent. He must also satisfy the court that he will otherwise suffer injury that cannot be compensated in damages unless the order is granted. In the event that the court is in doubt as to the above, the application would be determined on a balance of convenience. The plaintiff's case as pleaded in the plaint dated 13<sup>th</sup> February 2014 is that the defendant had advanced to him a loan in the year 1987 that was secured by a legal charge over the suit property.

10. The plaintiff has contended that although he has paid the loan that was advanced to him by the defendant in full, the defendant has refused to discharge the charge over the suit property. The defendant has admitted that it indeed advanced to the plaintiff a loan in the year 1987 that was secured by a charge over the suit property. The defendant has also admitted that the plaintiff did pay to it a sum of kshs.586,826/= in settlement of the amounts that were due by the plaintiff to the defendant. The defendant has contended however that the plaintiff had two (2) loans with the defendant which were both secured by the suit property. The first loan was advanced in the year 1987 through loan account no. 50309900-0062. This loan was secured by a first charge over the suit property. The second loan was advanced in the year 1990 through account no. 50309900-0131. This loan was secured by a further charge over the suit property. The defendant has contended that the amount of kshs. 586,826/= was paid by the plaintiff in settlement of his second loan with the defendant that was secured a further charge. The defendant has contended that the amount due on the plaintiff's first loan that was secured by a first charge over the suit property remains unpaid.

11. The defendant has contended therefore that the demand that it has made upon the plaintiff which is on account of the first loan is valid. The plaintiff has admitted that he had two (2) loans with the defendant. The plaintiff has also not denied that he has not paid the first loan. The plaintiff has contended that the first loan was not secured by a charge over the suit property. The plaintiff has contended further that the sum of kshs. 586,826/= that he paid to the defendant was in full and final settlement of his indebtedness to the defendant. There is no dispute on the material before me that the plaintiff had two (2) loans with the defendant which loans were advanced at different times through separate loan accounts. There is also no dispute that the plaintiff defaulted in repaying the two (2) loans in accordance with the loan agreements that he entered into with the defendant. What is in dispute is whether the two (2) loans were secured by a charge and further charge over the suit property and whether the sum of kshs.586,826/= that was paid by the plaintiff to the defendant was in settlement of the two (2) loans.

12. The plaintiff has contended that only the second loan that was advanced in the year 1990 was secured by a charge over the suit property. He has contended that the first loan that was advanced in the year 1987 was secured by chattels. This contention is contrary to the plaintiff's pleadings. In his plaint, the plaintiff has pleaded that the loan that was advanced to him by the defendant in the year 1987 was secured by a legal charge over the suit property. It is not open to the plaintiff to advance arguments which are contrary to his pleadings. See order 2 rule 6 of the Civil Procedure Rules, 2010. In addition to the plaintiff's own admission in his pleadings that the first loan that was advanced in 1987 was secured by a legal charge over the suit property, the defendant has also placed before the court copies of the two (2) Charges that were executed by the plaintiff in 1987 and in 1990 to secure the two (2) loans that were advanced by the defendant to the plaintiff. The plaintiff has not contested these Charges. I am not persuaded that the plaintiff was not aware that he had executed a charge and further charge over the suit

property to secure loans that were advanced to him by the defendant in the year 1987 and 1990. A certificate of official search dated 28<sup>th</sup> December 2011 that is annexed to the plaintiff's affidavit sworn on 13<sup>th</sup> February 2014 shows clearly that the two (2) loans were secured by a charge and further charge over the suit property. The certificate of official search was obtained by the plaintiff on 28<sup>th</sup> December 2011. This means that the plaintiff was well aware by the time he was making the payments referred to above that there were two (2) Charges registered against the suit property. For the foregoing reasons it is my finding that the two (2) loans that were advanced by the defendant to the plaintiff were secured by the suit property through a charge and further charge.

13. As to whether the sum of kshs.586,826/= that was paid by the plaintiff to the defendant on 9<sup>th</sup> January 2012 was in full and final settlement of his two (2) loan accounts with the defendant, my view is that I have no evidence to support that contention. The correspondence that was exchanged between the plaintiff and the defendant regarding the said payment does not indicate that the payment was in settlement of the two accounts. Infact, the letter by the defendant dated 21<sup>st</sup> November 2011 through which the plaintiff was allowed to clear the amount that had been demanded from him by 21<sup>st</sup> February 2012 expressly refers to Migori Flour Mills A/C No. 503-0131. There is no reference to account no. 50309900-0062. The plaintiff's advocate's undated letter through which the plaintiff demanded the charge over the suit property to be discharged also referred to Migori Flour Mills A/C No. 503-0131. There is no indication anywhere that the payment made by the plaintiff was on account of his two (2) loan accounts and that the defendant had agreed to accept the said payment in full and final settlement of the two (2) accounts.

14. For the foregoing reasons, I am unable to agree with the plaintiff's contention that the payment referred to above was in full and final settlement of his two (2) loan accounts. Since there is no evidence that the defendant had represented to the plaintiff that the said payment would be in full and final settlement of his total indebtedness to the defendant, I am in agreement with the submission by the defendant's advocates that the doctrine of estoppel on which the plaintiff has put heavy reliance is not applicable. In any event, as was held in the case of **Mulji Jetha Ltd –vs- Commissioner of Income Tax Nairobi [1967] E.A 50**; the principle of equitable estoppel cannot be used to found a cause of action. It can only be used by a defendant as a shield to defend himself but not by a plaintiff as a sword against a defendant. The plaintiff's estoppel argument seems to be misconceived in the circumstances.

15. From what I have set out hereinabove, I am not persuaded that the plaintiff has a prima facie case with a probability of success against the defendant. The plaintiff has therefore failed to establish the main condition for granting a temporary injunction. That being the case, I am not obliged to consider the other conditions as they will not affect the outcome of the plaintiff's application herein. The upshot of the foregoing is that the plaintiff's application dated 13<sup>th</sup> February 2014 is without merit. The same is accordingly dismissed with costs to the defendant.

**Delivered, signed and dated at KISII this 19<sup>th</sup> of December, 2014.**

**S. OKONG'O**

**JUDGE**

**In the presence of:-**

Mr. Onyango h/b for Abisai for the plaintiff

Mr. Mose L. for Nyamurongi for the defendant

Mr. Mobisa Court Clerk

**S. OKONG'O**

**JUDGE**