



**REPUBLIC OF KENYA**

**High Court at Eldoret**

**Environmental & Land Case 698 of 2012**

**RAJAB KIPKOSKEI MAGUT.....PLAINTIFF**

**VS**

**K-REP BANK LTD & 2 OTHERS.....DEFENDANT**

**RULING**

The application to which this ruling relates to is the Motion dated 24 March 2011 filed by the plaintiff. I did allow this application when it was argued and reserved the delivery of the formal ruling on the 19 February 2013. This now is the formal ruling.

The application before me is an application brought under the provisions of Order 40 Rule 1 and 4 of the Civil Procedure Rules and Sections 3 and 3A of the Civil Procedure Act. The main prayer sought in the application as drafted seeks the following order :-

*A permanent injunction be and is hereby issued restraining the 1<sup>st</sup> defendant , its agents, employees and or servant from selling, offering for sale advertising for sale, transferring or in any other manner dealing with the plaintiff's land parcel number Eldoret Municipality Block 14/1518 pending the hearing and determination of this suit.*

It will be seen that this is an application for injunction. I am not particularly happy with the drafting of the prayer since it is not drafted as a prayer but as the order itself. It is a minor issue that does not impact on the application but I think it is important for prayers to be drafted as prayers and not as the final order. The grounds upon which the application is based are inter alia that the plaintiff is the registered owner of the suit land, that the defendant through an auctioneer caused the suit land to be advertised for sale on 14/3/2011 for a sale scheduled to take place on 31/3/2011, that the defendant never issued a statutory notice; that the plaintiff was not given notice of any default by the 2<sup>nd</sup> defendant; that the power of sale of the 1<sup>st</sup> defendant has not crystallized; that the plaintiff has not been given an opportunity by the 1<sup>st</sup> defendant to exercise his right of redemption as no notice has been issued to him and the newspaper advertisement is too short and came to the plaintiff's notice too late in the day; that if the sale proceeds, the plaintiff stands to suffer irreparable loss.

The application is supported by the affidavit of the plaintiff and is opposed by the 1<sup>st</sup> defendant who filed a Replying Affidavit.

This being an application for injunction, I stand guided by the principles laid out in the case of **Giella vs Cassman Brown (1973) EA 358**. First, I need to be satisfied that the plaintiff has laid out a prima facie case with a probability of success; secondly, I need to be alive to the tenet that an injunction will not normally be granted if damages are an adequate remedy; and finally, if in doubt, decide the matter on a

balance of convenience.

The starting point is inevitably the plaintiff's case which is set out in the Complaint as elaborated by the supporting affidavit to the present application. Both defendants have filed defences but only the 1<sup>st</sup> defendant has filed a Replying Affidavit to the present application. The plaintiff's pleadings therefore have to be placed in the context of the defences raised by the defendants, especially the defence of the 1<sup>st</sup> defendant and its averments in its replying affidavit as the injunction sought is directed at the first defendant.

The plaintiff has pleaded in his Complaint that he is the registered owner of the suit land Eldoret Municipality Block 14/1518 measuring approximately 2 hectares. It is pleaded that in November 2008, the 2<sup>nd</sup> defendant approached the plaintiff requesting him to guarantee loan offered by the 1<sup>st</sup> defendant (the Bank) to the 2<sup>nd</sup> defendant and the plaintiff offered the suit land as security for a loan of Kshs. 2 million. It is pleaded that at that time, the 2<sup>nd</sup> defendant had won a tender worth Kshs.21, 214,950/= floated by the Municipal Council of Eldoret for the construction of Kahoya Market. It is pleaded that it was agreed between the defendants and the Municipal council of Eldoret that all payments will be channeled through the 2<sup>nd</sup> defendant's account with the Bank so that the Bank could recover its money from these payments. The plaintiff has pleaded that the construction of the market was completed and that he believes that the Municipal Council of Eldoret paid the 2<sup>nd</sup> defendant the amount due under the contract. The plaintiff has pleaded that on 14 March 2011, the Bank through Garam Investments, a firm of auctioneers, placed an advertisement in the Daily Nation newspaper putting up the suit land for sale apparently in exercise of its statutory power of sale and scheduled the auction for 31 March 2011. The plaintiff has pleaded that the intended sale is illegal, wrongful, irregular, fraudulent and null and void and he has set out the alleged particulars of illegality and fraud. These particulars are as follows :-

- (a) Failing to give the plaintiff a mandatory 45 days' notice to redeem his property.
- (b) Failing to give the plaintiff any or any sufficient notice of intention to realize the security by way of sale.
- (c) Failing to give the plaintiff notice of default by the 2<sup>nd</sup> defendant.
- (d) Acting unreasonably and insisting on going on with the sale without offering the plaintiff an opportunity to know how much is outstanding.
- (e) The plaintiff was not served with the requisite notice of any default on the part of the 2<sup>nd</sup> defendant or the 1<sup>st</sup> defendant's intention to sell and as such the 1<sup>st</sup> defendant's statutory power of sale has not crystallized. The advertisement and the intended sale are therefore in contravention of the provisions of the Registered Land Act.
- (f) The plaintiff was not informed by the 1<sup>st</sup> defendant that after the contract financed was completed the 2<sup>nd</sup> defendant did not pay the outstanding loan or that the payments were not channeled through the 2<sup>nd</sup> defendant's account with the 1<sup>st</sup> defendant as had been agreed.
- (g) The plaintiff was not served with any notices by the Auctioneer as required by Law in particular the Registered Land Act and the Auctioneers Act and Rules.
- (h) Failing to recover the securities offered by the 2<sup>nd</sup> defendant as the principal debtor before advertising the plaintiff's property for sale.

The supporting affidavit has more or less repeated what is contained in the complaint. It is deposed that the plaintiff was surprised to see in the Daily Nation newspaper of 14/3/2011 an advertisement by Garam Investment Auctioneers, acting on instructions of the 1<sup>st</sup> defendant, advertising the suit land for sale. He has deposed that prior to the advertisement, he was not served with any statutory notice by the Bank and

neither was he served with any notice by the auctioneer of an intention to sell the property. He has also deponed that he was never notified of any default by the 2<sup>nd</sup> defendant nor of the amount outstanding and that he has never been given an opportunity to redeem the suit land.

The 1<sup>st</sup> Defendant in its defence has denied that the intended sale is illegal, wrongful, irregular, fraudulent or null and void and has denied all particulars of fraud and illegality set out by the plaintiff. The 1<sup>st</sup> Defendant has averred that the intended sale and advertisement was done within the confines of the law and hence both the intended sale and advertisement are both legal and proper in law. It has filed a Replying affidavit sworn by Jeremy Imanene the Recoveries Manager of the 1<sup>st</sup> Defendant. There are various depositions in the affidavit on how the loan was offered to the 2<sup>nd</sup> defendant, how the payments were to be done, and that there is default by the 2<sup>nd</sup> defendant, that owing to the default, the 1<sup>st</sup> defendant placed an advertisement in the Daily Nation of 14/3/11 through Garam Investments Auctioneers for a sale scheduled for 31/3/2011 by way of public auction. It is deponed that the advertisement is lawful and that the intended sale was done within the confines of the law.

The application was canvassed before me on the 7 February 2013. Only Mr. Keter, learned counsel for the applicant attended. Having been satisfied that the hearing date was taken by consent, I allowed counsel for the applicant to proceed with the application. Mr. Keter urged me to allow the application. He took me through the pleadings, the application and the supporting affidavit, and through the response of the 1<sup>st</sup> defendant. Counsel argued that the Bank could not purport to sell the suit land without first issuing a statutory notice. He also argued that the Bank has not issued a 45 days' Notice of Redemption. He argued that the plaintiff has not been given an opportunity to exercise his right to redeem the property. He pointed out that the replying affidavit does not deny that no notices were issued and that they must be taken to admit that they did not issue any notice. He stated that the plaintiff has a good case against both defendants.

I have considered the application which in my view must be allowed.

The applicant has pleaded and deponed that the Bank never issued him with any statutory notice and neither was he issued with a 45 days' notice of redemption. The Replying Affidavit of Mr. Imanene has completely avoided addressing the issue of the statutory notice and the notice of redemption. A general deposition that the advertisement and the intended sale are within the confines of the law is all that comes close to responding to the applicant's assertion that no notices were issued. Once a chargor has pleaded and deponed that no notices have been issued as contemplated by statute, it is incumbent upon the chargee to demonstrate that such notices were duly issued. This would ordinarily be done by annexing the said notices to the replying affidavit.

This suit was premised upon the provisions of the Registered Land Act (CAP 300) (repealed on 2 May 2012). Section 74 of the RLA provided that before exercising the statutory power of sale, a 3 month notice, known as the statutory notice, needed first to be issued. It is on expiry of this notice that a chargee could embark on exercising its statutory power of sale. The RLA contemplated that all sales be by way of public auction. The procedure for the conduct of public auctions is set out in the Auctioneers Rules 1996. Rule 15...??? Provides that before a sale of immovable property is conducted, a 45 days redemption notice must be issued by an auctioneer. It is after the expiry of the redemption notice that the auctioneer can then proceed to advertise the suit land for sale.

The Bank has not demonstrated that it did issue the 3 months statutory notice nor the 45 days notice of redemption. Having failed to demonstrate this, I have no option but to take it that the plaintiff's assertion that the notices were not issued has not been controverted. I therefore hold that on a balance of probabilities, the plaintiff has demonstrated a prima facie case with a probability of success. There is no doubt that if the sale is to proceed, the applicant stands to lose his property and will suffer irreparable loss.

I allow the application with costs to the applicant.

It is so ordered.

DATED AND DELIVERED THIS 19<sup>TH</sup> DAY OF FEBRUARY 2013.

**JUSTICE MUNYAO SILA**

**ENVIRONMENT AND LAND COURT AT ELDORET.**

Delivered in presence of

Mr. A.K. Songok holding brief for Mr. Keter of Ms Keter & Co for the plaintiff.

Mr. C. Akenga of Ms Nyaundi Tuiyot & Co Advocates for the 1st defendant.

N/A for Ms Onyinkwa & Co for the 2nd defendant