

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CIVIL SUIT NO.43 OF 2010

PETER KINUTHIA WATHUO.....PLAINTIFF

VERSUS

CO-OPERATIVE BANK (K) LTD.....DEFENDANT

RULING

The Plaintiff filed an application pursuant to the then **Order XXXIX** (now **Order 42**) **Rules 1 & 3** of the **Civil Procedures Rules** and **Sections 3 & 3A** of the **Civil Procedure Act** seeking orders of temporary injunction to restrain the defendant, by itself or through its agents from selling, disposing of, or interfering with the Plaintiff's ownership and enjoyment of the parcels of land registered as LR.Nos.Bukhayo/Mundika/6954 and South Teso/Angoromo/5590 (herein after referred to as the suit properties) pending the hearing and determination of the suit. The grounds in support of the application are on the face of the application. The Plaintiff contends that his liability to repay the loan that was advanced to the principal debtor was not concurrent with that of the principal debtor. He argues that the bank had not exhausted all avenues for recovery of the loan from the said principal debtor before calling upon him as the guarantor to pay the same. The Plaintiff contends that the Defendant had altered the terms and conditions of the charge and therefore varied the interest payable in the charge to the detriment of the debtor. The Plaintiff asserts that he had not been served with the requisite notice of the intention by the Defendant to exercise its power of sale as chargee. The application is supported by the annexed affidavit of the Plaintiff.

In the affidavit, the Plaintiff deponed that he guaranteed one Jackson Kimani Ndungu who had been advanced the sum of KShs.2,000,000/- by the Defendant. The Plaintiff charged the suit properties to the Defendant to enable the principal debtor be advanced the amount. The Plaintiff deponed that he became aware that the principal debtor had defaulted in repaying the loan. The Plaintiff wondered why the Defendant did not first attempt to recover the outstanding sum from the principal debtor before seeking to call the guarantee. The Plaintiff averred that he had not been served with the requisite statutory notice and the notice of redemption before the Defendant purported to advertise the suit property for sale. The Plaintiff complained that the interest charged by the Defendant on the loan advanced was illegal since it was not charged in accordance with the instrument of charge. In the premises therefore, the Plaintiff argued that it would be unfair and unjust for the Defendant to proceed with the sale of the suit properties before the hearing and determination of the suit.

The Defendant filed a replying affidavit in opposition to the application. Daniel Kimosop, the Branch Manager of the Defendant's Bungoma Branch swore a replying affidavit in opposition to the application. He deponed that the Plaintiff had not established a case to entitle this court to grant him the order of temporary injunction that he has sought. He swore that the Plaintiff had voluntarily executed a guarantee in favour of the principal debtor and was aware that in the event that the principal debtor defaulted in repaying the loan, as a guarantor, he would be called upon to repay the same. He deponed that the Defendant made the Plaintiff aware at all times of the status of the loan account, including when the principal debtor fell in arrears. He denied the claim by the Plaintiff that he had not been served with the requisite statutory notices. He annexed his replying affidavit copies of the statutory notices which were sent to the Plaintiff by registered post. He deponed that after the failure by the principal debtor to repay the loan, the bank was within its right to seek to sell the suit properties to recover the outstanding amount. He urged the court to disallow the application because the Plaintiff had failed to establish any legal reason that would prevent the Defendant from exercising its statutory power of sale. He urged the court to dismiss the application.

At the hearing of the application, this court heard oral rival submission made by Mr. Jumba for the Plaintiff and by Ms. Mbaka for the Defendant. The two counsel essentially reiterated the contents of the application and the replying affidavit. This court has carefully considered the said submission and the pleadings filed by the parties herein in support of their respective opposing positions. The issue for determination by this court is whether the Plaintiff established a case to enable this court grant the interim relief that he has sought. The principles to be considered by this court in determining whether or not to grant the injunction sought by the Plaintiff is now well settled. In **Giella –Vs- Cassman Brown [1973] EA 358**, it was held that for the court to grant an injunction, the applicant must establish a prima facie case. He must also establish that he would suffer irreparable damage that cannot otherwise be compensated by an award of damages. If the court shall be in doubt, it shall decide the application on a balance of convenience.

In the present application, certain facts are not in dispute. It is not disputed that the Plaintiff executed a charge dated 3rd September 2004 wherein he agreed to charge the suit properties to secure the loan that was then being advanced to the principal debtor. Before appending his signature on the charge, the Plaintiff acknowledged and confirmed that he understood the effect of **Sections 74 and 79** of the **Registered Land Act** (now repealed). The said sections of the **Registered Land Act** requires any chargor to confirm that he had been made aware that should the loan together with the accrued interest not be repaid, then the chargee shall be at liberty to exercise his statutory power of sale. There is no dispute that the principal debtor defaulted in repaying the loan that was advanced to him. It is the Plaintiff's case, firstly, that the Defendant acted illegally in seeking to realize the security that he had offered as a guarantor before first exhausting all the remedies available to it as against the principal debtor. The court has perused the instrument of charge. There is nowhere in that instrument that requires the Defendant to first exhaust any remedy against the principal debtor before calling upon the guarantor to repay the loan. The Plaintiff's assertion therefore is not supported by the charge. There is no legal requirement that a chargee first exhausts its remedies as availed to it by the charge instrument against the principal debtor before exercising its rights against the guarantor.

Secondly, the Plaintiff argued that the Defendant had charged an interest rate that was not agreed in the charge and was therefore illegal. It is not denied that the Plaintiff charged the suit properties to the Defendant. If indeed the claim by the Plaintiff will be upheld at trial, then such dispute will constitute a dispute as to the amount owed. In **Mrao Ltd –VS- First American Bank of Kenya Ltd & 2 Others [2003] KLR 125** the Court of Appeal held that a dispute over the sum owed cannot constitute a prima facie case to entitle the court to grant an order of injunction. In the present case, it was clear that the claim by the Plaintiff to the effect that the Defendant charged the interest rate that was not contractual is not supported by evidence.

Thirdly, the Plaintiff argued that he had not been served with the requisite statutory notices. In response to this claim, the Defendant annexed copies of the statutory notices it alleged to have served the Plaintiff before it sought to exercise its statutory power of sale. In the instrument of charge, the Plaintiff indicated that his postal address as c/o P.O. Box 666, Busia. Under Clause 14 of the instrument of charge, it was agreed that any service upon the chargor would be through his last known postal address. There is no evidence that the Plaintiff informed the Defendant of any change of postal address. This court is satisfied that the Plaintiff was issued with the statutory notice by registered post through the above postal address in a letter dated 6th February 2006. He was also served with another statutory notice vide a letter dated 18th February 2010. He was issued with a notice of redemption by the Auctioneer vide a letter dated 21st July 2010. All these notices were sent by a registered post through the Plaintiff's postal address. The claim by the Plaintiff that he was not served with the statutory notices is therefore not supported by evidence. On the contrary, the Defendant established that it served the Plaintiff with the requisite statutory notices.

From the above reasons, it is clear that the Plaintiff has failed to establish a prima facie case to entitle this court to grant him the order of temporary injunction that he craves. The Plaintiff failed to establish that the Defendant had acted illegally in the exercise of its statutory power of sale. The Defendant was made aware at the time he signed the instrument of charge that in the event that the principal debtor defaulted in repaying the loan that was advanced to him together with the accrued interest, then the properties charged

would be liable to be sold by the Defendant to recover the then outstanding amount. If the Plaintiff will suffer any damage as a result of the exercise of statutory power of sale, then he will be compensated by an award of damages. The damage, if any, is quantifiable. The application dated 27th September 2010 is hereby dismissed with costs.

L. KIMARU

JUDGE

DATED, COUNTERSIGNED AND DELIVERED AT BUSIA THIS 24TH DAY OF JULY, 2013.

F. TUIYOT

JUDGE