



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAKAMEGA**  
**LAND & ENVIRONMENT CASE NO. 257 OF 2013**

**WASHIKA WALUCHIO ALLY ..... PLAINTIFF/APPLICANT**

**VERSUS**

**MOLLYN CREDIT LIMITED. .... DEFENDANT/RESPONDENT**

**RULING**

On filing a plaint on 1st track basis on the 20th September, 2013 the plaintiff, on the same date, filed an application under certificate of urgency. The application was filed by way of a Notice of Motion. This is the application for my decision today.

The Notice of Motion was brought under Section IA, 3,3A, and 63(e) of the Civil Procedure Act (Cap. 21). It was also brought under Order 40 rules 1, 2 and 4 of the Civil Procedure Rules. The prayers are as follows -

1. That the application be heard ex-parte in the first instance.
2. That the defendant/respondent his agents, servants or employees be restrained by way of temporary injunction from interfering with, selling, transferring, auctioning or in any way continuing with the intended sale of land parcel No. S. WANGA/EKERO/4099 pending the hearing and determination of this application.
3. That the respondent, his agents, servants or employees be restrained by way of a temporary injunction from interfering with, selling, transferring, auctioning or in any way whatsoever continuing with the intended sale of land parcel No. S. WANGA/EKERO/4099 pending the hearing and final determination of this suit.
4. That an order do issue compelling the respondent to render to the applicant a true and accurate account for the loan account.
5. That the applicant be granted leave to offset the loan amount by instalments of Kshs.20,000/= till full payment is made.
6. That costs of this application be in the cause

The application has grounds on the face of the Notice of Motion. It was filed with a supporting affidavit sworn by the plaintiff on the same date. It was deponed in the said affidavit inter-alia that the plaintiff was unemployed and not able to pay the loan sum of Kshs.44,556/= instalments as agreed. That Eshikhoni Auctioneers had advertised the property for sale alleging that the amount now due was 1,575,952/= as on 25th February 2013. That the interest rate charged was in violation of the provisions of Section 36 (3) of the Central Bank of Kenya Act. It was also deponed that the plaintiff still had the equitable right of redemption. The plaintiff also filed a further affidavit which he swore on 11th November, 2013. It was deponed therein that of the loan amount of Kshs.800,000/=: the plaintiff had already paid the respondent through Co-operative Bank, Kimaathi Branch Kshs.600,000/=.

The application is opposed. The defendant filed a replying affidavit sworn by Edelquine Mmbone Wanyonyi on 19th November, 2013. It was deponed inter-alia that the plaintiff had applied and was granted a loan of Kshs.800,000/=, and that the said land property was used as security. That the plaintiff defaulted in making payments as required and as a result, a statutory notice of sale was issued. That since the plaintiff had admitted owing the money, no prima facie case could be established by him. That the application was frivolous, vexatious and an abuse of the process of the court.

At the hearing, Mr. Luchivia for the plaintiff, made oral submissions in support of the application. Counsel emphasized that if this application was not allowed, then the proceedings would be rendered nugatory. Mr. Kiveu, who appeared for the defendant opposed the application. He stated that the court should not be used to renegotiate the loan. Counsel emphasized that by September, the plaintiff had only repaid the amount of Kshs.20,000/=, while notice of default had been issued to him way back in March, 2013.

In this application, the plaintiff is seeking various orders. Prayer 5 cannot be considered by this court at this stage as it would determine the substantive suit herein. Therefore, I will not deal with it. Prayers 1 and 2 have been overtaken by events. I will therefore not deal with them. Prayer 3 and 4 are the substantive prayers which I will deal with.

Prayer 3 is for interlocutory injunctive orders pending the hearing and determination of the suit. The considerations to be taken by the court in an application for such interlocutory orders were clearly explained in the now famous case of **Giella -vs- Cassman Brown Ltd. [1973] EA 358**. They are three. An applicant has to show a prima facie case with a probability of success. Secondly, an injunction will not normally be granted unless the applicant will otherwise suffer irreparable loss that cannot be compensated adequately by way of damages. Thirdly, if the court is in doubt, it will determine the application on the balance of convenience.

Does the plaintiff have a prima facie case? All parties agree that there is a loan agreement which is the subject of the case herein. The matter is now before this court for interpretation and decision, on whether the plaintiff's claim against the defendant is sustainable and the defendant's action in attempting to realize the security through auction, is lawful. In the meantime, the plaintiff claims to have paid a substantial amount of the loan. This has not been disputed. A prima facie case is not one which must succeed but one which may succeed. With the facts and evidence placed before me at this stage, I am of the view that a prima facie case with a probability of success has been established.

Will the plaintiff suffer irreparable loss if an injunction is not granted? This is a case involving land. The claim of the defendant is a monetary claim. The plaintiff claims to have paid Kshs.600,000/ already to the defendant out of the loan of Kshs.800,000/=. This claim has not been denied or challenged by the defendant. In my view, if a temporary injunction is not granted and the plaintiff loses the land through the intended sale, then he will suffer irreparable loss as it is unlikely that he will get similar family land thereafter. On the other hand, the monetary claim of the defendant can always be realised even if it is by the sale of the same land, after this case is substantively determined.

I observe that the defendant has not stated how much it has cost them to advertise for the sale or to hire the auctioneer. I will therefore not speculate on that. Having found that the plaintiff has satisfied the above two primary requirements for grant of injunctive orders, the application for those orders will succeed.

The balance of convenience also in favour of the plaintiff as it is not disputed that he is in occupation of the land. The request for interlocutory injunction will therefore be granted.

I now turn to the prayer for an account which is prayer 4. The defendant is the one who has loaned money to the plaintiff. They are the ones who are calculating the interest and other charges payable. This is a commercial transaction where all parties are required to act transparently and in good faith with each other. In my view, the defendant has no justifiable reasons to refuse to account to the plaintiff. They cannot claim a right to burden the plaintiff with unexplained charges. In my view, prayer 4 is justified

and I will grant the same.

With regard to costs, I note that the plaintiff might have taken time to file this suit and the application. However, he has stated that he has made an effort and already paid Kshs.600,000/= to the defendant by November this year. That in my view is a sign of an effort being made in good faith, and that payment cushions the defendant for the time being. I will therefore order that costs of the application be in the cause.

For the above reasons, I allow the application and grant prayer 3 and 4. However, as the matter has been filed as a fast track suit, the plaintiff must demonstrate hereafter that he is serious and takes steps to ensure that the suit will be heard and substantively determined in the shortest possible time. The costs of the application are in the cause.

*Dated at Kakamega this 20th day of November, 2013*

**George Dulu**

**J U D G E**