



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARISSA

ENVIRONMENTAL & LAND CASE 367 OF 2011

BARE ALI ISSACK.....1ST APPLICANT

ABDULLAHI BARE ALI.....2ND APPLICANT

VERSUS

FIRST COMMUNITY BANK LIMITED.....RESPONDENT

RULING

The applicants have brought this application under a certificate of urgency seeking an injunction to restrain the respondent either through themselves, servants or agents or any person, body or institution acting pursuant to their instructions individually or collectively from interfering, advertising for sale, dealing, letting, selling, trespassing, interfering with the peaceful and quiet enjoyment and/or transferring the suit properties described as Garissa/Bulla/124, Plot 142/Posta/Garissa, Garissa/Plot No. 1752, and Plot 1754/Kismayu/Garissa pending the hearing and determination of the application in the first instance. They also seek an injunction in similar terms pending the hearing and determination of the suit. The applicants also seek further orders as the court may deem just to grant for ends of justice to be met.

The application is brought under Sections 1A, 1B, 2A, 3, 3A, & 63 (e) of the Civil Procedure Act and Order 40 Rule 1,2 &3 of the Civil Procedure Rules and all enabling provisions of the Law.

The matter was certified urgent and ex-parte orders granted in the first instance pending hearing and determination of the application. The court also directed the applicant to effect service of the application to the respondents. A hearing date was fixed for 9th March 2012.

When the matter came up for hearing on 9th March 2012 the respondents and/or their counsel were absent. The court allowed the hearing to proceed upon satisfying itself that service had been properly effected on the respondents and the documents stamped acknowledging service.

From the grounds on the face of the application and in the supporting affidavit, the applicants state that they are business partners supplying beef cattle to Kenya Meat Commission. It is as such that they were granted loan facilities by the respondent in Account Numbers 107797 and 9992597 respectively to invest in the business. The loan facility was for Kshs 5,000,000 and the applicants have been servicing the loan on a monthly basis on account of payments made directly into the accounts by Kenya Meat Commission

and prompt deductions by the respondent.

They state that they have not defaulted in loan repayments and therefore it came as a surprise to them to see a demand from the respondent for Kshs 7,452,245.62 whereas the loan facility was for Kshs 5,000,000. The applicants state that despite asking for clarifications from the respondent this has not been done. The respondent has gone further to instruct an auctioneer to take action towards recovering that amount. A notification for sale of the applicants' properties named in this ruling has been given for 26th April 2012 unless the applicants pay the amount demanded.

An injunction under Order 40 of the Civil Procedure Rules is sought by a party in situations where any property in a dispute is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongly sold in execution of a decree, among other situations specified under that Order. The purpose of the injunction at this preliminary stage is to preserve the status quo in the subject matter pending a full investigation of the issues and final determination of the case. The law on temporary injunctions is settled in this country following the principles laid down in **Giella vs. Cassman Brown & Co. Ltd (1973) EA 358**, namely:

- i. Firstly, the Applicant must show a prima facie case with a probability of success,**
- ii. Secondly, on interlocutory injunction will not normally be granted unless it is shown that the applicant will otherwise suffer irreparable loss which could not be compensated in damages; and,**
- iii. Thirdly that if the court is in doubt as to the existence or otherwise of a prima facie case, it should decide the application on a balance of convenience.**

In the application before me, the applicants have attached a notification for sale to the effect that the properties listed in that notification and belonging to the applicants will be sold by public auction on 26th April 2012 unless a sum of Kshs 7,452,245.62 is paid. This is the amount of money being challenged in the suit as being higher than what the applicants state as owing to the respondent.

I have carefully considered the plaint, the application and the affidavit in support of the application. I have also considered the annexed documents and brief submissions by counsel. It is my finding that the applicants have established a prima facie case with a probability of success. It is only fair to grant the injunction to allow the issues raised in this case to be fully interrogated. In my view, the respondents will not suffer injustice of any kind. The applicants admit they owe the respondents some money, their only contention being that it is not the amount demanded by the respondents.

I therefore grant an injunction to the applicants restraining the respondent either through themselves, servants or agents or any person, body or institution acting pursuant to their instructions individually or collectively from interfering, advertising for sale, dealing, letting, selling, trespassing, interfering with the peaceful and quiet enjoyment and/or transferring the suit properties described as Garissa/Bulla/124, Plot 142/Posta/Garissa, Garissa/Plot No. 1752, Plot 1754/Kismayu/Garissa pending the hearing and determination of this suit.

The costs of this application will be in the cause.

Delivered, signed and dated 20th March 2012

Stella N. Mutuku

Judge