REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 750 of 2009

HOSEA MUNDUI KIPLAGAT……PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LIMITED……..DEFENDANT

RULING

The application before the Court is brought by a Chamber Summons dated 7th October, 2009, and taken out under **Order XXXIX Rules 1 (a), 2, 3 & 9 of the Civil Procedure Rules; Section 3A of the Civil Procedure Act (Cap. 21) Laws of Kenya and all other enabling provisions of the law.** The Applicant seeks from the Court orders that –

1. The Defendant by itself and /or by its agents or servants be restrained by a temporary injunction from offering for sale, selling, disposing off or alienating interests or in any other manner whatsoever interfering with the plaintiff's interests in land parcel known as NAROK/OL POSIMORU 'B'/5 pending the hearing and determination of this application inter parties.

2. That the Defendant by itself and / or by its agents or servants be restrained by a temporary injunction from offering for sale, selling, disposing off or alienating interests or in any other manner whatsoever interfering with the plaintiff's interests in land parcel known as NAROCK/OL POSIMORU 'B' / 5 pending the hearing and determination of this suit.

3. That costs of this application be provided for.

The application is supported by the annexed affidavit of Mr. HOSEA MUNDUI KIPLAGAT and is based on the grounds that –

(a) The Defendant has advertised its intention to sell the Plaintiff's land parcel measuring approximately 290 acres allegedly since the amount claimed was not secured by the subject charge.

(b) The plaintiff contends that the Defendant lost the right to recover any amount from the plaintiff by entering into a consent in Court with the principal debtor and hence the plaintiff has wholly been discharged.

(c) The plaintiff contends that the amount due to the defendant has not been ascertained and the Defendant has at different times claimed KShs. 87,000,000/=, KShs. 56,000,000/=, KShs. 35,000,000/= and KShs. 20,000,000/= a clear confirmation that the Defendant is acting mischievously to the detriment of the plaintiff.

(d) The plaintiff contends that this liability is limited to the sum of KShs. 4,875,000/= plus simple

interest from 2002 to 2008.

(e) The parcel sought to be sold is approximately 290 acres whose value is in excess of KShs. 500,000,000/= and should the same be sold to recover the sum of about Kshs.5,000,000/=, the plaintiff stands to suffer irreparable loss which cannot be adequately compensated by an award of damages.

(f) The Applicant is willing to pay the amount that is legally found to be due in order to save the agricultural land being pursued.

(g) The Defendant has since 2002 refused to co-operate in ascertaining what is due but has instead been demanding amounts that were never secured by a charge.

(h) It was a term in the said charge and indeed the guarantee that upon default by the principal debtor, and upon notification by the Defendant, the plaintiff would pay the maximum of KShs. 4,875,000/= to the Defendant, plus the agreed simple interest.

(i) Though it appears that the principal debtor defaulted much earlier, the Defendant did not take action to recover the amount until about 2002 when it notified the plaintiff about the default, demanding payment of the sum guaranteed.

(j) The content of the said notification is erroneous and misleading because at no time did the charge secure payment of KShs. 9,500,000/= as alleged. The sum of KShs. 9,500,000/= was guaranteed under a separate arrangement and was not secured by the subject charge and the same is not admitted since it is already barred by the Law of Limitation of Actions Act. The amount claimed was therefore exaggerated and not due at all.

Opposing the application, the Respondent filed a replying affidavit sworn by CHRIS THEURI, the Respondent's Relationship Manager, on 2nd November 2009. In that affidavit, the Deponent deposes that the amount secured by the charge dated 8th January 1996 was KShs. 4,875,000/= plus interest at the rate of 22% p.a. and a default rate of 15% p.a. which rates of interest were subject to variation at the sole discretion of the Defendant as per clauses 1 and 2 of the said Charge produced by the plaintiff. The Principal Debtor, Kenomar International (K) Limited defaulted in repayment of the advances and the Defendant commenced the process of realizing the security. On or around 22nd July, 2009 the plaintiff was informed that the Defendant had instructed auctioneers to sell by public auction the charged property unless he paid the outstanding amount. The plaintiff was served with a Notification of sale of the said property by the Auctioneers on 28th July, 2009 but did not take any action to redeem the property.

Counsel for the respective parties filed written submissions. After considering the application, the supporting and replying affidavits, and the written submissions of the respective parties, I take the view that the main issue for determination is whether the Applicant has made out a case for an interlocutory injunction.

In **GIELLA v. CASSMAN BROWN LTD & ANOR [1973] E.A. 358,** the conditions for granting orders of injunction were stated to be that- *"**Firstly, an Applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt it will decide an application on the balance of convenience."***

I note that the Applicant has admitted in paragraph 2 of the supporting affidavit the execution of a charge in favour of the Respondent relating to the said property to secure payment of the sum of KShs. 4,875,000. The Applicant has acknowledged the fact that the principal debtor defaulted much earlier but the Defendant did not take action to recover the amount until about 2002. It is the Applicant's case that by the Respondent entering into a consent with the principal debtor, the Applicant's liability as a guarantor

was thereby discharged and the Respondent cannot seek payment from him. But at the same time, the Applicant has expressed his readiness to settle what is properly and legally due once ascertained by the court. This contradicts the previous position taken by the Applicant.

The Respondent raised a preliminary objection on the ground that the current application is *res judicata* a similar application having been heard and determined in HCCC No. 362 of 2005. On a look at the said application one notices that the same involved the same parties and the same subject matter. I therefore agree with counsel for the Respondent that the subject of the debt was the same matter which was directly and substantially in issue in the earlier application.

Paragraph 1(b) of the guarantee hereinabove alluded to provides that-

"…this guarantee shall be a continuing security and shall remain in force as such notwithstanding any charge in the name, style or constitution of the Customer and it shall not be considered as satisfied notwithstanding any intermediate payment or satisfaction of account or the payment or liquidation at any time hereafter of the whole or any part of any sum or sums of money due from the Customer to the Bank as aforesaid but shall extend to cover any sum or sums of money which shall at any time for the time being constitute the balance due from the customer to the Bank…"

It is noteworthy that the debt which is the subject of the said guarantee has not been satisfied, and the guarantee is a continuing security and shall remain in force until the subject debt is satisfied. Consequently, the Applicant's contention that the recovery of debt is time barred cannot be sustained.

The Applicant has not produce any evidence before this court to show that indeed he made any attempts to settle the debt since he acknowledged that the principal debtor had defaulted. The failure to meet his obligations under the contract means that the applicant has come to a court of equity with unclean hands which equity frowns upon. At least he has not denied that the Respondent's statutory power of sale had arisen.

In view of the foregoing, I am not satisfied that the Applicant has made out a prima facie case with a probability of success as is stipulated in **GIELLA'S CASE**. On suffering irreparable injury if the injunction is not granted, it is noteworthy that the Respondent is a well established financial institution. If it is found that an injunction ought to have been granted, then the Applicant can be compensated adequately since his loss or injury is quantifiable. If the court was in doubt, the court would still find that the balance of convenience tilts in the Respondent's favour since the interest keeps accruing and may escalate to a point where it will exceed the value of the property. In such a situation the Applicant will lose his property and yet the Respondent will not have been fully paid. Each party will end up being a loser.

For the above reasons, I find that the applicant is not entitled to an injunction pending the hearing and determination of the suit.

The application is accordingly dismissed with costs.

It is so ordered.

L. NJAGI
JUDGE

DATED and **DELIVERED** at **NAIROBI** this 19th day of November, 2012

MABEYA
JUDGE