



REPUBLIC OF KENYA

High Court at Kisumu

Civil Case 8 of 2011

FR. GEORGE MATHENGE1st PLAINTIFF

FR. NICHOLAS ONYACH.....2nd PLAINTIFF

FRANCISCAN F. S. OF KENYA C. S. S. LTD.....3rd PLAINTIFF

VERSUS

MICRO ENTERPRISES S. P. T. R. TRUSTEES.....1st DEFENDANT

MUGA AUCTIONEERS & G. MERCHANTS.....2nd DEFENDANT

RULING

The Plaintiffs/ Applicants Notice of Motion dated 7th February 2011 pray for the following reliefs:-

1. Pending the hearing and determination of this suit a temporary injunction do issue directed at and restraining the defendants, their agents, servants employees and or any other person acting through or under their instructions jointly and severally from entering upon alienating, wasting, advertising for sale, selling, auctioning, transferring, disposing, charging, leasing, subdividing, dealings and or interfering with the 1st plaintiff land parcel number East Kisumu / Dago / 515 and East Kisumu / Dago/ 516”.

The application is supported by the affidavits of Fr. Nicholas Onyach, Sr. Irene Akumba and Douglas Majanja.

From the affidavit evidence on record the 1st and 2nd plaintiffs are the registered proprietors of the suit property. At all material times the 1st plaintiff Franciscan Family Association of Kenya is a charitable organization.

The 1st plaintiff equally founded the 3rd plaintiff – Cent Sacco Society Ltd which is registered under the Ministry of Co-operatives.

The 1st and 2nd plaintiffs guaranteed the 3rd plaintiff a mortgage facility from the 1st defendant/respondent . According to the plaintiffs/applicants the suit properties owned by the 1st plaintiff guaranteed the said loan as collaterals.

The details of the loan are clearly indicated in the replying affidavit of the 1st defendant/respondent sworn by one John Masha the General Manager. It appears that the plaintiffs took two (2) sets of loan. The first trench amounted to Kshs. 7,500,000, this was in May 2005 and the second in December 2006, amounting to Kshs. 8,750,000. This position has not been opposed by the plaintiffs.

It is further worthy to note that the further legal charges and sets of agreements were personally guaranteed by the 3rd plaintiff's officers.

The 1st defendant avers that as at March 2010 the amount due and owing was Kshs. 9,479,213.80 and the plaintiffs was badly in arrears. Due to this default the 1st defendant commenced recovery process.

The plaintiffs /applicants born of contention is that they were not given any Notice by the respondent prior to undertaking the exercise its statutory power of sale. The 1st plaintiff further argues that the 3rd defendant locked him out of the entire process and that they were not aware at all of the default. As a matter of fact as soon as they were made aware they prepared a bankers cheques of Kshs. 500,000 in favour of the defendant.

The salient issues to decide at this preliminary stage is whether or not the plaintiffs were issued with the relevant notices by the defendants as per the established rules. Further does the 1st and 2nd plaintiffs who are the guarantors to the 3rd plaintiff have any say in regard to the intended auction of their properties?. Is the figure of Kshs. 9, 479,213.80 inflated?.

On the last issue of the amount due and outstanding the plaintiff's admit that their figure is Kshs. 7,849,541 and not Kshs. 9,479.213.80 as suggested by the defendant. According to them the same has been inflated by additional charges and interest which they term them as illegal.

My answer to this argument is premised in the case of **Pema Holding Ltd =vs= Tropical Farm Management (Kenya) Ltd & Another (2008) eKLR** where the court stated.

“We need not go into other matters such as whether the calculation of the demanded amount was properly done and whether interest accruing from any wrong calculation should have changed the position, save to say that in law it is now established law that disputes as to amounts cannot stop a mortgagee from exercising its statutory power once the same has arisen”.

Consequently, in this case whether the amount is 9 millions or Kshs. 7 millions as contended by the parties at this juncture is not relevant. If anything the plaintiffs are not objecting in principle that they owe the respondent and the same in my opinion is mathematical and accounts can easily be undertaken.

The other issue is what was raised by the 1st and 2nd plaintiffs that as guarantors to the 3rd plaintiffs they have a critical say in protecting the property from being sold by the respondent.

I have perused the charge document very keenly as well as the further charge. The sum total of my finding is that having surrendered their securities to the 3rd plaintiff for charging charge they relinquished any say over the same. The 3rd plaintiff is their creature. The distinction between them is a matter of registration regimes but their purposes are the same, namely to alleviate the poverty from the sick, the poor and the down trodden. If the 3rd plaintiff did not notify them of the defendant and the problems they were facing in recovering the loan from their members then the respondent has no blame to carry. As a matter of fact they failed to monitor the activities of the 3rd plaintiffs.

It further begs the question whether the 1st and 2nd plaintiffs have any locus in this suit. Can they, being guarantors, stop the defendants from exercising its statutory power of sale?

Faced with almost a similar situation like this the Honourable Judge Ringera (as he then was) said in the case of **Nairobi Mamba Village =vs= National Bank of Kenya Milimani Commercial Court**

case No. 1838 of 2001.

“The argument by counsel for the plaintiff that as the plaintiff is the principal borrower he has locus to challenge the sale of the guarantors security on the basis that unless his obligation to pay the loan and default in such obligation is first established the guarantor (who is a collateral debtor) cannot be called upon to pay or in default have his security sold appears to me to be fallacious. The fallacy is not in the proposition that a guarantor cannot be called upon to pay the debt guaranteed unless the principal debtor is in default for such is undoubtedly the correct position in law but in the other proposition that the principal debtor can object to the guarantor being sued or otherwise brought to shoulder his obligations under the guarantee. None of the English cases cited on behalf of the plaintiff show that the principal debtor can sue and obtain relief on behalf of the guarantor”.

The difference though with the present scenario is that both the chargee and the guarantors have filed this suit against the creditor. My understanding however is that it is only the principal debtor in this case the 3rd plaintiff who has the real locus to sue the defendant as it has the contractual capacity with the defendant.

The other principle issue raised by the applicants is lack of notice by the Respondents.

Rule 15 of the Auctioneers Rules Chapter 526 Laws of Kenya provides that :-

“15; Upon receipt of a court warrant or letter of instructions the auctioneer shall in the case of immovable property

- a)
- b)

c) locate the property and serve the notification of sale of the property on the registered owner or an adult member of his family residing or working with him or where a person refuses to sign such notification the auctioneer shall sign a certificate to that effect.

d) Give in writing to the owner of the property a notice of not less than 45 days within which the owner may redeem the property by payment of the amount set forth in the court warrant or letter of instructions,

e) On expiry of the period of notice without payment arrange sale of the property not earlier than fourteen days after the first newspaper advertisement”.

I have perused the respondents replying affidavit and from the annexures thereto several correspondences were issued to the plaintiffs as well as the guarantors. Of great significances are the notification of sale dated 25th November 2010 and the 45 days redemptio notice respectively issued by the respondents. Both documents were received and signed by one Erick Ogot Sembe . One Joseph Gathirwa Muturi has sworn a certificate of service dated 29th November 2010 to that effect.

This goes contrary to the averments by Fr. Nicholas Onyach in his supplementary affidavit sworn on 1st February 2011. According to him the notice was directed at the 3rd plaintiff only.

He has not denied that Erick Ogot who received the notices does not work for the plaintiff or at all. I am therefore satisfied that the plaintiff were well served as per the requirements of the Auctioneers Rules earlier own quoted.

The final issue to determine is whether the plaintiffs application fall within the parameters set out by the case of **Giella =vs= Cassaman Brown & Co Ltd 1973 EA 358** namely that:-

“ a) An applicant must show a prima facie case with a probability of success.

b) An injunction will not normally be granted unless the applicant might suffer irreparable injury.

c) When the court is in doubt it will decide the application on the balance of convenience”.

I do not think that the applicant can enjoy any of the aforesaid benefits. The loan was advanced by the 1st defendant to the plaintiffs and this has not been denied. The only reasons are that their members defaulted in payments and they veinly blamed the post election violence which apparently and unfortunately has become a scape goat for every defaulter. They admit the sums of Kshs. 7 million or thereabouts. They enjoyed the loan which they took willingly. They gave out the two securities consciously with the full knowledge that the defendants shall sell then if they do not repay. Since the defendant must also make profits to stay afloat this court cannot impede its course.

Further the balance of convenience does not tilt in favour of the applicants. From the date they filed the suit, it is now over 1 ½ years. I have not been shown any significance steps they have taken to offset the admitted Kshs. 7 million or at all. Had the plaintiff been honest enough they would have demonstrated as a sign of good faith efforts to offset the loan facility.

The plaintiffs/applicants have argued that the properties do benefit the poor and the like in the society. Whereas this could be true, they nevertheless offered them for a commercial venture. The consequences are that the same ought to be treated commercially.

For the above reason I shall dismiss the application with costs to the defendants.

Dated, signed and delivered at Kisumu this 14th day of November 2012.

**H.K. CHEMITEI
JUDGE**

In the presence of:

P. J. Otieno for the plaintiffs

Onyango holding brief for Wade for the defendants

HKC/aao