



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET
CIVIL CASE NO. 184 OF 2010

KIPKEMEI ARAP SONGOK PLAINTIFF

AND

BARCLAYS BANK OF KENYA LIMITED DEFENDANT

RULING

The application by the plaintiff dated 22nd December 2010 is essentially for a temporary injunction order to issue against the defendant Bank restraining it either by itself, its servants and/or agents from selling, auctioning, transferring, alienating, disposing, advertising for sale or conveying by private treaty, or in any other way interfering or dealing with land parcels Nos. **NGERIA/KESSES BLOCK 1 (CHEPTABACH)/59, NGERIA/KESSES BLOCK 2 (ONGATA)/81, SERGOIT/KELJI BLOCK 1 (NGOCHOI)/10 and MOIBEN/KAPSUMBER BLOCK 1 (TACHASIS)/1** pending the determination of this suit.

As per the Complaint dated 22nd December 2010, the suit seeks Judgment against the defendant for a declaration that the alleged outstanding amount of Ksh. 47,216,455/56 or any large or lesser sum is illegal, excessive, harsh, oppressive and unconscionable as it is based on illegal charges, penalties and/or undisclosed interest rate.

The plaintiff also prays for an order that he has repaid the overdraft, loan, interest and all penalties to the defendant and thus entitled to a discharge of all his property security. Further, the plaintiff prays for a permanent injunction against the defendant and an order for the reconciliation of the current accounts, loan accounts and overdraft account.

Basically, the suit arises from overdraft facilities granted to the plaintiff by the defendant on the 8th September 2000, 23rd July 2001 and 11th October 2001 all totaling Ksh. 10,000,000/= (Kenya Shillings Ten (10) Million). The said facilities were secured by legal charges over the parcels of land mentioned herein above.

The plaintiff alleges that in compliance with the terms and conditions of the facilities he repaid a total of Ksh. 21,922,700/60cts inclusive of interest accrued and penalties but on or about the 7th December 2010, the defendant notified him of its intention to exercise its statutory power of sale to recover a further sum of Ksh. 47,216,455/56cts plus associated costs and accruing interest at the rate of

25.75% per annum.

The plaintiff contends that the intended sale of his property is tainted with irregularities, illegalities and therefore unlawful, null and void. The particulars of the alleged irregularities and illegalities include that the defendant did not serve the plaintiff with statutory notice of sale or intended sale, consolidated the loan, overdraft and current accounts without consent of the plaintiff and failed to obtain the requisite consent of the Land Control Board thereby rendering the entire transaction null and void by virtue of the Land Control Act.

The plaintiff contends that the alleged outstanding amount in the sum of Ksh. 42,216,455/56cts is not a true reflection of his indebtedness as it is excessive, oppressive, harsh and unconscionable.

In support of this application the plaintiff deponed an affidavit dated 22nd December 2010 in which he admits that he was granted overdraft facilities amounting to a total figure of Ksh. 10 million and secured by legal charges over his specified parcels of land. At his request the redemption period was extended at various times and on 13th July 2004 vide a letter of even date (Annexure marked "KAS 2"), the defendant accepted repayment of Ksh. 21,127,780/90cts in full and final settlement of the overdraft.

The plaintiff alleges that he repaid a total of Ksh. 21,922,700/60cts and requested for a discharge of the charges created over his property but all in vain. He contracted the Interest Rates Advisory Centre who indicated that there was an overcharge on interest (Annexure marked "KAS 5" refers). However, on 7th December 2010, the defendant demanded a further repayment of Ksh. 47,216,455/56cts and instructed a firm of auctioneers to proceed to auction the plaintiff's charged property in exercise of its statutory power of sale.

The plaintiff alleges that he was not served with the statutory notices of sale or intention to sale and that the intended sale is tainted with irregularities and illegalities and shall cause him irreparable loss and damage. In his supplementary affidavit dated 31st January 2011, the plaintiff maintains that the requisite consent of the Land Control Board was not obtained contrary to the requirements of the Land Control Act and the Registered Land Act. Further, the consent respecting title No. **MOIBEN/KAPSUBER BLOCK 1 (TACHASIS)/1** was purportedly issued on the 13th July 2000 whereas the charge is shown to have been registered on 28th October 1998 which charge is for a principal sum of Ksh. 5 million whereas the purported consent shows the consideration as an "*uncertain*" sum.

The plaintiff also alleges that there was no charge respecting title No. **NGERIA/KESSES BLOCK 2 (ONGATA)/81**. The consent exhibited by the defendant is for a parcel of land unknown to the plaintiff. Also, the charge respecting the Ongata land is shown to have been made on 17th March 1992 yet the material facilities were granted and the purported charges registered after the year 2000. Further, there is no charge respecting title No. **NGERIA/KESSES BLOCK 1 (CHEPTABACH)/59** and no letter of consent respecting title No. **SERGOIT/KELJI BLOCK 1 (NGOCHOI)/10**.

In opposing this application, the defendant relied on the facts contained in a replying affidavit deponed by its legal Counsel dated 20th January 2011 in which the defendant contends that various facilities to the tune of Ksh. 10 million were advanced to the plaintiff who on his own volition charged his various property as security for repayment. The charge documents whose validity was not contested by the plaintiff i.e. (annexure marked No 2) were executed by the plaintiff who understood the consequences of default of payment to be the exercise of statutory power of sale by the defendant pursuant to S. 74 of the Registered Land Act.

The defendant also contends that the allegation that the intended sale of the charged property is tainted with irregularities and illegalities is not the truth as the statutory notices (Annexure marked No. 3) were issued and served upon the plaintiff and even before that, the plaintiff had persistently requested its indulgence to allow him more time to settle the amounts owed.

The defendant further contends that the plaintiff was very much aware of the applicable interest rate

which was agreed between themselves and him.

As regards the consents of the Land Control Board, the defendant contends that the same were obtained and any challenge pertaining to that was an afterthought.

Considering all the foregoing averments alongside the submissions made by the learned Counsels, **MR. NGALA** for the plaintiff and **MR. WETANGULA** for the defendant, this Court is called upon to decide whether or not the plaintiff is entitled to a temporary injunction pending the hearing and determination of this suit.

The conditions for the grant of temporary injunction were set out in the famous case of **GIELLA VS. CASSMAN BROWN & CO. LIMITED [1973] EA 358**. These are:-

- (i) An applicant must show a prima-facie case with a probability of success.**
- (ii) An injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury.**
- (iii) When the Court is in doubt, it will decide the application on the balance of convenience.**

With regard to the first condition, there is no dispute that the plaintiff was granted overdraft loan facilities by the defendant and to secure the repayment thereof he executed legal charges over his four parcels of land.

It is also not disputed that the plaintiff repaid a sum of Ksh. 21,422,700/60cts (See Annexure marked No. 9 in the replying affidavit) but contrary to what is stated by the plaintiff the repayment served to reduce the entire outstanding debt and was not in full and final settlement of the debt.

The outstanding balance as at 7th December 2010 was Ksh. 47,216,455/56cts as indicated in a letter of even date to the plaintiff by the defendant (Annexure marked "KAS 6" in the supporting affidavit). Prior to that letter, the plaintiff had been given a lifeline by the defendant when after a meeting with the defendant, he agreed to make a payment of Ksh. 4,070,313 as full and final settlement of the debt. The meeting was held on 28th and 29th September 2010 and a letter to that effect was written on the 25th December 2010 (Annexure "KAS 6" in the supporting affidavit).

It is apparent that the plaintiff is disputing the amount alleged to be outstanding i.e. Ksh. 47,216,455/56cts. His contention is that he has fully repaid the loan. This explains the prayer in the plaint for the reconciliation of accounts. It is also apparent that the interest charged by the defendant is highly disputed. The plaintiff implies that there was an overcharge of interest by the defendant even though the defendant contends that the interest rate was agreed. The plaintiff contends that the amount currently demanded by the defendant is illegal, excessive, harsh, oppressive and unconscionable in as much as it is based on alleged illegal charges, penalties and/or undisclosed interest rates. Besides the alleged outstanding amount and the interest charged among other charges, the plaintiff is disputing the validity of the charge instruments.

If indeed, the charge instruments were invalid at the time the facilities were granted to the Plaintiff, it would invariably follow that the entire transaction was null and void ab-initio. A valid charge is what prompts and sustains a bank's statutory power of sale. If the charge is devoid of legal validity, then the power of sale cannot be exercised and if it is exercised, it would be illegal.

It is the plaintiff's contention that the facilities granted by the defendant were secured by charges over his four parcels of land. If that were so, he cannot be heard to complain of the validity of charges through which he benefited. But then again, the defendant was required to exercise proper care and diligence to ensure that the facilities granted to the plaintiff were secured by charges which were properly and validly executed. If the charges were later found to be wanting then the defendant would have only itself to blame for failing to exercise proper care and diligence.

The plaintiff alluded to the alleged invalidity of the charges in paragraph (9) (ix) of the plaint. It is not therefore an afterthought for the plaintiff to allege in this application that the charges are not valid.

The charge instruments annexed to the defendant's replying affidavit relate to title No. **NGERIA/KESSES BLOCK 1 (CHEPTABACH)/59** registered on 7th September 2001, **NGERIA/KESSES BLOCK 2 (ONGATA)/81** registered on 19th March 1992, **MOIBEN/KAPSUMBER BLOCK 1 (TACHASIS)/1** registered on 28th October 1998 and **SERGOIT/KELJI BLOCK 1 (NGOCHOI)/10** registered on 29th September 2000. The instruments show that there needs to be a reconciliation between the date of the registration thereof and the date when the facilities were offered. This is more so with regard to those instruments registered prior to the year 2000.

Title No. **NGERIA/KESSES BLOCK 1 (CHEPTABACH) 59** is not even reflected in the defendant's letter of offer dated 8th September 2000 (Annexure No. 1 in the replying affidavit). How the title became part of the security needs to be clarified.

Purely on the basis of the uncertainty surrounding the validity of the charge instruments, this Court is inclined to hold that the plaintiff has shown a prima facie case with a probability of success. He would for that reason alone be entitled to a temporary injunction order against the defendant. With that finding, there arises no need to consider the remaining two conditions for the grant of a temporary injunction.

In the end result, the plaintiff's application is granted in terms of prayer (3) with costs to the plaintiff.

J. R. KARANJA

JUDGE

[Read and signed this 17th day of February 2011]

[In the presence of Mr. Ngala for the plaintiff and Ms. Adalo for defendant]