REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL SUIT NO. 55/2010

HENRY GIBENDI ALWODI :: PLAINTIFF

=VERSUS=

VERONICA JEPTOO LAGAT :::::::::::::::::::::::::::::: 1ST DEFENDANT
BARCLAYS BANK OF KENYA LTD :::::::::::::::::::::::: 2ND DEFENDANT

RULING

Before me is an application for injunction under Order XXXIX Rules 1 and 9 of the Civil Procedure Rules. The application is by **Henry Gibendi Alwodi,** the plaintiff, against the defendants, **Veronica Jeptoo Lagat** and **Barclays Bank of Kenya Limited**. The brief background of the application is as follows:-

The plaintiff is armed with a Grant of Representation *Ad Litem* of the estate of the late **Esther Mugaji** who was one of the plaintiffs in HCCC No. 254 of 1997 (O.S) hereinafter **"the civil suit"** against several defendants among them the 1st defendant herein. The court therein, on 10th February, 2004 declared that Land parcel number Nandi/Kapkangani/80 (hereinafter **"the suit land"**) belonged to the deceased and one **Samson Kaunda Mukaji.**

During the pendency of the said suit, the 1st defendant charged the suit land to the 2nd defendant for sums advanced to her by the latter. She defaulted and the 2nd defendant sought to exercise its statutory power of sale and thereby provoked the filing of this suit and this application, both lodged on 21st April, 2010. There are two main reasons for the application namely, that the charge over the suit land was fraudulently created by the 1st defendant and she has failed to service the loan and thereby exposed the suit land to the risk of disposal by the 2nd defendant. The application is supported by an affidavit sworn by the plaintiff which elaborates the two grounds.

The application is opposed by the 2nd defendant. In this regard, it has filed a replying affidavit sworn by its Recoveries Legal Officer. It is deponed in the affidavit, *inter alia*, that the suit land was offered as security by the 1st defendant and a Legal Charge duly registered on 6th March,2001; that at the time of registration, there was no encumbrance registered against the title and neither the plaintiff nor any other person notified the 2nd defendant of the said civil proceedings who should have been heard before the said decree was passed; that no fraud by the bank has been demonstrated, and that when there was default, the 2nd defendant was entitled to exercise its statutory power of sale. In the premises, the 2nd defendant contends that the plaintiff's suit and application have been brought in bad faith with the aim of frustrating the said exercise.

The application was canvassed before me on 30th March, 2011 by **Ms Mufutu,** learned counsel for the plaintiff and **Mr. Mwinamo**, learned counsel for the 2nd defendant. Counsel reiterated the stand-points taken by their clients in their respective affidavits.

I have considered the application, the affidavits filed and the submissions of counsel. Having done so, I take the following view of the matter. The principles applicable for the grant of an interlocutory injunction are settled. They were crystallized in the case of ***Giella –vrs- Cossman Brown & Company and Another [1973] E.A 358***. They are: First, the applicant must show a prima facie case with a probability of success at the trial but if the court is in doubt, it should decide the application on a balance of convenience. Secondly, normally an interlocutory injunction will not be granted unless the applicant would suffer an injury which cannot be compensated in damages.

In the application at hand, the plaintiff does not dispute that the 2nd defendant granted a loan to the 1st defendant on the security of the suit land. He also does not dispute that the 1st defendant defaulted in the repayment of the said loan. That fact is indeed expressly admitted by the plaintiff. He blames the 1st defendant for creating the said charge with the knowledge of the said civil case. He however, does not blame the 2nd defendant in his pleadings at all, nor does he explain why the late **Esther Mugaji** did not seek to join the 2nd defendant in the said civil suit. In those premises, it is clear to me that on the default of the 1st defendant, the 2nd defendant's statutory power of sale arose and became exercisable. The plaintiff has not challenged the validity or adequacy of statutory notices served by the 2nd defendant upon the 1st defendant. Given those facts, I am not persuaded that the plaintiff has established a prima facie case with a probability of success at the trial. Having come to that conclusion, I need not consider the other conditions for the grant of an interlocutory injunction. However, even if I were to consider the application under the condition that an injunction ought not to issue where damages would be an adequate remedy, I would still reject the plaintiff's application as the suit land was offered as security and is therefore clearly quantifiable and if sold, damages would adequately compensate the plaintiff.

Even on a balance of convenience, I would still reject the plaintiff's application as further delay in the realization of the security might diminish its value as a security for the repayment of the increasing indebtedness of the 1st defendant to the 2nd defendant more so, since the plaintiff attributes no blame to the 2nd defendant. Balance of convenience would therefore tilt in favour of the declining the injunction.

The upshot of my above consideration of the plaintiff's application dated 20th April, 2010, is that the same is without merit and is for dismissal. It is dismissed with costs to the 2nd defendant.

It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 25TH DAY OF MAY, 2011.

F. AZANGALALA,
JUDGE.

Read in the presence of:-

1. **Mr. Manani** for the plaintiff and
2. **Mr. Mwinamo**, holding brief for **Mr. Muriu** for the 2nd defendant.

F. AZANGALALA,
JUDGE.
25/5/2011