



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

COMMERCIAL & TAX DIVISION – MILIMANI

CIVIL CASE NO. 809 OF 2010

DAVID KARIUKI GATHUMBI.....1ST PLAINTIFF
ARLINGTON CONSTRUCTION LTD.....2ND PLAINTIFF

VERSUS

EQUITY BANK LIMITED.....DEFENDANT

RULING

1. By a chamber summons dated 19th November, 2010, David Kariuki Gathumbi and Arlington Construction Ltd (hereinafter referred to as the 1st and 2nd applicant), have come to this court seeking several orders. Prayers No.(1) and (2) are already spent. What is now pending before me is prayer No.(3) in which the applicants seek orders that:

“Pending the hearing and determination of the suit filed herein this honourable court be pleased to grant a permanent injunction restraining defendant/ respondent (Equity Bank Limited), either by themselves, their servant, agent and or whomsoever in any means howsoever from attaching, advertising for sale, selling, alienating for sale, transferring, in any manner disposing off or in any other manner dealing with parcel of land known as Kiambaa/Karura/T380.”

2. The application is based on the following grounds:

- (i) That the 1st plaintiff/applicant is the registered owner of the parcel of land known as Kiambaa/Karura/T380 with the defendant having a Charge over the same the 1st plaintiff having charged the same as a guarantor for the 2nd plaintiff/applicant.
- (ii) That the defendant/respondent has issued an illegal and ambiguous statutory notice over the said parcel of land.
- (iii) That the defendant/respondent has proceeded to issue statutory notice for a liability not guaranteed by the 1st plaintiff and not a liability owed to it by the 2nd plaintiff hence the said statutory notice is illegal.
- (iv) That the defendant/respondent has continued to charge interest on the 2nd plaintiff/applicant

arbitrarily and illegally.

(v) That the defendant/respondent has exhibited every intention of disposing off the suit property in a bid to exercise its right of sale under the said illegal statutory notice.

(vi) That the plaintiff/applicant stands to suffer irreparable loss as he risks losing the property charged in satisfaction of a liability he did not guarantee, which liability is not owing against the 2nd plaintiff/applicant.

(vii) That the suit property is the 1st plaintiff/applicant's residential house hence he stands to suffer irreparable loss by losing his home.

(viii) That it is equitable in the circumstance to restrain the defendant/respondent from interfering with the plaintiff/applicant's quiet possession of the suit property.

(ix) That the plaintiff/applicants have established a prima facie case deserving the orders sought.

3. The application is further supported by an affidavit sworn by David Kariuki Gathumbi on 19th November, 2010.

4. The respondent has opposed the application through an affidavit sworn on 4th February, 2011 by Purity Kinyanjui who is the head of Debt Recovery Unit of the respondent. Purity deponed *inter alia* that the 1st and 2nd plaintiffs have been clients of the defendant for a long time. The plaintiff's accounts were constantly overdrawn. The 2nd plaintiff applied for the business current account to be converted from an overdraft into a term loan. As a result a letter of offer dated 25th September, 2008 was made to the plaintiffs which offer was duly accepted. The defendant denied any irregularity in the account. The defendant maintained that the loan account was in arrears and that the defendant is therefore entitled to realize its security. The deponent asserted that the plaintiffs were duly issued with an appropriate statutory notice.

5. Both counsel for the plaintiff and the defendant have filed skeletal submissions. Counsel also appeared before me and highlighted the submissions. I have given due consideration to this application. Firstly, the applicant is seeking a permanent injunction which is the same prayer sought in the plaint. An order of permanent injunction has finality. If granted at this stage, it would have the effect of prematurely determining the plaintiffs' suit without fully hearing the plaintiffs' suit. Thus, the application before the court is incompetent as the prayers sought by the applicants are not available to the applicants at this stage.

6. It is not disputed that the suit property has been charged to the defendant. As chargee, the defendant has a statutory power of sale over the suit property. It would therefore be unfair and unjust to permanently bar the defendant from exercising this right. Further, the defendant's statutory power of sale arises from a legal Charge executed by the 1st plaintiff and a guarantee also signed by the 1st plaintiff. The plaintiff's contention is that the statutory notice issued by the defendant is illegal as the liability is not guaranteed by the 1st plaintiff nor is it a liability owed to the defendant by the 2nd plaintiff. In order to determine *prima facie*, the liability which was guaranteed by the 1st plaintiff, it was necessary that both the Charge and the guarantee executed by the 1st plaintiff be availed to the court. It is only then that the court can appreciate the agreed terms between the parties including the secured debt and the interest to be charged and be in a position to rule whether *prima facie* there is an infringement or a danger of the applicant's rights being infringed. By failing to avail these documents, the plaintiff has withheld vital information from the court.

7. Further, from the plaintiff's own annexures, it is evident that the accounts of the plaintiff are overdrawn and have always been overdrawn. The attempt by the applicant to challenge the amount actually outstanding on the account, only raises an issue with regard to calculations. However, it is trite law that a mortgagee will not be restrained from exercising his power of sale because the amount due is in

dispute. (*Mrao Ltd vs First American Bank & 2 others (2003) KLR 125.*)

8. For the above reasons, I find that the application dated 19th November, 2010 is not only incompetent but also lacks merit. It is accordingly dismissed with costs.

Dated and delivered this 19th day of May, 2011

H. M. OKWENGU
JUDGE

In the presence of: -

Kirugi for the plaintiffs/applicants

Wetangula H/B for Mr. Komolo for the defendant/respondent

..... Court clerk