



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BUNGOMA
Civil Suit 3 of 2009

GUADSON KIRAGUPLAINTIFF

VRS

BARCLAYS BANK OF KENYA LTDDEFENDANT

RULING

This application is brought by way of Chamber Summons under Order XXXIX rule 1 & 2 of the Civil Procedure Rules, sections 74 and 77 of the Registered Land Act, Cap 300, Section 44 A of the Banking Act, Cap.488 section 6 of the Land Control Act, Cap 302 seeking for the following main prayers:

1. *That an interlocutory injunction do issue against the Defendant restraining it by itself, its servants and/or agents from selling, or transferring the land parcels known as EAST BUKUSU/SOUTH KANDUYI/5490 and EAST BUKUSU/SOUTH KANDUYI/5772 pending the hearing and determination of this application in the first instance and thereafter pending the hearing and determination of the suit.*
2. *That the costs of this application be provided for.*

The facts of this application are that the applicant Guadson Kiragu Karani was advanced two loans by the Respondent Barclays Bank of Kenya Ltd, totaling to Ksh.730,000/= and secured the loan with two parcels of land i.e *EAST BUKUSU/S.KANDUYI/5490 and 5772*. The applicant defaulted in payment of the loan resulting to the Respondent giving notice to exercise his statutory power of sale under sections 72 and 74 of the Banking Act. The grounds supporting the application are that the Respondent has mismanaged the loan accounts of the applicant to the extent of claiming a sum of Ksh.16,162,274.94/=. The Applicant contends that, the said demand contravene section 44 A of the Banking Act Cap 488 of the Laws of Kenya which limits the amount that an institution may claim from a debtor. The Applicant depones in his supporting affidavit that the entire transaction is illegal null, and void as suit land parcels being agricultural land in terms of section 2 of the Land Control Act, Cap.302, no consent of the relevant Land Control Board was obtained as required by section 6 of the Land Control Act. The Applicant claims that the Respondent has intimated that it shall sell land parcel No.5490 on 26th of May, 2009 but has not given notification for land parcel No.5772. The Applicant claims that he was not served with a statutory notice contrary to section 74 of the Registered Land Act and with notification of sale contrary to section rule 11 of the Auctioneers Rules 1997.

The issue of non-compliance with Order III, rule 7 and 8 was raised by the Applicant's Counsel who argued that the Respondent's advocates were not properly on record. The applicant was represented by Mr. Kigamwa of Kairo Mbutia & Partners while the Respondent was represented by M/S Njalare of Muiro Mungai & Co. Advocates.

The application was opposed on grounds contained in the replying affidavit of the respondent's recovery's manager Marian Kiilu. As she depones that, the applicant has breached the loan agreement and has not availed any evidence of any payment. The Applicant was served with both the statutory notice and notification of sale as required by the law. The outstanding amount of the loan to date is Ksh,18,187,426.81/= at the said amount does not exceed twice the amount that was due at the time section 44A came into force. As at 1st May, the Applicant owed the Respondent Ksh.9,811,495.67/= . The Applicant has not satisfied the requirements of granting an injunction and as such this application should be dismissed.

The applicant claims that the statutory notice was posted to the wrong address being 111, Nairobi which is denied by the Respondent. The Respondent states that he sent the notice by registered post and annexes the certificate of posting which shows on item 16 the name of G.Kiragu Karani P. O. Box 111, Bungoma. A letter annexed to the application by the applicant by Garam Investments, addressed to G. Kiragu Karani bears the postal address of P. O. Box 111, Bungoma. The notification of sale issued by the Respondent's Advocates, Muriu Mungai & Advocates is addressed to G. Kiragu Karani of P. O. Box 111, Bungoma. The only discrepancy is found in paragraph 8 of the Replying Affidavit where the last known address of the applicant is given as P. O. Box 111, Nairobi. I find that this could be a clerical or typing error during the preparation of the said affidavit. The contention that the statutory notice was posted to the wrong address is not supported by any tangible evidence. It would be expected that if the registered mail did not reach the addressee, it would have been returned to the sender.

I note that the Respondent has annexed a certificate of service of the notification of sale under section 15 (C) of the Auctioneer's rules to the Replying Affidavit. It is sworn by one Joseph Mungai Gikonyo. In paragraph 5 of that affidavit, the deponent states that he served the notification of sale on the mother of the Applicant at the registered suit premises. The contents of the said affidavit were not disputed by the applicant. Neither was the deponent called for cross-examination during the hearing of the application.

The provisions of section 44A limits the amount that an institution may recover from a debtor with respect to a non performing loan to not more than twice the amount due when the loan became non-performing. This law came into force in the year 2007 when the amount due and owing to the Respondent by the applicant was Ksh.9.811,495.67/= as shown by paragraph 15 of the Replying affidavit. This fact was not disputed by the applicant, since he did not swear a further affidavit. It is my finding therefore, that the Applicant has failed to show that, the claim by the respondent does contravene the provisions of section 44A.

The applicant in paragraph 8 of the supporting affidavit depones that he has dutifully made repayments of the loan despite the mismanagement of his account by the Respondent. The applicant has not annexed any evidence to support that averment. Since the subject of the application is the repayment of the loan, the applicant ought to have given some evidence to show what he has paid to the Respondent since the loan was advanced in 1994.

On the issue of the validity of the charge for failure to obtain the relevant land board consent, I find that this is one of the prayers in the plaint. If this court was to analyse the allegations made in this application in that regard, it would amount to deciding the suit prematurely. It is also important to note that the issue is being brought up more than 15 years after the loan was advanced I will therefore, leave that issue to the main suit.

In regard to non-compliance with order III, rule 7 and 8, I concur with the Applicant's counsel that the Respondent's advocate wrongly filed a notice of appointment instead of a notice of appearance. However, this is not fatal to the Respondent's case and it can be regularized. The court having accepted the documents during filing, can not refuse to recognize the firm of Muriu Mungai as the advocates on record for the Respondents. I hereby allow the counsel to correct the anomaly within 14 days.

The law regarding to granting interlocutory injunctions was set out in the case of GIELLA VS. CASSMAN BROWN [1973] EA 358. The applicant must show a prima facie case with a probability of success or that if the injunction is not granted the applicant will suffer irreparable injury that cannot be

compensated by an award of damages. If in doubt, the court shall decide the application on the balance of convenience. The Applicant in this case is required to show that his case has a probability of succeeding when it comes to hearing. Looking at the pleadings, I am not convinced that the applicant has satisfied this requirement. Secondly, the Applicant is supposed to show that he is likely to suffer irreparable loss that can be adequately be redressed by an award of damages. In the present case, the issue is in regard of money which is capable of being compensated by damages. The balance of convenience in this case tilts towards the respondent. Considering the evidence and circumstances of the case, it would not serve the interest of justice to grant the prayer sought. I find that this application has no merit and I dismiss it with costs to the Respondent.

Dated, Delivered and Signed at Bungoma this 24th day of May, 2009 in the presence of Mr. Kiganwa for the Applicant and MS Jalale for the Respondent on 24/05/2009.

F. N. MUCHEMI

JUDGE