



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

ELCC NO. E015 OF 2020

DANSON MWANGI PLAINTIFF

VERSUS

AFYA COOPERATIVE SAVINGS AND CREDIT SOCIETY LIMITED...1ST DEFENDANT

GEORGE NJOROGE MUIRURI T/A LEAKEY AUCTIONEERS.....2ND DEFENDANT

RULING

1. This ruling is in respect of the plaintiff's Notice of Motion dated the 10th November 2020 which seeks the following orders:

1. [Spent]

2. [Spent]

3. THAT a temporary injunction do issue restraining the defendants/respondents whether jointly or severally either by themselves or their agents, servants, employees or persons acting under their direction, control or supervision from advertising for sale, disposing of, selling or otherwise interfering with the quiet possession, usage and utilization of all that property known as LR No. Elburgon/Turi Block 5/196(Turi), pending the hearing and determination of the suit herein.

4. THAT costs of this application be provided for.

2. The application is supported by an affidavit sworn by the plaintiff. He deposed that he is the registered owner of land parcel No. Elburgon/Turi Block 5/196(Turi) and that he entered into a loan agreement with the 1st defendant for a sum of KShs 4,500,000/= which was secured by the suit property. He deposed further that the loan was to be repaid in 24 equal instalments of KShs 121,080 and that he made repayments until June 2016 when he fell into arrears due to poor health and a harsh economy. That he therefore requested for the restructuring of his loan which was allowed on 12th February 2018 with the result that the remainder of the loan being KShs 3,724,850.98 would be paid within 60 months with monthly installments of KShs 83,000.

3. He deposed further that he continued to repay the loan until 2019 when he was taken ill and could no longer repay the loan. He added that the COVID-19 pandemic worsened the situation. As a result of the default, the defendants sought to sell the suit property on the 11th September 2020 and he filed a suit seeking an injunction being Molo CM ELC 45 of 2020. The subordinate court granted interim injunctive orders that it later vacated due to lack of jurisdiction.

4. The 1st defendant responded to the application through a replying affidavit sworn by Stephen Obondy a legal officer under its employment. He confirmed that the plaintiff had been granted a loan facility by the 1st defendant and that a legal charge was registered over the suit property on the 17th December 2014. That the plaintiff defaulted in repaying the loan and that by 26th November 2020, the outstanding loan was KShs 3,546,780. He added that the 1st defendant therefore served upon the plaintiff a 90-day statutory notice dated the 9th June 2016 requiring payment of KShs 4,046,924 which was outstanding as at 31st May 2016. He further deposed that as a result of the court orders issued by the Court at Molo, the sale did not proceed.

5. The plaintiff filed a further affidavit and deposed that he had managed to cover the principal amount of KShs 4,500,000 and had as at the date of his said affidavit repaid KShs 4,751,214. He deposed further that a valuation report dated 14th November 2020 which the 1st defendant had sought to rely on is unacceptable since the valuers were not registered as at the time they were conducting the valuation and that they undervalued the property.

6. The application was canvassed through written submissions. The plaintiff argued that the 1st defendant did not follow the required procedure in the exercise of its statutory power of sale as it did not conduct a forced sale valuation. He also relied on Section 97 of the Land Act and argued further that the 2nd defendant relied on a valuation reported dated the 28th October 2016 for a sale that was scheduled for 11th September 2020 which was more than 12 months old contrary to Rule 11 (b)(x) of the Auctioneers Rules 1997. Additionally, the plaintiff placed reliance on Section 8(2) and (9) of the Valuers Act Cap 532 and the case of **Samuel Mwehia Gitau vs. Elijah Kipng'eno Arap Bii & another [2017] eKLR** and submitted that the valuers who prepared the valuation report dated the 14th November 2020 were not among the registered valuers under the Gazette Notice No. 2823 dated 3rd April 2020. Accordingly, he argued that the plaintiff has a *prima facie* case with a probability of success and will suffer irreparable loss if the orders sought are not granted.

7. The 1st defendant placed reliance on the case of **David Mburu Githere v Jamii Bora Bank Limited [2017] eKLR** and submitted that the plaintiff does not have a *prima facie* case as he defaulted in the repayment of the loan contrary to the charge that he had executed. It also relied on the case of **Alghussein Establishment vs Eton college [1991] 1ALL ER 267** quoted in **Imperial Health Sciences Kenya Limited v Wiseway Freighters Limited [2019] eKLR** and submitted that the plaintiff is in breach of the terms and conditions of the lending and he therefore cannot seek to obtain an injunction in order to defeat the contractual rights of the 1st defendant. It further argued that a dispute on the amount due is not a ground for restraining the exercise of statutory power of sale. On the issue of the Valuation Report, it submitted that one of the valuers who signed the valuation report dated 20th November 2020 was gazetted in Gazette Notice No. 2823 dated 3rd April 2020 and the other one is a practicing valuer within the meaning of Section 2 of the Valuation Act. As to whether the plaintiff will stand to suffer any loss, the 1st defendant submitted that when the plaintiff gave the suit property as security he was aware that in the event of default, then the suit property could be sold.

8. I have considered the application, the affidavits and the submissions. The test applicable when considering an application for an interlocutory injunction is well settled. An applicant seeking such an order is required to establish a *prima facie* case with a probability of success. Even where a *prima facie* case is established, an interlocutory injunction will not issue if damages are an adequate remedy in the circumstances of the case. If the court is in doubt as to whether damages will be an adequate compensation, then the court will determine the matter on a balance of convenience. All these three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant must surmount sequentially. If *prima facie* case is not established, then irreparable injury and balance of convenience need no consideration. See **Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR**.

9. Regarding the definition of *prima facie* case, the Court of Appeal in **Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] eKLR** termed it thus:

... a case in which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter... [it] is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case.

10. The applicant herein has acknowledged that he defaulted in so far as his repayment obligations under the legal charge are concerned. From the material placed before the court, I am satisfied that the defendants served the applicant with the requisite statutory notices. Indeed, the plaintiff admitted receipt of the notices at paragraph 11 of his supporting affidavit.

11. Although the applicant cited ill health and COVID-19 pandemic as a reason for the default, that is really neither here nor there. Besides, no evidence of illness was availed and as regards the pandemic, suffice it to state that it is a very recent development which came after the applicant had defaulted. It has not been shown that the pandemic had any particular effect on the applicant over and above its global effects on everyone, the defendants included. Further, both incidences of default occurred before the onset of the pandemic.

12. It is not in dispute that the sale that was scheduled for 11th September 2020 did not take place owing to the orders issued in Molo CM ELC 45 of 2020. As at the date the present application was filed, there was no sale scheduled in respect of the suit property. As I understand it, the combined effect of **Section 97** of the **Land Act** and **Rule 11 (1) (b) (x)** of the **Auctioneers Rules 1997** is that a chargee is required to set a reserve price on the basis of a valuation carried out not more than 12 months prior to the date of a proposed sale. If there is no scheduled sale then the obligations under the said provisions do not kick in. Since no new sale has been scheduled, the valuation report prior to 11th September 2020 is really of no consequence. When a new sale is ultimately scheduled, it will be the duty of the defendants to comply with the law in staging such sale, including ensuring that a valid valuation is in place. As matters stand now, it would be futile to start interrogating the valuation report dated 20th November 2020 yet there is no evidence that it is to be used in any particular sale. The court cannot give a blanket injunction on the basis of a valuation report that is yet to be of relevance in any sale. All in all, I am not persuaded that the applicant has any *prima facie* case. That being the case, I need not enquire into the other two limbs of the test for interlocutory injunctions.

13. In the result, I dismiss the application with costs to the defendants.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 18TH DAY OF MARCH 2021.

D. O. OHUNGO

JUDGE

In the presence of:

Ms Kihenjo for the plaintiff/applicant

Ms Njiru for the 1st defendant/respondent

No appearance for the 2nd defendant/respondent

Court Assistants: B. Jelimo & J. Lotkomoi