



**Oundo v Ondiek (Environment & Land Case E013 of 2023)
[2024] KEELC 592 (KLR) (8 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 592 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND CASE E013 OF 2023
SO OKONG'O, J
FEBRUARY 8, 2024**

BETWEEN

ENOS OLANDO OUNDO PLAINTIFF

AND

MAURICE OMONDI ONDIEK DEFENDANT

RULING

1. The Plaintiff brought this suit against the Defendant on 29th September 2023. In his plaint, the Plaintiff averred that he was the owner of all that parcel of land known as Kisumu/Konya/6496 (hereinafter referred to only as “the suit property”). The Plaintiff averred that the suit property was initially owned by the Defendant who charged the same to Equity Bank of Kenya Limited (hereinafter referred to only as “Equity”) to secure a loan. The Plaintiff averred that he purchased the suit property at a public auction on 1st April 2021 at Kshs. 3,000,000/- after the Defendant defaulted on his loan repayment obligations to Equity which put up the property for sale in the exercise of its statutory power of sale. The Plaintiff averred that the suit property was registered in his name on 3rd June 2022 after paying the purchase price in full.
2. The Plaintiff averred that even after the suit property was transferred to his name, the Defendant refused to vacate the suit property and hand over possession to the Plaintiff. The Plaintiff averred that the Defendant had remained in possession of the suit property and was also collecting rent from tenants occupying part of the premises. The Plaintiff averred that the said acts by the Defendant amounted to trespass.
3. The Plaintiff sought judgment against the Defendant for; a declaration that the Defendant’s acts of interference with the suit property were illegal and void, a permanent injunction restraining the Defendant from obstructing, residing on, managing and /or interfering with the suit property, an order for vacant possession of the suit property, damages for trespass and costs of the suit.



4. Together with the plaint, the Plaintiff filed a Notice of Motion application dated 30th September 2023 seeking a temporary injunction restraining the Defendant from obstructing, residing on, managing and/or dealing or interfering in any way whatsoever with the suit property pending the hearing and determination of the suit. The Plaintiff's application was brought on the grounds set out on the face thereof and on the supporting affidavit sworn by the Plaintiff on 30th September 2023. In the affidavit, the Plaintiff reiterated the contents of the plaint. The Plaintiff added that he had on several occasions called upon the Defendant to vacate the suit property but he had refused to do so. The Plaintiff averred that he had a strong case against the Defendant with a high probability of success. The Plaintiff averred further that he stood to suffer grave loss and prejudice if the orders sought were not granted since the suit property was exposed to wastage and damage. The Plaintiff annexed to his affidavit in support of the application among others copies of; the memorandum of sale, certificate of sale, advertisements of the suit property for sale, instrument of transfer by chargee, title deed for the suit property and a demand letter to the Defendant for possession. The Plaintiff filed a supplementary affidavit sworn on 23rd October 2023 in which the Plaintiff stated that before putting up the suit property for sale by public auction, Equity and the auctioneer instructed by it, served the Defendant with all requisite notices. The Plaintiff annexed to the affidavit several demand and statutory notices that were served upon the Defendant by Equity and the auctioneers that it instructed to put up the suit property for sale by public auction. The Plaintiff reiterated that he had a prima facie case with a high probability of success against the Defendant and that he stood to suffer prejudice and loss if the orders sought were not granted.
5. The Plaintiff's application was opposed by the Defendant through a replying affidavit sworn on 4th October 2023. The Defendant admitted that he took a loan from Equity secured by the suit property a substantial portion of which he claimed to have paid. The Defendant averred that he ran into financial problems that led to his default in keeping up with the loan repayment schedule. The Defendant averred that he pleaded with Equity to reduce the interest that had accrued on the loan so that he could pay a sum of Kshs. 3,000,000/- but Equity insisted that he had to deposit with them a sum of Kshs. 6,000,000/-. The Defendant averred that the suit property was put up for sale without notice to him while he was still negotiating with Equity on the loan repayment terms.
6. The Defendant averred that he did not know of the sale of the suit property until this suit was filed and he was served with the pleadings and a court order. The Defendant averred that the value of the suit property including developments thereon was Kshs. 10,000,000/- and that the same was sold to the Plaintiff at a throwaway price of Kshs. 3,000,000/-. The Defendant averred that the sale of the suit property to the Plaintiff was irregular as due process was not followed. The Defendant averred that the title held by the Plaintiff was in the circumstances invalid. The Defendant averred that he was capable of redeeming the suit property if he was given time by Equity. The Defendant urged the court to dismiss the Plaintiff's application.
7. The Defendant filed a further affidavit on 31st October 2023. The Defendant averred that his postal address was P.O.BOX 1 MIWANI. The Defendant averred that this postal address was known to Equity. The Defendant averred that the notices that were purportedly sent to him by Equity and its auctioneers through postal addresses, 1071-40100, Kisumu, 3091-40100, Kisumu, and 3391-40100 Kisumu were all sent to the wrong addresses and as such were never received by him. The Defendant averred that nobody informed him of the sale of the suit property even the Plaintiff. The Defendant averred that the sale of the suit property at Kshs. 3,000,000/- was conducted in bad faith as that was the amount that he was prepared to pay to Equity.



The submissions

8. The application was argued by way of written submissions. The Plaintiff filed its submissions dated 8th November 2023. The Plaintiff submitted that he had established a prima facie case with a probability of success against the Defendant and that damages would not remedy the loss he was likely to suffer if the injunction sought was not granted. The Plaintiff submitted further that even if the court was in doubt and the case was considered on a balance of convenience, the balance of convenience would tilt in favour of granting the orders sought. The Plaintiff cited several decided cases in support of his submissions some of which I will refer to later in the ruling. The Plaintiff submitted that the Defendant's equity of redemption was extinguished at the fall of the hammer at the public auction and that if the Defendant was aggrieved with the manner in which Equity exercised its statutory power of sale, his remedy was in damages against Equity. The Plaintiff submitted that having purchased the suit property in good faith for valuable consideration, his title was protected under Section 99 of the *Land Act*, 2012.
9. The Defendant filed submissions dated 15th November 2023. The Defendant submitted that the Plaintiff had not satisfied the conditions for the grant of the injunctive orders sought in his application. The Defendant submitted that the Plaintiff had not established that he had a prima facie case against the Defendant with a probability of success and that he stood to suffer irreparable harm which could not be adequately compensated in damages unless the orders sought were granted. The Defendant reiterated that he was never served with a statutory notice, redemption notice and the auctioneers' 45 days notice of sale. The Defendant reiterated that the postal addresses that were purportedly used by Equity and the said auctioneers to serve the said notices did not belong to him.
10. The Defendant submitted that he had developed the suit property and the same was valued at approximately Kshs. 10,000,000/-. The Defendant submitted that he was residing on the suit property. The Defendant submitted that the title held by the Plaintiff was bad in law as due process was not followed in the sale of the property. The Defendant submitted that even if the court were to consider the balance of convenience, the same would tilt in favour of not granting the orders sought. The Defendant submitted that the Plaintiff had approached the court with unclean hands and as such he was not deserving of an equitable remedy. The Defendant urged the court to dismiss the Plaintiff's application.

Analysis and determination

11. I have considered the Plaintiff's application together with the affidavits filed in support thereof. I have also considered the Defendant's affidavit and supplementary affidavit filed in reply to the application. Finally, I have considered the submissions by the advocates for the parties and the authorities cited in support thereof. The Plaintiff has sought a temporary injunction against the Defendant pending the hearing and determination of the suit. The principles upon which this court exercises its discretion in applications for a temporary injunction are now well settled. As was stated in *Giella v. Cassman Brown & Co. Ltd* [1973] EA 358, an applicant for a temporary injunction must show a prima facie case with a probability of success, and such injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not be adequately compensated by an award of damages. It was held further that if the court is in doubt as to the foregoing, the application would be determined on a balance of convenience. In *Nguruman Limited v. Jan Bonde Nielsen & 2 Others*[2014]eKLR, the Court of Appeal adopted the definition of a prima facie case given in *Mrao*



Limited v. First American Bank of Kenya Limited & 2 Others[2003]eKLR and went further to state as follows:

“The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. ...All that the court is to see is that on the face of it the person applying for an injunction has a right which has been threatened with violation...The applicant need not establish title it is enough if he can show that he has a fair and bonafide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put on a preponderance of probabilities. This means no more than that the court takes the view that on the face of it, the applicant’s case is more likely than not to ultimately succeed.”

12. In Bomet Beer Distributors Ltd & another v. Kenya Commercial Bank Ltd & 4 others [2005] eKLR, the court stated as follows:

“What is clear is that once a property has been knocked down and sold in a public auction by a chargee in exercise of its statutory power of sale, the equity of redemption of the chargor is extinguished. The only remedy for a chargor who is dissatisfied with the conduct of the sale is to file suit for general or special damages.”

13. In Joyce Wairimu Karanja v. James Mburu Ngure & 3 others [2018] eKLR, the court stated that:

“29. Third, both statutory and decisional law have clearly stated that the remedy for a mortgagor who has suffered damages as a result of improper auction, is not to reverse the auction against an innocent purchaser – but in damages. Indeed, the statute immunizes a purchaser at a sale conducted by a mortgagee in the exercise of the statutory power of sale in the following words in section 99 of the *Land Act*:

- (1) This section applies to—
 - (a) A person who purchases charged land from the chargee or receiver, except where the chargee is the purchaser; or
 - (b) A person claiming the charged land through the person who purchases charged land from the chargee or receiver, including a person claiming through the chargee if the chargee and the person so claiming obtained the charged land in good faith and for value.
- (2) A person to whom this section applies—
 - (a) Is not answerable for the loss, misapplication or non-application of the purchase money paid for the charged land;



- (b) Is not obliged to see to the application of the purchase price;
 - (c) Is not obliged to inquire whether there has been a default by the chargor or whether any notice required to be given in connection with the exercise of the power of sale has been duly given or whether the sale is otherwise necessary, proper or regular.
- (3) A person to whom this section applies is protected even if at any time before the completion of the sale, the person has actual notice that there has not been a default by the chargor, or that a notice has been duly served or that the sale is in some way, unnecessary, improper or irregular, except in the case of fraud, misrepresentation or other dishonest conduct on the part of the chargee, of which that person has actual or constructive notice.
- (4) A person prejudiced by an unauthorised, improper or irregular exercise of the power of sale shall have a remedy in damages against the person exercising that power.
30. This section seems quite clear that a purchaser of property sold in the exercise of a chargee’s statutory power of sale is protected even in cases where the person had actual notice that the chargee had not properly realized that statutory power of sale in terms of procedure. In this case, there is no evidence to show that the Appellant had any notice of any irregularities in the planned sale and evidence suggests that there were none anyway. The point is that the Appellant is then inoculated by section 99 from any action to recover the Suit Property from her.”

14. In *Khalid Yamin Khan v. Equity Bank Limited & another* [2018] eKLR, the court stated as follows:

In the case of *Joseph Gitahi Gachau & Another v Pioneer Holdings (A) Limited & 2 Others* [2009] eKLR the court observed that where a property, even a residential property is charged to secure a loan, it is converted into a commodity for sale and where there is failure to pay the charge debt or loan, no sentimental value or attachment to the mortgaged property, however great, would operate against the exercise of the statutory power of sale by the mortgagee.”

15. The Plaintiff’s case is straightforward. The Defendant borrowed money from Equity and provided the suit property as security for the loan. The Defendant defaulted in his loan repayment obligations to Equity. Equity served the Defendant with statutory demand notices to repay the loan. The Defendant failed to comply with the said notices. Equity instructed Lufree Auctioneers to sell the suit property by public auction to recover the loan amount that was due from the Defendant which stood at over Kshs. 10,000,000/-. The said auctioneers served the Defendant with 45 days redemption notice by post and in person through the Defendant’s agent. The Defendant did not redeem the suit property within the notice period. Lufree Auctioneers advertised the suit property for sale by public auction. The Plaintiff attended the auction and he was the highest bidder for the property at Kshs. 3,000,000/-. The Plaintiff paid the full purchase price and had the suit property transferred to him by Equity. The Plaintiff was thereafter issued with a Title Deed for the property. The Defendant who was residing on the suit property was informed of the sale of the suit property to the Plaintiff and asked to vacate the



property but he refused to comply. The Plaintiff has placed before the court documents in support of all that I have stated.

16. The Defendant's response to the Plaintiff's claim is that although he obtained a loan from Equity on the security of the suit property and had defaulted in his repayment obligations to Equity, he was not served with any notice by Equity and its auctioneers demanding the payment before the property was sold. The Defendant claimed that his postal address was P.O.BOX 1 MIWANI and that the notices that were purportedly served upon him were posted to the wrong postal addresses. The Defendant claimed that the property was sold at undervalue because, at the time of the auction sale, the suit property was valued at Kshs. 10,000,000/-. The Defendant also claimed that the sale was conducted in bad faith in that at the time of the auction of the suit property, he was in negotiations with Equity to pay a sum of Kshs. 3,000,000/- in full and final settlement of the debt. The Defendant placed no evidence before the court in proof of his claims. The contractual documents between the Defendant and Equity would be the Loan Agreement and the Charge. These documents would have the Defendant's postal address for service of notices. Equity was not made a party to the suit. The two documents I have mentioned would be in the possession of Equity and the Defendant who were parties to the same. Since it was the Defendant who claimed that his postal address was P.O.BOX 1 MIWANI and not 3091-40100 and 1071-40100 Kisumu that were used by Equity and the auctioneers to serve him with notices, the burden was on the Defendant to establish what his contractual postal address was. This could have been done by producing before the court the Loan Agreement and the Charge document. The Defendant did not also produce a single communication between him and Equity through P.O.BOX 1 MIWANI although he claimed to have been having negotiations with Equity before the sale of the suit property. I am unable to see why Equity would address letters to the Defendant through the wrong Kisumu addresses instead of the Defendant's postal address that he gave in the Charge document for use in serving him with notices. The Defendant has not convinced me on a prima facie basis that he was not served with the necessary statutory notices. The Defendant did not also place any evidence before the court showing that the suit property was valued at Kshs. 10,000,000/- and that he was in negotiation with Equity before the sale of the suit property. The Defendant has not convinced me at this stage that Equity engaged in any irregularity or procedural impropriety in the sale of the suit property. Even if there was any such incident, that would only entitle the Defendant to damages against Equity but not to set aside the sale since no wrongdoing has been alleged against the Plaintiff. The Plaintiff's contention that he purchased the suit property for valuable consideration in good faith has not been rebutted by the Defendant.
17. Due to the foregoing, I am satisfied that the Plaintiff has established a prima case with a probability of success against the Defendant. I am also persuaded that the Plaintiff stands to suffer irreparable injury unless the orders sought are granted. The Defendant has not repaid a loan of Kshs. 4,080,000/- excluding interest which he obtained from Equity in 2013. There is no evidence that the Defendant would be able to make good any damage or waste committed on the suit property. The Defendant has not denied that he is collecting rent from premises on the suit property. I am not convinced that the Defendant would be able to refund such rent should he lose the case at the trial. There is therefore a risk that the loss likely to be incurred by the Plaintiff if the orders sought are not granted cannot be compensated in damages. The Plaintiff having established a prima facie case against the Defendant and that he stands to suffer irreparable harm, it is not necessary to consider the balance of convenience. I wish to say that even if I were to consider the balance of convenience, the same would tilt in favour of allowing the application. The Plaintiff is the registered owner of the suit property having purchased the same at Kshs. 3,000,000/-. There is no justification for the Defendant's continued occupation and interference with the property.



Conclusion

18. In conclusion, I find merit in the Notice of Motion application dated 30th September 2023. The application is allowed in terms of prayers 4 and 5 thereof. The execution of the first order (prayer 4) shall be stayed for 7 days from the date hereof solely to allow the Defendant time to move out of the suit property in case he is residing thereon. The Defendant shall however not collect rent or interfere with the suit property in any manner whatsoever during this period of 7 days.

DELIVERED AND DATED AT KISUMU ON THIS 8TH DAY FEBRUARY OF 2024

S. OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Aboge for the Plaintiff

Mr. Nyanga for the Defendant

Ms. J. Omondi-Court Assistant

