



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL SUIT NO. 69 OF 2018

SAMMY KAVUKU.....PLAINTIFF/APPLICANT

VERSUS

AGRICULTURAL FINANCE CORPORATION.....1ST DEFENDANT/RESPONDENT

CASH CROP AUCTIONEERS.....2ND DEFENDANT/RESPONDENT

RULING

1. By this Notice of Motion application dated 27th March 2018 and filed herein on 28th March 2018, Sammy Kavuku (the Plaintiff) prays for a temporary order of injunction to issue restraining the Defendants from selling by public auction all that property known as LR No. Kilifi/Mbaraka Chembe/572 until the hearing and determination of this suit.

2. In addition, the Plaintiff prays for an order to issue allowing him to dispose off his house erected on the said parcel of land by private treaty. Alternatively, he prays that the Court be pleased to set a benchmark reserve price of Kshs 8,500,000 in the event the sale proceeds by way of public auction and for any proceeds recovered from the sale over and above the outstanding loan to be released to him.

3. The said application is supported by an affidavit sworn by the Plaintiff and is premised on the grounds inter alia that:

i) The Plaintiff obtained a loan facilities from the 1st Defendant by Charging the said parcel of land situated at Watamu;

ii) The Plaintiff proceeded to regularly service the loan facility until his retirement which affected his ability to continue in the same manner in light of family responsibilities and prevailing economic challenges;

iii) The Plaintiff wrote a number of letters to the 1st Defendant seeking to have the repayment terms varied to accommodate the difficulties he was facing but got no response;

iv) The Defendants have now proceeded to advertise the said parcel of land for sale without considering the Plaintiff's pleas. The suit property comprises the family residential house and the Plaintiff and his family are bound to be rendered homeless unless the Orders sought herein are granted.

4. In a Replying Affidavit sworn by its Legal Officer John Mutuma and filed herein on 7th May 2018, the Agricultural Finance Corporation (the 1st Defendant) avers that on 12th August 2010, the Plaintiff applied for and received a development loan of Kshs 580,000/- which sum was to be repaid within a period of two years with interest and costs. The Plaintiff furnished the title deed of the suit property as security for the said loan.

5. The Plaintiff thereafter defaulted on the loan repayment and by a Statutory Notice dated 19th December 2016, the 1st Defendant recalled the outstanding loan sums and instructed Messrs Cash Crop Auctioneers (the 2nd Defendant) to dispose off the suit property to recover the outstanding balances. The 2nd Defendant thereafter issued the Plaintiff with a 45 days redemption notice and notification of sale but the Plaintiff remains in default.

6. The 1st Defendant further avers that in view of the Plaintiff's persistent default, they advertised the suit property for sale in the Daily Nation of 8th March 2018 and slated the public auction thereof for 3rd April 2018. It is the 1st Defendant's case that all its actions were within the purview of the law and the Plaintiff's application is an abuse of the Court process and a bid to frustrate the exercise of its statutory power of sale.

7. I have perused and considered the Plaintiff's application and the response by the 1st Defendant. I have equally perused and considered the written submissions filed by the parties herein as well as the authorities to which they referred me.

8. The Plaintiff herein prays for an order of injunction to restrain the Defendants from selling by public auction all that parcel of land known as LR No. Kilifi/Mbaraka Chembe/572 (the suit property) pending the hearing and determination of the suit filed herein.

9. In *Nguruman Limited –vs- Jan Bonde Nielsen & 2 Others(2014) eKLR*, the Court of Appeal reiterated the conditions to be met by a litigant who seeks injunctive relief as follows:

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to:-

a) Establish his case only at a prima facie level;

b) Demonstrate irreparable injury if a temporary injunction is not granted, and

c) Ally any doubts as to (b) by showing that the balance of convenience is in his favour.

10. In the matter before me, the Plaintiff/Applicant acknowledges that he is indebted to the 1st Defendant as a result of a loan facility extended to him and secured vide a Charge registered on the suit property on 12th August 2010. From the Statutory notice attached to the 1st Defendant's Replying Affidavit, dated 3rd April 2017 (annexture “JM 5”) the outstanding balance stood at Kshs 862,000/-.

11. The Plaintiff does not dispute the said figure. Neither does he deny that the 1st Defendant Corporation served him with a Statutory notice stemming from his default to repay the loan. It is however the Plaintiff's case that the suit property comprises of his lifetime investment where he has a residential home housing his family. It is his case that the property is worth millions of shillings and if the same is sold by public auction without a reserve price, he will suffer irreparable loss.

12. As it were the dominant purpose of the Land Act is to give a Chargor all reasonable opportunity within the confines of the law to redeem his property as Article 40 of the Constitution of Kenya 2010 provided that Parliament shall not enact a law that arbitrarily deprives a person of property or limits or in any way restricts the enjoyment of any right under the Article. The Court must therefore balance this requirement against the interests of a Chargee who should also not be unduly restricted from exercising its statutory power of sale.

13. The Plaintiff before me did not have the benefit of legal representation. From his rather long submissions herein however, it is discernible that one of his major concerns is what he considers the very low price that the suit property may attract if the same was to be sold as scheduled by public auction. In that context, I am persuaded that the 1st Defendant owes a duty of care to the Plaintiff to ensure that in the event the sale goes through, the property is not sold at a throw- away price.

14. In this regard Section 97 of the Land Act provides as follows:

“1. A Chargee who exercises a power to sell the Charged land, including the exercise of the power to sell in pursuance of an order of a Court, owes a duty of care to the Chargor, any guarantor of the whole or any part of the sums advanced to the Chargor, any Chargee under a subsequent Charge or under a Lien to obtain the best price reasonably obtainable at the time of sale.

2. A Chargee shall, before exercising the right of sale, ensure that a forced sale valuation is undertaken by a valuer.(Emphasis added).

15. A perusal of the numerous documents attached by the 1st Defendant reveals that no valuation report on the current forced value of the property has been attached. That can only mean that none has been undertaken by the 1st Defendant as required under Section 97(2) above.

16. In the absence of any evidence by the Defendants to the contrary, this Court is inclined to accept the Plaintiff's un rebutted affidavit evidence that the Charged property is likely to be sold at a gross undervalue.

17. In the circumstances, I think it would be unfair to allow the sale as scheduled to go on. Accordingly and given that the Plaintiff's default was not denied, I shall grant an injunction for 90 days to enable the Defendants to comply with the provisions of Section 97(2) of the Land Act. If at the end of the said period the Plaintiff shall remain in default, the 1st Defendant shall be at liberty to exercise its statutory power of sale as by law provided.

18. Orders accordingly.

Dated, signed and delivered at Malindi this 11th day of July 2019

J.O. OLOLA

JUDGE