



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE No. 294 OF 2017

JOSEPH KARIUKI KARANJA.....PLAINTIFF

VERSUS

GUARANTY TRUST BANK (KENYA) LTD.....1ST DEFENDANT

BENJAMIN GATHIRU T/A

REGENT AUCTIONEERS.....2ND DEFENDANT

RULING

1. This ruling is in respect of plaintiff's Notice of Motion dated 13th July 2017, pursuant to which the plaintiff seeks the following orders:

1. Spent.

2. Spent.

3. That this honourable court be pleased to grant a temporary injunction restraining the defendants either by themselves, their agents, servants and/or employees from selling, offering for sale, transferring and/or in any other way interfering with the plaintiffs' Dundori/Lanet Block 5/235 pending the hearing and determination of this suit.

4. Costs of this application be provided for.

2. The application is supported by an affidavit sworn by the plaintiff. In it, he deposed that on 14th August 2013, he obtained a loan of KShs 3,000,000 from the 1st defendant and charged the parcel of land known as Dundori/Lanet Block 5/235 (the suit property) as security. He religiously paid the instalments and as at 24th May 2017, the outstanding balance was KShs 419,062. He added that as at 14th May 2017, he was not in any arrears. In spite of this, he was informed by an agent of the 1st defendant on 7th July 2017 that the suit property would be sold by public auction on 14th July 2017 on account of an outstanding sum of KShs 1,852,964.03 plus interest. He further stated that he was not issued with any notice as required by Sections 90 and 96 of the Land Act. He therefore urged the court to grant the orders sought.

3. The 1st defendant opposed the application through a replying affidavit sworn by Ruth Muiruri, its Head of Legal Services. She stated that the plaintiff defaulted as regards his loan repayment obligations and was indebted to the 1st defendant to the tune of KShs 2,552,146.62 with arrears of Kshs.683,149.96 as at 12th October 2015. Consequently, the 1st defendant issued to the plaintiff a statutory notice dated 12th October 2015 under Section 90 of the Land Act. The notice, a copy of which was annexed as "RM4" was personally served upon the plaintiff on 24th November 2015. The plaintiff was subsequently issued with a 40 days' notice to sell dated 21st March 2016 under Section 96(2) of the Land Act. The notice was personally served upon the plaintiff on 2nd April 2016 and a copy was annexed as "RM5". Ultimately, the 1st defendant instructed the 2nd defendant to sale the suit property by public auction. Accordingly, the 2nd defendant issued to the plaintiff a 45 days' notice and notification of sale dated 27th September 2016.

4. She added that on 22nd September 2016, a day before the auction sale, the plaintiff wrote to the 1st defendant a letter dated 22nd September 2016 and sought postponement of the auction sale. He also promised to pay Kshs.1, 000, 000 within the 1st week of October 2016 and to clear the balance by 15th October 2016. A copy of the letter was annexed as "RM9". The 1st defendant agreed to postpone the sale but on condition that the Kshs.1, 000, 000 be paid by 7th October 2016 and that the balance be cleared by 15th October 2016. In a letter dated 22nd September 2016, the plaintiff accepted all the conditions and promised to strictly adhere to them. The plaintiff failed to honour his promise and as a result, the 1st defendant through the 2nd defendant, scheduled an auction sale for 23rd March 2017. Once again, the plaintiff made new proposals and also sought postponement of the sale through a letter dated 13th March 2017. The 1st defendant agreed and postponed the

auction. Yet again, the plaintiff failed to offset the loan arrears and as a result, the 1st defendant instructed the 2nd defendant through letter dated 14th June 2017 to arrange an auction sale. The 2nd defendant issued to the plaintiff a Notification of Sale dated 16th June 2017 scheduling an auction sale on 14th July 2017. A Newspaper advertisement to that effect was also placed in the Daily Nation Newspaper of 19th June 2017.

5. It was further deposed on behalf of the 1st defendant that as at 2nd August 2017 the loan account had a balance of Kshs.1, 847, 215.29 which amount continues to accrue interest. In the circumstances, it was deposed that the plaintiff had approached the court with unclean hand tainted by misrepresentations and non-disclosures and is therefore not deserving of the orders sought.

6. The application was argued by written submissions. The plaintiff/applicant filed submissions on 27th November 2017 while the 1st and 2nd defendants filed submissions on 5th December 2017. I have considered the application, the affidavits filed and the submissions.

7. In an application for an interlocutory injunction such as the present one, the applicant must establish a prima facie case with a probability of success. Even where a prima facie case is established, an injunction ought not to issue if damages can adequately compensate the applicant. If the court is in doubt as to the answers of the above two tests, then the court should determine the matter on a balance of convenience. These principles were enunciated in the case of **Giella –vs- Cassman Brown & Co. Ltd [1973] E.A 358** and were reiterated by the Court of Appeal in **Nguruman Limited –vs- Jan Bonde Nielsen & 2 Others [2014] eKLR**.

8. The applicant contends that the 1st defendant did not issue to him any notice as required by Sections 90 and 96 of the Land Act. I have however perused the documents annexed to the replying affidavit filed on behalf of 1st defendant and I note that a statutory notice dated 12th October 2015 was issued under Section 90 of the Land Act and that it was served upon the plaintiff on 24th November 2015. The plaintiff acknowledged receipt of it by signing it. Similarly, a 40 days' Notice of sell under Section 96 of the Act was issued on 21st March 2016 and was personally served upon the plaintiff on 2nd April 2016. He acknowledged service by signing it. In the circumstances, I have no hesitation in finding, as I hereby do, that the plaintiff was duly served with the requisite notices under Sections 90 and 96(2) of the Land Act.

9. The plaintiff also argued that the sale scheduled for 14th July 2017 was never advertised. The 1st defendant has however placed before the court uncontroverted evidence that an advertisement was placed in the Daily Nation Newspaper of 19th June 2017. Consequently, I find no merit in the plaintiff's contention that there was no advertisement.

10. Finally, the plaintiff argued that he was not in any loan arrears. This cannot be true. The plaintiff variously admitted being in arrears in his letters to the 1st defendant dated 22nd September 2016 and 12th March 2017. This contention therefore also fails.

11. In view of the foregoing, I am not satisfied that the plaintiff has any prima facie case with a probability of success. That being the case, Notice of Motion dated 13th July 2017 is dismissed with costs to the defendants.

Dated, signed and delivered in open court at Nakuru this 3rd day of May 2018.

D. O. OHUNGO

JUDGE

In the presence of:

No appearance for the plaintiff

No appearance for the defendants

Court Assistant: Gichaba