



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ENVIRONMENT & LAND COURT CASE. NO. 239 OF 2017

'FAST TRACK'

JOHN KIPROP CHEMETIOI.....PLAINTIFF/APPLICANT

-VERSUS-

KENYA COMMERCIAL BANK LIMITED.....1ST DEFENDANT/RESPONDENT

PHTUMA AUCTIONEERS.....2ND DEFENDANT/RESPONDENT

RULING

This ruling is in respect of an application dated 29th June 2017 brought by way of Notice of Motion by the plaintiff/applicant for orders that:

1. Spent.
2. That the defendants be restrained whether by themselves, their servants and/ or agents from selling whether by private treaty or public auction, transferring or conveying or in whatever way interfering with the plaintiff's proprietary interests in land parcel known as UASIN GISHU/KIMUMU SCHEME/1759 measuring 0.32 acres pending the hearing of this application interpartes.
3. That the defendants be restrained whether by themselves, their servants and/ or agents from selling whether by private treaty or public auction, transferring or conveying or in whatever way interfering with the plaintiff's proprietary interests in land parcel known as UASIN GISHU/KIMUMU SCHEME/1759 measuring 0.32 acres pending the hearing and determination of this suit.
4. That the costs of this application be provided for.

When this matter was brought under certificate of urgency, the court certified it as urgent and granted interim orders with direction that the applicant serves the application within 7 days for inter partes hearing. The parties thereafter agreed to canvass the application by way of written submissions.

Plaintiff/Applicant's Submissions.

The application was supported by the affidavit of John Kiprop Chemetioi sworn on 29th June 2017. Counsel for the Applicant submitted that the main issue for determination by the court at this stage is whether the Plaintiff has satisfied the test for the grant of an injunction as was settled by the case of Giella v Cassman Brown & Co Ltd (1973) EA 358. The test is simply:

- a. the Applicants have made out a prima facie case with a probability of success
- b. Whether the Applicants might suffer irreparable injury if the injunction is not granted.
- c. If there is doubt, whether the balance of convenience favours the Applicants

It was Counsel's submission that the Plaintiff has satisfied the threshold for grant of injunctions. On the issue of prima facie case, Counsel listed the following grounds to prove that limb of the test has been satisfied:

1. That the 1st Defendant varied the rate of interest from 17.0 % p.a. to 18.5% p. a without any notice to the Applicants and Applicants voluntary consent or that of the borrower sought contrary to the loan agreements, the law and the Standard Banking

Practices compiled by the Kenya Bankers Association (KBA).

2. That the 1st Defendant demand is unlawful and based also on illegal interests and the penal charges if any have not been substantiated whatsoever.
3. That the 1st Defendant acted in breach of the binding agreement of the parties by failing to review the overdraft facilities in accordance with clause 3 d of the letters of offer within 30 days hence no interest could be charged on the overdraft facility after the said date.
4. That the computation of interests on a day to day basis was inconsistent with the Banking Practice and the law.
5. That the term period for repayment of overdraft is illogical and untenable in law.
6. That the 1st Defendant charged compound interest on a monthly basis on the facilities which was not among the negotiated and agreed terms of the contract and it was inconsistent with the Banking Practice and the law.
7. That the 1st Defendant despite receiving payments of rent emanating from land reference No. UASIN GISHU/KIMUMU SCHEME/1750 which amount the Respondent has never accounted for the proceeds.
8. That the 1st Defendant never issued the Applicants with proper prescribed statutory notices issued informing the Applicants and/or to specifying the amounts that must be paid to rectify any alleged default as required by section 90 (1) (2)(a) and (b) of the Land Act, 2012.
9. That the Applicant was never issued with a statutory notice of not less than 40 days as required by section 96(2) of the Land Act 2012 Laws of Kenya.
10. That the 1st Defendant is seeking to sell the Applicants' property by private treaty without having regard to the market value contrary to section 98(1) (d) of the Land Act 2012.
11. That the suit property is a matrimonial property which at the time it was being charged spousal consent was never sought. The spousal consent annexed by the Respondents marked FM 2 is misleading as the deponent Salome Jemosop is not the spouse of the Applicant.

Counsel further submitted that damages cannot be an adequate remedy to the applicant on the grounds that he has been in occupation, has developed the suit land and that it is matrimonial home. Counsel cited the case of Francis Githinii Karobia v Stephen Kageni Gitaul Civil Case 53 of 2005 (unreported), to fortify the fact that damages would not be an adequate remedy where Kimaru J stated "This court notes that land being unique in nature and character damages in certain instances would not constitute an adequate remedy. He further submitted that the balance of convenience lies in favour of the applicant since he is in occupation with his family and that it is desirable that this dispute be resolved before that suit property can be interfered with. Counsel therefore urged the court to allow the application as prayed.

1ST DEFENDANT'S SUBMISSIONS

The 1st defendant filed submissions in opposition to the plaintiff/applicant's application for injunction. Counsel gave a background to the transaction whereby he stated that the suit property was charged by the Plaintiff to obtain a loan facility in the year 2014 of Kenya Shillings Four Million Ksh 4,000,000.00. He submitted that the Plaintiff/ Applicant breached the terms of contract entered into between the parties by his failure to honour payments of installments as and when they fell due leading to the 1st Defendant/ Respondent exercising its statutory power of sale, a remedy provided for in the contract between the Plaintiff/ Applicant and the 1st Defendant/ Respondent.

Counsel submitted that the two main issues for determination are as to whether the application meets the threshold for the grant of temporary injunctive orders; and who should bear the Costs of the application. It was Counsel's submission that the Applicant has failed to present any evidence pointing towards this suit succeeding as there is an outright breach of the contract made between the parties which breach makes the Plaintiff undeserving of the reliefs sought.

Counsel stated that one of the allegations upon which this application is hinged is that the 1st Respondent varied interest rates without notifying the Applicant and that the same was in contravention of the law is devoid of truth as the said rates remained unchanged at 17 per cent and in any case, any changes affecting the calculations of the variance if at all were guided by the Kenya Bank Reference Rate and the same was well communicated to the Applicant herein.

Further Counsel took issue with the Applicant's misrepresentation that the Statutory Notices envisaged by the law were never served upon him. He submitted that the applicant admitted in his affidavit in support of his application that he indeed got the notices. This he stated that it is evident from the fact that he wrote to the 1st Respondent acknowledging receipt of the Notices and can therefore not be heard to say that he was never served with the same. See annexures marked 'FM 7-11' in response to the application.

On the issue of the property being matrimonial home Counsel submitted that whether the property or part of it, as is alleged is matrimonial cannot bar the 1st Respondent from exercising its statutory power of sale against a defaulting applicant. He cited the case of **Julius Mainye Anyega vs. Eco Bank Limited [2014] eKLR** where the court expressed itself as follows;

“The suit property may be a matrimonial home. But what is startling is the Applicant's argument which, properly understood, suggest that matrimonial homes should never be sold under the Mortgagee's Statutory Power of sale. These statements have become quite common in applications for injunction to restrain a Mortgagee from exercising the statutory power of sale. I want to disabuse Mortgagors from what seems to be a misplaced posture especially by defaulters. The true position of the law on matrimonial properties is that a Mortgage will not be created on such property without first obtaining the consent of the spouse. Similarly, no sale of the matrimonial property will be carried through without giving the necessary notices to the spouse or spouses of the Mortgagor. These protections once availed *will not prevent sale of a matrimonial home where the necessary consents have been obtained and all notices given to all parties with an interest in the matrimonial home, which is given as security for a loan or credit facility. And many courts have expressed themselves as clearly on the subject. I am content to cite the case of HCCC Number 82 of 2006 Maltex Commercial Supplies Limited & Another vs. Euro Bank Limited (In Liquidation)* that;

Any property whether it is a matrimonial or spiritual house, which is offered as security for loan overdraft is made on the understanding that the same stands the risk of being sold by the lender in default is made on the payment of the debt secured".
[Emphasis Ours]

He further cited the case of **Maithya vs. Housing Finance co. of Kenya & Another [2003] 1 EA 133 at 139** Honourable Nyamu, J. stated as follows on the subject:

"Charged properties are intended to acquire or are supposed to have a commercial value otherwise lenders would not accept them as securities. The sentiment of ownership which has been greatly treasured in this country over the years has in many situations given way to commercial considerations. Before lending, many lenders banks and mortgage houses are increasingly insisting on valuations being done so as to establish forced sale values and market values of the properties to constitute the securities for the borrowings or credit facilities... Loss of the properties by sale is clearly contemplated 171/ the parties even before the security is formalized"

On the limb of whether an applicant will suffer irreparable harm Counsel cited the case of Hoffman La Roche & Co. Industry vs. Secretary of State for Trade and Industry [1975] AC 295 at 355 (H.L) which described irreparable damage to be; "The object of [an interim injunction] is to prevent a litigant who must necessarily suffer the law's delay, from losing from that delay the fruit of his litigation; this is called 'irreparable damage,...' Counsel also referred to Munyao Sila J in Simon Kipnetich Bett vs. Richard C. Kandie [2012] where while addressing what would amount to an irreparable harm rendered himself thus:

"To me, the assessment of irreparable harm has to be done on case by case basis. The court must assess whether the subject matter of the case will be so wasted as to make the final determination, if in favour of the Applicant a nullity. In my view, if the subject matter of the suit is capable of substantially being maintained in no worse a state at the conclusion of the suit as it is at the time of the Application for injunction, then there is no irreparable harm (Emphasis by Respondents) Such harm must also be harm that cannot adequately compensated by an award of damages. In other words it is the sort of harm which will render victory in the suit empty and devoid of any substance...

It was Counsel's submission that there is no irreparable damage that could visit the Plaintiff/ Applicant herein as he voluntarily charged the suit property well knowing of the consequences involved in case of default meaning that he acceded to any adverse consequences that could arise if there was a default on the part of the borrower.

On the limb of balance of convenience Counsel submitted that the 1st Respondent stands a higher risk of injustice if the orders sought by the Applicant are to be granted and the balance of convenience tilts towards this Honourable Court denying the injunctive orders in favour of the respondent. He cited the case of Films Rover International [1986] EALL ER, where it was observed that in granting injunctive orders, the court should take whichever course that appears to carry the lower risk of injustice if it should turn out to have been wrong. The same position was affirmed in Suleiman vs. Amboseli Resort Ltd (2004) e KLR 589 where the court stated that a fundamental principle is that the court should take whichever course that appears to carry the lower risk of injustice if it should turn out to have been "wrong".

Counsel finally submitted that the plaintiff's application should be dismissed with costs as he has not met the threshold for grant of injunctions and it is trite law that costs follow the cause or event. He cited the case of Joseph Oduor Anode vs. Kenya Red Cross Society, Nairobi High Court Civil Suit No. 66 OF 2009; [2012] eKLR where Odunga J expressed himself thus;

In matters of costs, the general rule as adumbrated in the aforesaid statute [the Civil Procedure Act] is that costs follow the event unless the court is satisfied otherwise. That satisfaction must, however, be patent on record. In other words, where the Court decides not to follow the general principle, the Court is enjoined to give reasons for not doing so

Analysis and determination

I have considered the submissions from both Counsel for the Plaintiff/ applicant and the Defendant/ respondent together with the supporting documentation. I have also looked at the pleadings and notice that this matter involves a dispute of a charge that was created over the suit parcel of land known as UASIN GISHU/KIMUMU SCHEME/1759. The dispute also involves taking of accounts and in view of the Mombasa Court of Appeal Civil Appeal no 83 of 2016 **Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others [2017] eKLR** which held the Environment and land Court does not have jurisdiction to deal with matters in respect of charges and taking of accounts, I will down my tools and refer this matter to the High Court for hearing and determination.

If I were to complete this ruling I would have found that the plaintiff has not established a prima facie case against the defendants to warrant the grant of an injunction. The respondent followed all the procedures of issuance of statutory notices as provided by the law and as admitted by the applicant through his communication with the respondent as seen in the affidavit. The fact that a property is matrimonial in nature or has a sentimental value does not stop it from being auctioned if the requisite procedures have been followed according to the law. When charging such property the party is well aware of the consequences of default.

I therefore discharge the temporary order for injunction earlier issued in this matter and transfer this matter to Eldoret High Court for further orders.

Dated and delivered at Eldoret this 2nd day of July, 2018.

M.A ODENY

JUDGE

Read in open court in the presence of Mr. Kagunza holding brief for Mr. Mukabane for Plaintiff/Applicant.

Mr. Koech: Court Assistant.