



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC.NO. 209 OF 2019

DANIEL K. M. MASAKHA.....PLAINTIFF

VERSUS

1. FAMILY BANK LIMITED

2. ANTIQUE AUCTIONS

3. MASHINANI DISTRIBUTORS LTD....DEFENDANTS

RULING

1. This court has been called to determine a notice of motion application dated 22nd November, 2019 which seeks injunctive orders against the 1st and 2nd defendants, to bar them and/or their agents, servants, representative or any other person or entity from proceeding with the sale of the property known as LR No. Mombasa/Municipality Block /2/15 by way of public auction or by private sale. At the ex-parte stage when the matter was heard under certificate of urgency, the court granted orders 1 and 2 of the application and this ruling thus relates to Order No. 3 and 4 of the application.

2. The applicant/plaintiff Mr. Daniel K. M. Masakha contends in the said application and in the grounds in support thereof, as well as the supporting affidavit, inter alia, that he owns jointly the suit property together with his wife Joan Atamba Makatiani and that the said property is their matrimonial and only have.

3. The application is opposed by the replying affidavit of Anthony Ouma, who is a senior officer of the 1st defendant bank and an advocate of the High Court. In a nut shell, the opposition to the application for injunction is premised on the fact that the 3rd defendant approached the 1st defendant for a loan and a letter of offer to that effect dated 3rd February 2016 was issued to the 3rd defendant, and that was thus advanced Kshs.30,000,000 and that the suit property was offered as a security and a first legal charge over MOMBASA/MN BLOCK 2/5 was created to cover an amount of Kshs.6.3million. Additional securities included creation of a charge over BUNGOMA/MUNICIPALITY/517 to cover Kshs.10.8 million and holding of original logbooks and debenture mortgage over motor vehicle KBV 242X Mitsubishi Canter, Motor vehicle KAY 816Q Mitsubishi Canter, Nissan Diesel CWB450 KBU 459F Bhachu Trailer 3 Axle ZE5585, Nissan Diesel CWB450 KBS 657Z, caterpillar CAT 1409 KHM 997F, Mitsubishi Fuso Canter KBV 243X, Bhachu Trailer 3 Axles ZE 9383, to cover a total of Kshs.12.9 million. By an instrument of charge dated 30th May 2016 a first legal charge was created over Title/Number Mombasa/MN/Block/2/5 with the plaintiff and his wife as chargor's, the 1st defendant as the chargee and the Borrower being the 3rd defendant. It is important to note that the legal charge herein was for a principal amount of Kshs.6,300,000/=.

4. It appears that the 3rd defendant who is the borrower thereof, further applied for a bank facility on 6.4.2018 and a letter of offer dated the same date was issued and on 3.12.18 another letter of offer was issued to the 3rd defendant for Kshs. 45,400,000/=. The bank through Anthony Ouma in its replying affidavit, indicated that the original loan was thus restructured twice on 6.4.2018 and 3.12.18, and that the borrower did not service the loan as required but defaulted, and the loan fell into arrears. That as a result of the loan being in arrears the 1st defendant issued the requisite notices to the 3rd defendant to rectify the default and due to the failure to rectify the 1st defendant issued instructions to the 2nd defendant to advertise the suit property for auction. The applicant however denies all these allegations, holding that he is a stranger to the said charge at all.

5. Parties agreed to proceed with the application by way of written submissions that are on record. This being an interlocutory application the court is only mandated to look at the facts but leave the findings to the trial court. Although the plaintiff is denying the existence of a charge over his property, there indeed exists a charge dated 30.5.16 which was registered at the District Land Registry Mombasa on 2nd June 2016, to secure Kshs.6,300,000 advanced to Mashinani Distributor's Limited as the borrower. Being an application for a temporary injunction, the law for grant of such is well settled under the principles in **Giella vs Casma Brown Ltd (1973) EA 358** which principles are "First, an applicant must show a prima facie case with probability of success. Secondly, an interlocutory injunction will not normally be granted unless

the applicant might otherwise suffer irreparable injury, which would not be adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.” At this stage, the court looks at the principles of **Giella vs Cassman Brown** and applies to the facts herein.

6. Applying the first principle as to whether he is a prima facie case, with probability of success, it is imperative then to define what a prima facie case is; “A prima facie case in a civil application include but is not confined to a genuine and arguable case. It is a case which, on 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 to call for an explanation or rebuttal from the latter”. (See **Mrao Ltd –v- First American Bank of Kenya Ltd & 2 Others (2003) KLR 123**).

7. In its submission the applicant submits that it has a prima facie case in that there were is no charge over the suit property. The applicant submits that the charge dated 30.5.16 was to secure any advancement made by the letter of offer dated 3.2.16. The plaintiff further submits that the said charge of Kshs.6,300,000/= cannot secure any future advancement made through the letter of offer of 6.4.18 and 3/12/18, and that for such additional advancements and restructuring the 1st defendant ought to have created a further charge. This court is persuaded by the said submission and finds merit in it, and should it be upheld by the trial court. I do find that this is an arguable issue to be decided at the trial.

8. Having demonstrated an arguable point, it is the courts view that the applicant has thus established a prima facie case, and accordingly the plaintiff’s application dated 22.11.19 is allowed in terms of prayer 3 thereof and costs in the cause.

9. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 28TH DAY OF JULY 2021

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

C.K. YANO

JUDGE