



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CASE NO. 113 OF 2020

OMAR MASUMBUKO.....PLAINTIFF/APPLICANT

VERSUS

NATIONAL BANK OF KENYA LTD.....DEFENDANT/RESPONDENT

RULING

The application is dated 8th September 2020 and is brought under order 40 rule 1,2,3&4, order 50 rule 1 of the Civil Procedure Rules and Sections 3A & 63 (e) of the Civil Procedure Act, Article 40 of the Constitution of Kenya seeking the following orders;

1. That this application be certified as urgent and be heard exparte in the first instance.
2. That pending the hearing and determination of this application, a temporary order of injunction do issue restraining the defendant/respondent whether by themselves or their representatives, servants, agents, and/or assigns from howsoever selling, alienating, trespassing onto, and/or in any other manner whatsoever interfering with or otherwise dealing with the property known as LAND REFERENCE NUMBER 9270/I/MN (suit property).
3. Pending the hearing and determination of this suit, an order of injunction do issue restraining the respondents whether by themselves or their representatives, servants, agents and/or assigns from howsoever selling, alienating, trespassing onto, and/or in any other manner whatsoever interfering with or otherwise dealing with the property known a LAND REFERENCE NUMBER 9270/I/MN (suit property).
4. That this Honourable Court be pleased to compel the defendant/respondent to produce books of accounts pertaining to his account Number 201-015-951 NATIONAL BANK OF KENYA, NKRUMAH ROAD and sale of KILIFI/CHAURINGO/1.
5. That the cost of this application be provided for.

This application is based on the following grounds that this application is the only avenue available to enable the plaintiff/applicant to reinstate the suit for the purpose of effectively arguing/prosecuting the case at hearing. That on 30th June, 2020 the plaintiff/applicant was served with a notice of redemption and a statutory notification of sale from Purple Royal Auctioneers indicating the suit property will be sold on Thursday, 10th September 2020 if he does not satisfy his purported outstanding debt. That on 24th August, 2020 Purple Royal Auctioneers by way of advertisement in the local dailies published an advertisement for Public Auction of the suit property on Thursday 10th September, 2020 at 11.00 a.m. That the purported outstanding debt stood at Kshs.37,115,294.30 as at 30th June 2020 which amount is vehemently contested as the plaintiff/respondent took out a bank guarantee of Kshs.11,000,000/- only and as such by application of the in Duplum Rule the amount is extremely exaggerated. That the defendant/respondent has refused to furnish the plaintiff/applicant with proper accounts of his deposits/loan repayments to enable him properly calculate the outstanding balance owed if any. That further to the aforementioned the stated bank guarantee above was secured with two properties being L.R. NO. 8551/I/MN and L.R. 9270/I/MN and where the defendant/respondent auctioned the former property and has refused to render accounts of the sale to date. That the reason for the delay is that the plaintiff/applicant and the defendant/respondent have been engaged in lengthy negotiations which are at an advance stage and therefore the said steps to auction the suit property have been undertaken in bad faith. That the filing of this application was further occasioned with the ongoing Covid 19 pandemic which hampered accessibility and operations. That the defendant/respondent will not suffer any prejudice, if the orders sought are granted as prayed for but the plaintiff/applicant will be gravely affected as he will lose his family home and furthermore he will suffer irreparable loss as the suit property is valued at Kshs.258,000,000/= while the amount claimed is Kshs.37,115,294.

The respondent submitted that the applicant approached the respondent for certain banking facilities when it agreed to and advanced monies to the applicnat to the tune of Kshs.11 million in November, 1994 against a charge registered on his property known as L.R. 9270/I/MN. That the applicant is indebted to the respondent in the sum of Kshs.37,115,294.30 which sum the applicant has made no attempts to liquidate despite being afforded ample time by the respondent upon the applicant's own requests for extension. This is an undisputed and uncontroverted fact that is not denied by the plaintiff. That it is true that the parties herein were involved in ELC No. 381 of 1997 where the

validity of the applicant's title over the suit property was being challenged. That the applicant was ordered to honour his obligation to the respondent in accordance with the terms of the charge and pursuant to the agreement in the letter dated 21st March 2019 between the parties herein. That the applicant thereafter engaged the respondent on a possible settlement of the loan and made an offer of Kshs. 15,250,000.00 on 15th March, 2019 which the respondent responded to by stating it would consider accepting Kshs.18,000,000.00 on 21st March 2019 as redemption of the above security provided and on condition that payment was made within a period of 90 days from the date thereof. That the plaintiff did not make any payment and now alleges that the amount payable to the defendant in the sum of Kshs.35,236,970.05 is not payable on account of the 'In Duplum Rule'. That an accounting dispute, if there is one at all, does not, in law entitle the plaintiff to the equitable relief in terms of an injunction as sought now. In any event, even under the 'In Duplum Rule' the defendant would be entitled to a sum in excess of Kshs.65,000,000.00 on account of the indebtedness herein as is evident from the account statement copies annexed here as exhibit 'PC-1'. That having failed to repay the indebtedness to the defendant, the defendant as and is entitled to exercise its right to a statutory power of sale of the charged property and as such issued the statutory notices dated 30th January, 2020 and 12th May 2020 upon the applicant. The respondent carried valuation on the suit property and instructed Messrs Purple Royal Auctioneers to go ahead and carry out a public auction of the said suit property on behalf of the respondent. Annexed is a bundle and collectively marked as 'PC-2' true Photostat copies of the correspondences exchanged between the parties herein and the statutory notices and valuation carried out by the respondent.

This court has considered the application and submissions therein. The application being one that seeks injunctions, has to be considered within the principles set out in the case of *Giella vs Cassman Brown & Co Ltd 1973 E.A 358* and which are:-

1. *The applicant must show a prima facie case with a probability of success at the trial*
2. *The applicant must show that unless the order is granted, he will suffer loss which cannot be adequately compensated in damages and,*
3. *If in doubt, the Court will decide the application on a balance of convenience.*

It must also be added that an interlocutory injunction is an equitable relief and the Court may decline to grant it if it can be shown that the applicant's conduct pertinent to the subject matter of the suit does not meet the approval of a Court of equity. The applicant submitted on 30th June, 2020 the plaintiff/applicant was served with a notice of redemption and a statutory notification of sale for Purple Royal Auctioneers indicating the suit property will be sold on Thursday, 10th September 2020 if he does not satisfy his purported outstanding debt. That on 24th August, 2020 Purple Royal Auctioneers by way of advertisement in the local dailies published an advertisement for Public Auction of the suit property on Thursday 10th September, 2020 at 11.00 a.m. That the purported outstanding debt stood at Kshs.37,115,294.30 as at 30th June 2020 which amount is vehemently contested as the plaintiff/respondent took out a bank guarantee of Kshs.11,000,000/- only and as such by application of the in Duplum Rule the amount is extremely exaggerated. That the defendant/respondent has refused to furnish the plaintiff/applicant with proper accounts of his deposits/loan repayments to enable him properly calculate the outstanding balance owed if any. That further to the aforementioned the stated bank guarantee above was secured with two properties being L.R. NO. 8551/I/MN and L.R. 9270/I/MN and where the defendant/respondent auctioned the former property and has refused to render accounts of the sale to date.

In the case of *Kibutiri vs Kenya Shell, Nairobi High Court, Civil Case No.3398 of 1980 (1981) KLR*, the Court held that;

“The conditions for granting a temporary injunction in East Africa are well known and these are: First, the Applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which might not 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. See also E.A Industries ..Vs..Trufoods (1972) EA 420.”

In the case of Robert Mugo wa Karanja vs Ecobank (Kenya) Limited & another (2019) eKLR the court in deciding on an injunction application stated;

‘circumstances for consideration before granting a temporary injunction under order 40 rule 1 of the Civil Procedure Rules requires a proof that any property in dispute in a suit is in a danger of being wasted, damaged or alienated by any party of the suit or wrongfully sold in execution of a decree or that the defendant threatens or intends to remove or dispose the property; the court is in such situation enjoined to grant a temporary injunction to restrain such acts....’

In Annexure OM-1A, the applicant has established he is the proprietor of the suit property subject to the respondent's charge. The applicant charged the suit property to the respondent to guarantee Kshs 11 million that was advanced to Freight Contractors Services Limited on 18 August 1995. Annexure OM-2A is a Notice of Redemption from Purple Royal Auctioneers dated 30 June 2020. It notifies the applicant to redeem the suit property by paying Kshs 37,115,294.30/= within 45 days least the suit property be sold by public auction on 10 September 2020. OM-2B is a Notification of Sale from Purple Royal Auctioneers dated 30 June 2020. It notifies the applicant that the suit property valued at Kshs 251,650,000/= as at 25 February 2020 would be sold by public auction on 10 September 2020. I find that the applicant has established a prima facie case as there appears to be a dispute between the parties as to the outstanding amount.

In the case of **Board of Management of Uhuru Secondary School vs City County Director of Education & 2 Others (2015) eKLR** stated as follows

“In summary, the principles are that the Applicant ought to demonstrate an arguable prima facie case with a likelihood of success and that in the absence of the conservatory orders he is likely to suffer prejudice. Further, the Court should decide whether a grant or a denial of the conservatory relief will enhance the Constitutional values and objects of a specific right or freedom in the Bill of Rights, and whether if an interim Conservatory order is not granted, the petition or its substratum will be rendered nugatory. Lastly, that the Court should consider the public interest and relevant material facts in exercising its discretion whether to grant or deny a

conservatory order.”

In the case of Ochola Kamili Holdings Ltd vs Guardian Bank Ltd (2018)eKLR, stated that;

“The court is alive to the fact that interlocutory injunction, being an equitable remedy, would be discharged upon being shown the person’s conduct with respect to the matter pertinent to the suit does not meet the approval of the court which granted the orders which is the subject matter and especially where a party upon getting injunction orders sits on the matter and uses the orders to the prejudice of the opponent. The orders of injunction are meant to preserve the subject matter Not to oppress another party nor should an injunction be used to economically oppress the other party or to deny justified repayment of outstanding loan. That once such a post-injunction behavior is exposed it would in my view be a ground to discharge an injunction because the order obtained would be an abuse of the purpose for which the injunction was obtained. No court would allow its orders to be used to defeat the ends of justice”.

The respondent submitted that having failed to repay the indebtedness to the defendant, the defendant as and is entitled to exercise its right to a statutory power of sale of the charged property and as such issued the statutory notices dated 30th January, 2020 and 12th May 2020 upon the applicant. The respondent carried valuation on the suit property and instructed Messrs Purple Royal Auctioneers to go ahead and carry out a public auction of the said suit property on behalf of the respondent. Annexure OM-16 is a valuation report on the suit property, the report was prepared by Maina Chege & Co at the request of the applicant. On the suit property stands a three bedroomed house and is valued at Kshs 258,000,000/=. The applicant pleads that he stands to lose his family home and suffer irreparable loss as the suit property is valued at Kshs 258 million, while the amount claimed is Kshs 37 million. The applicant claims that the respondent has refused to furnish him with the proper books of his deposits/loan repayments to enable him properly calculate the outstanding balance owed. He further claims that the respondent has been issuing him with notices demanding erratic, unexplained fluctuating amounts as balances. He also claims that the respondent auctioned LR NO. 8551/I/MN (Kilifi/Chauringo/1) on 5 January 1998 that was valued at Kshs 1,125,000/= for Kshs 200,000/= and has refused to render the accounts of the sale to date. The respondent affirms the indebtedness of the applicant to the respondent and has annexed PC-1, which Paul Chelanga its Recoveries Manager claims to be Account Statement copies. On perusing the annexure, I note that from Page 6-13 of the Replying Affidavit is account number is 01020-057363-00 and account name is Freight Contractors Services. The statement is for 31st January 2007 – 30th April 2007. While from page 13-28 of the Replying Affidavit is account number 01030-075387-00 and account name is Masumbuko, Mohamed Omar, is for 10th November 2006 – 8th August 2007. These statements are incomplete and the applicant has the right to be supplied with current statements of account are prayed. I find that the balance of convenience tilts in favour of the applicant and he is entitled to the full and current statements of account. I find that the application is merited and grant the following orders;

1. Pending the hearing and determination of this suit, an order of injunction do issue restraining the respondents whether by themselves or their representatives, servants, agents and/or assigns from howsoever selling, alienating, trespassing onto, and/or in any other manner whatsoever interfering with or otherwise dealing with the property known a LAND REFERENCE NUMBER 9270/I/MN.
2. That the defendant/respondent to produce books of accounts pertaining the applicants account with regard to this matter within the next 30 days.
3. That the costs to be in the cause.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 26TH OCTOBER 2021.

N.A. MATHEKA

JUDGE