



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL SUIT NO. E 011 OF 2020**

**NAJMUDIN NOORALI MOHAMEDALI.....PLAINTIFF**

**VERSUS**

**1. I & M BANK LIMITED**

**2. PURPLE ROYAL AUCTIONEERS .....DEFENDANTS**

**RULING**

1. This is a ruling on the application dated 22.10.2020 seeking for orders of temporary injunction against the defendants herein restraining them or their servants from selling the Plaintiff's property known as **Title Number Mombasa/Block XV/47 (Go-down No. 1)**. The Applicant further seeks costs to be awarded.

2. The Application is premised on grounds on face of the Application, which are further explicated in the affidavit of Plaintiff sworn on the 22.10.2020. The Plaintiff also filed a further affidavit dated 10/11/2020.

3. The Plaintiff's case is that he was a guarantor to Hatimi Service Station which the first Defendant vide a credit facility dated 12.1.2020 advanced a credit overdraft facility for Kshs 8,500,000/=. He avers that he reasonably believed that the borrower was servicing the credit only to be caught by surprise on 26.8.2020 when he was served with a notification of sale by the 2<sup>nd</sup> Defendant claiming a total sum of Kshs. 28,656,048.63 allegedly owing to the first Defendant. The Applicant maintains that the amount claimed is strange to him and he had all along believed that the borrower was servicing the credit facility on a monthly basis without fail.

4. Therefore, according to the Plaintiff, unless a temporary injunction against the defendants is granted, there is real and imminent threat that his property will be auctioned and occasion him irreparable loss and damage that cannot be compensated by way of damages. He also avers that no steps have been shown by the Defendants that execution was ever commenced against the principal borrower. He has also annexed a counter valuation report showing that his property is worth Kshs. 36,000,000/=.

5. The Respondent opposed the application and in doing so filed a replying affidavit sworn on 2/11/2020 by George Ratemo Mecheo, Hatimi, the 1<sup>st</sup> Defendant's Manager in the Debt Recovery Department. He avers that the Plaintiff caused to be registered a charge in favour of the bank for a sum of Kshs. 25,500,00/=. The charge document is dated 8/3/2016. That on 23/4/2018 a loan of Kshs. 20,383,433/= was disbursed to the borrower and since then the borrower has been in default of payment. It is averred that as at 27/10/2020, the borrower has been in default of Kshs. 17,937,040/=. The Deponent further argued that the prayers sought could not issue because they were not sought in the plaint. It is further proposed that in the event that this court finds the application merited, then it should order the Applicant to Deposit a sum of Kshs. 5,000,000/= as a measure of goodwill and faith.

6. Directions were taken that the application be disposed by way of written submissions. Both parties complied and filed their submissions. The Plaintiff/Applicant's submissions are dated 10/11/2020 and filed on 11/11/2020 whilst for the Defendants' are dated on 27/11/2020 and filed on even date. I have benefitted from reading the submissions whose gist reiterate the pleadings by the parties and I need not to duplicate the same here.

**Analysis and Determination**

7. I have considered the affidavit evidence, the annexures thereto and submissions by both parties' advocates on record and the relevant applicable law and precedents relied upon.

8. The first issue for determination is whether on the evidence and material placed before court, the plaintiff has satisfied the conditions upon which a temporary injunction can be granted.

9. It is now well settled in law that the granting of injunctive reliefs is a discretionary exercise predicated upon 3 interdependent and sequential limbs to wit: that the claimant has established a prima facie case with a probability of success; once established, the claimant ought to prove that an award of damages would be insufficient to alleviate any damage caused and finally, when in doubt, the court would decide the application on a balance of convenience. See case of **Giella vs. Cassman Brown & Co. Ltd [1973] EA 358**.

10. That being the case, the first inquiry that this Court must make is to assess whether the Plaintiff/Applicant has established a *prima facie* case with a probability of success. As to what constitutes a prima facie case, the Court of Appeal offered guidance in the case of *Mrao Limited vs- First American Bank Ltd & 2 Others [2003] KLR 125* where Bosire J A observed as follows:-

**“So what is a prima facie case?**

**I would say that in civil cases, it is a case which on the 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 as to call for an explanation or rebuttal from the latter...But as I earlier endeavored to show, and I cite ample authority for it, a prima facie case is a more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the Applicant’s case upon trial. That is clearly a standard, which is higher than an arguable case.”**

11. In the matter before me, it is not in dispute that the Plaintiff/Applicant executed guarantee documents and offered his property as security over a credit facility granted to Hatimi Service Station. What the Plaintiff contends is that he had reasonably believed that Principal debtor had been servicing the credit facility until he was served with a notification of sale. These averments appear to rebut the contentions by the Defendant that the Plaintiff had been notified of the defaults by the Principal debtor.

12. While it is true that a guarantor bears the same obligation as the principal debtor in case of a default, I am inclined to exercise my discretion towards granting the Plaintiff a chance to exercise his equitable right of redemption. I take that liberty for the reason that it might have been true that the Plaintiff was not aware of the Principal borrower’s default and further that from the valuation report annexed as “M-1” in the Plaintiff’s further affidavit dated 10/11/2020 the Charged property has a value adequate to settle the amount claimed by the Defendants.

13. On substantial loss, I take recourse with **Order 40 Rule 1** of the **Civil Procedure Rules**. The section provides that:-

**"Where in any suit it is proved by affidavit or otherwise that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongly sold in execution of a decree ... the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders."**

14. It is common ground that the defendants have served the Plaintiff with a notification of sale and I am satisfied that the property faces a danger of being sold. That alone could occasion substantial loss.

15. In light of the discussions above, I am of the view that justice will be done to both parties if the court orders, as I hereby do, that;

**a. The Defendants be and are hereby directed to serve the Plaintiff specifically with notices prerequisite to exercise of statutory power of sale as required in law. I direct as such to enable the Plaintiff put his house in order be at liberty to settle the outstanding amount before the period for notices expires.**

**b. An injunction is hereby granted against the Defendants pending compliance with order (a) above.**

**c. In light of the circumstances of this case, I think it is in order that each party should bear their own costs.**

It is so ordered.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 3<sup>RD</sup> DAY OF FEBRUARY, 2021**

**D. O. CHEPKWONY**

**JUDGE**

**Order**

In view of the declaration of measures restricting court operations due to the **COVID-19** pandemic and in light of the directions issued by His Lordship the Chief Justice on **15<sup>th</sup> March 2020**, this Ruling has been delivered to the parties online with their consent. They have waived compliance with **Order 21 Rule 1** of the Civil Procedure Rules which requires that all judgments and rulings be pronounced in open Court.

**JUSTICE D. O. CHEPKWONY**