



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISII

ELC CASE NO. 6 'B' OF 2021

ANTHON ONGORI OTUNDO.....1ST PLAINTIFF

JEREMIAH KENNEDY OAGARE.....2ND PLAINTIFF

AGNES MORAA OTUNDO.....3RD PLAINTIFF

VERSUS

CO-OPERATIVE BANK OF KENYA.....1ST DEFENDANT

NIRA AUCTIONEERS.....2ND DEFENDANT

RULING

INTRODUCTION

1. By a Notice of Motion dated 23rd July 2021 the 1st Plaintiff/Applicant filed an application seeking an order of temporary injunction to restrain the Defendants/Respondents by themselves, their agents and/or servants from selling land parcels WEST KITUTU/BOMATARA/3643, NYARIBARI CHACHE/B/B/BOBURIA/8797 and NYANSIONGO SETTLEMENT SCHEME /482 or in any manner doing anything inconsistent with the interests of the Plaintiffs/Applicants pending the hearing and determination of the suit herein.

2. The application is premised on the grounds set out on the face of the Notice of Motion and the Applicant's Supporting Affidavit sworn on the 23rd July 2021. In essence the Applicant is admitting that he is indebted to the 1st Defendant but that he has been unable to meet his contractual obligations owing to the global Covid-19 pandemic. He is therefore pleading for time to repay the loan. He fears that if the suit properties are sold by way of public auction, the Plaintiffs shall be rendered homeless.

3. The application was strenuously opposed by the 1st Defendant/Respondent vide the Replying Affidavit sworn by Joel Odhiambo, the Business Banker, Cooperative Bank of Kenya, Kisii Branch. In the said affidavit he depones that the Plaintiffs obtained credit facilities and guaranteed the facilities to Manga Cash and Carry Limited in the sum of Kshs. 6,952,182, Kshs. 1,000,000 and Kshs. 4,600,000 all totaling Kshs. 12, 552, 182. The said amount was secured by charge in respect of their properties known as WEST KITUTU/BOMATARA/3643, NYARIBARI CHACHE/B/B/BOBURIA/8797 and NYANSIONGO SETTLEMENT SCHEME /482.

4. It is his contention that having charged the said properties to the bank, the Plaintiffs were aware of what they were doing and they can therefore not claim that the same should not be sold since they reside on the said properties together with their families.

5. He depones that the interest and charges levied on the Plaintiffs' accounts are legal and the Plaintiffs are indebted to the bank in the sum of Kshs. 23, 682,925 which they have failed to pay. He further depones that the Plaintiffs have been issued with the necessary statutory notices which they have ignored.

6. The only issue for determination is whether the Plaintiffs have satisfied the conditions for the grant of an order of temporary injunction.

ANALYSIS AND DETERMINATION

7. The principles for the grant of an injunction were set out in the case of **Giella V Cassman Brown & Company Ltd 1973 EA 358** where the Court held as follows:

“First, the applicant must show that he has 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 would not adequately be compensated by damages. Thirdly, if the court is in doubt, it will decide the application on a balance of convenience.”

8. In the case of **Mrao V First American Bank of Kenya Limited (2003) eKLR** Bosire JA (as he then was) stated as follows:

“A prima facie case is... one 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”

9. Counsel for the 1st Defendant has submitted that the Applicant has not demonstrated that the Plaintiffs have a prima facie case with a probability of success as he has admitted that they are still indebted to the bank. He contended that the Applicants had not demonstrated that they would suffer irreparable loss if the injunction is not granted.

10. In the case of **Hyundai Motors Kenya Limited v East African Development Bank Ltd [2007] eKLR**, Warsame J. (as he then was) stated as follows;

“The application in my view epitomizes the resolute nature of the Applicant and its utter contravention of the requirement of good conscience and commercial ethics. It has borrowed huge sums of money on the strength of the Mortgage document. It admits or acknowledges a debt of Kshs 100 million. There is persistent default but wants to use every trick on earth to restrain the Respondent from selling the suit property. It appears nowadays there is no end to litigation and it has become customary for defaulter to the slightest excuse in order to postpone the day of reckoning. They must have in mind that the money of the lenders is not for free. The loan advanced was not meant to be candy sweets to be enjoyed freely by the Applicant. The monies of the lenders are a carrot accompanied by a stick and the stick can only be used when there is a default. Where there is an absolute default, the party in default cannot avoid the stick simply because it has taken the carrot.

11. In the instant case, the Plaintiff does not dispute the fact that he is indebted to the 1st Defendant nor has he raised any other ground to demonstrate that he has a prima facie case with a probability of success. All he is asking is that he should be granted more time to repay the outstanding loan. This is not a good ground for granting an injunction.

12. In arriving at the said decision, I am guided by **HCCC Number 82 of 2006 Maltex Commercial Supplies Limited & Another –vs- Euro Bank Limited (In Liquidation)** Musinga J. held;

“It is not disputed that the Borrower is in arrears of its loan repayment to the 1st Respondent. The court has established that an appropriate statutory notice was served upon the Applicant ... in the circumstances, the Applicant has not made out a prima facie case with a likelihood of success.”

13. The Applicant having failed to demonstrate that he has a prima facie case with a probability of success, there is no need to consider whether the Plaintiffs are likely to suffer irreparable loss. At any rate, the mere fact that the Plaintiffs stay on the suit properties would not stop the 1st Defendant from exercising its statutory power of sale.

14. In the case of **Maltex Commercial Supplies** (supra) the court held that

“Any property whether it is a matrimonial home or spiritual house which is offered as security for a loan /overdraft is made on the understanding that the same stands the risk of being sold by the lender if default is made on the payment of the secured debt”.

15. Having considered the Notice of Motion, rival affidavits and submissions as well as the law and the authorities cited to me, I find and hold that the Applicant has not met the conditions for the grant of an order of temporary injunction. The application therefore lacks merit and it is hereby dismissed with costs to the 1st Defendant.

DATED, SIGNED AND DELIVERED AT KISII THIS 8TH DAY OF DECEMBER, 2021.

J.M ONYANGO

JUDGE