



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND TAX DIVISION

MISCELLANEOUS CIVIL APPLICATION NO. E109 OF 2019

WILFRED WAWERU KIHARA.....APPLICANT

-VERSUS-

HOUSING FINANCE BANK.....1ST DEFENDANT/ RESPONDENT

LEGACY AUCTIONEERING AGENCIES.....2ND DEFENDANT/RESPONDENT

RULING

1. This ruling is in respect to the application dated 1st July 2020 wherein the applicant seeks the following orders: -

1. Spent.

2. That the application dated 2nd April 2019 be reinstated herein to permit the full adjudication of the matter before this Honourable Court once it is heard and determined in court.

3. That the applicant prays for orders of temporary injunction restraining the respondents/defendants, by themselves, their agents or their servants from auctioning the applicant's property or in any way dealing with the property pending the hearing and determination of this application.

4. That the applicant prays for orders of temporary injunction restraining the respondents/defendants, by themselves, their agents or their servants from auctioning the applicant's property which auction is dated on 7th July 2020 at 11 am or in any way dealing with the property pending the hearing and determination of the main suit.

5. That the costs of this application be in the cause.

2. The application is supported by the applicant's affidavit and is premised on the grounds that the applicant, having obtained a loan of Kshs 27,000,000 from the defendant in 2015, has been faithfully servicing the loan till sometime in the year 2018 when he started experiencing financial difficulties brought about by the poor economic state of the National Economy coupled with wanton corruption in country.

3. The applicant states that he engaged the 1st defendant with a view to regularizing his accounts through the sale of a separate property and transferred the proceeds of the sale to the loan account but that the 1st defendant proceeded to advertise the charged property for sale by way of public auction thus prompting the applicant to file an application for injunction before the lower court which application was allowed after which the matter was transferred to this court with an extension of the interim orders until the matter was heard on 7th May 2019.

4. He further states that in the intervening period, he continued to engage the 1st respondent and managed to sell the separate property and pay the sum of Kshs 7,316,000 to the 1st defendant in order to regularize the loan account.

5. He states that quite unfortunately, his advocates inadvertently misdiarised the hearing date as 7th June 2019 instead of 7th May 2019 which error resulted in the dismissal of the application and caused the applicant to lose track of the case even though he continued to follow up with the 1st defendant on the restructuring of the loan.

6. It is the applicant's case that their discussions did not yield any positive results and that the 1st respondent instead served him with a Notification of Sale slated for 18th September 2019 but that after further talks, the auction was suspended on condition that: -

i. That the applicant does provide bank statements from other banking institutions.

ii. The applicant instructs the tenants in the subject property to make direct payments via the 1st respondent's pay bill at the end of every month henceforth until the loan is fully settled.

iii. The applicant deposits Kenya Shillings Three Hundred Forty Thousand into the loan account being the monthly instalment.

iv. The 1st respondent be allowed to visit the subject property in the company of the applicant accountant.

7. He states that even though he complied with the conditions for the suspension of the auction, his request for loan restructure or for proper accounts did not receive and positive feedback from the 1st defendant who went ahead to issue yet another notice of sale for an auction slated for 7th July 2020 at the height of the Covid- 19 Pandemic.

8. The applicant contends that he will be able to settle the arrears due if given ample time once his application for loan restructure is considered and approved. The applicant stated that the charged property is valued way above the disputed arrears and that there is no risk of loss that will be caused to the 1st defendant in the intervening period should the application be allowed.

9. I have considered the instant application the respondent's response, the parties' submissions together with the authorities that were cited.

10. The applicant seeks orders to reinstate the application dated 2nd April 2019 to permit its full adjudication. The applicant also seeks orders to restrain the respondents from auctioning the suit property which are the same orders sought in the application dated 2nd April 2019. Parties however proceeded to fully canvass the application for injunction and in the circumstances, I am of the view that it will be pointless to reinstate the earlier application of 2nd April 2019 when similar prayers have already been canvassed herein I will therefore proceed to consider the merits of the application for injunction so as to save the judicial time.

11. The applicant does not deny that it is indebted to the 1st defendant for the loan for which he charged the suit property. The main contention is that the applicant has made all efforts to settle the arrears due and even sold a separate property in order to keep up with the loan repayments despite the harsh economic times. The applicant also stated that he is willing to continue with the loan repayments if the 1st defendant can honour his request to restructure the loan.

12. I note that the 1st defendant does not deny that the applicant approached it to request for loan restructure and also sold a separate property in order to settle part of the arrears due. The applicant has cited negative economic growth and Covid- 19 Pandemic as some of the reasons why he has been unable to keep up with the loan repayments. I also note that the lower court granted the applicant temporary orders of injunction pending the inter partes hearing of the suit.

13. The law on granting of interlocutory injunction is set out under order 40(1) (a) and (b) of the Civil Procedure Rules 2010 which provides:
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"Where in any suit it is proved by affidavit or otherwise—

(a) That any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or [Rev. 2012] Civil Procedure CAP. 21 [Subsidiary] C17 – 165;

(b) That the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, 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."

14. The conditions for consideration further in granting an injunction is now well settled in the case of *Giella vs Cassman Brown & Company Limited (1973) E A 358*, where the court expressed itself on the condition's that a party must satisfy for the court to grant an interlocutory injunction: -

"First, an 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 would 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."

15. Having regard to all the circumstances of this case, I find that the instant application meets the conditions set for the granting of interim orders of injunction as the applicant has not only demonstrated that he has a prima facie case against the respondent, but that he will suffer substantial loss should the suit property be sold when he has already made efforts and is still willing to settle the debt. I find that the balance of convenience in this matter tilts in favour of the applicant. I note that the applicant has been diligent and has, against all odds, been keen in settling debt owed to the 1st defendant. It is clear that the applicant is not on a mission to merely buy time or frustrate the 1st defendant's

realization of its security.

16. Consequently, I allow the application dated 1st July 2020 albeit partly, as follows: -

a. A temporary order of injunction is hereby issued to restrain the defendants from auctioning the applicant's property pending the hearing and determination of the main suit.

b. The costs of the application shall abide the outcome of the suit.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT NAIROBI THIS 1ST DAY OF JULY 2021 IN VIEW OF THE DECLARATION OF MEASURES RESTRICTING COURT OPERATIONS DUE TO COVID-19 PANDEMIC AND IN LIGHT OF THE DIRECTIONS ISSUED BY HIS LORDSHIP, THE CHIEF JUSTICE ON THE 17TH APRIL 2020.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Kihara for Plaintiff/Applicant.

Mr. Njuguna for Ms Mungai for Defendants/Respondents

Court Assistant: Sylvia.