



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL CASE NO. 77 OF 2018

(Formerly Eldoret ELC No. 119 of 2017)

JERUTO TAPKILI TENGEKYON.....1ST PLAINTIFF

SAMWEL KIPRUTO CHEPKEITANY.....2ND PLAINTIFF

-VERSUS-

AGRICULTURAL FINANCE CORPORATION.....1ST DEFENDANT

KOLATO AUCTIONEERS.....2ND DEFENDANT

STEPHEN KIBOWEN.....3RD DEFENDANT

RULING

[1] The application that is coming up for ruling is the plaintiffs' Notice of Motion dated **30 May 2017**. It is expressed to be brought under **Sections 3 and 3A and 63** of the **Civil Procedure Act, Chapter 21** of the **Laws of Kenya** and **Sections 68 and 69** of the **Land Registration Act, 2012**, as well as **Order 40 Rules 3** and **Order 51** of the **Civil Procedure Rules, 2010**, for the following orders:

[a] Spent

[b] That pending hearing of the application *inter partes* an order of temporary injunction be issued restraining the 3rd Respondent by himself or through his agents, servants, officers or otherwise from charging, selling, disposing off, alienating transferring or interfering with the applicant's interest in that property known as LEMBUS/KILOMBE/157.

[c] That pending hearing determination of the main suit, an order of temporary injunction be issued restraining the 3rd Respondent by himself or through his agents, servants, officers or otherwise from charging, selling, disposing off, alienating transferring or interfering with the applicant's interest in that property known as LEMBUS/KILOMBE/157.

[d] That the Court do issue an order of inhibition stopping further dealings, transfer, registration and transactions over that parcel of land known as LEMBUS/KILOMBE/157.

[2] The application was premised on the grounds that the 2nd Plaintiff is currently in occupation of the piece of land known as LEMBUS/KILOMBE/157 (the suit property) along with his descendants who are over 84 in number, and that they have no other known home or piece of land from which to earn a living. It was therefore the contention of the applicants that they stand to suffer irreparable loss and damage, adding that none of the requisite statutory notices was ever served. The grounds were amplified in the supporting affidavit sworn by **Samwel Kipruto Chepkeitany**, the 2nd plaintiff, sworn on **30 May 2017**; in which he averred that he was the original registered owner of the suit land, before selling it to the 1st plaintiff; and that he thereafter re-purchased the property when the 1st plaintiff got overwhelmed with the repayment. He averred that he paid over **Kshs. 4,600,000/=** which the 1st defendant accepted; and was therefore shocked to learn that the 1st defendant had secretly sold the property without any notice.

[3] The 2nd plaintiff further averred that when he got to learn of the sale, he immediately complained to the 1st defendant; whereupon the sale was cancelled by the 1st defendant per its letter dated **1 October 2014**. He added that he has continued to occupy the suit property to date with over 84 descendants of his; and that they stand to suffer irreparably, unless the prayers sought are granted.

[4] The application was opposed by the defendants, and a Replying Affidavit filed to that effect sworn by the 3rd defendant was filed on **19 June 2017**. He averred therein that on or about **5 May 2014**, he read an advertisement in the Daily Nation newspaper about a public auction of a parcel of land known as LEMBUS/KILOMBE/157 measuring 27.5 Ha; and that the advertisement had been put up by the 2nd defendant on the instructions of the 1st defendant. The 3rd defendant further averred that it was within his knowledge that the 1st defendant was acting in exercise of its statutory power of sale as a charge in respect of facilities given to the 1st plaintiff. He accordingly placed his bid and bought the suit property at a public auction for **Kshs. 5,000,000/=**; and that the only option now open for the plaintiffs is to sue the 1st defendant for damages, if at all, pursuant to **Section 99(4) of the Land Act, No. 6 of 2012**.

[5] The 3rd defendant also gave a chronology of events and the details pertaining the previous suits filed before the Environment and Land Court at Nakuru to assert his proprietary rights over the suit property as a *bona fide* purchaser for value. He further asserted that the application has been made to further delay the eviction of the plaintiffs who are illegally in occupation of his land. He also mentioned that when the 1st defendant attempted to resile from the sale, he instituted **Nakuru ELC No. 218 of 2014: Stephen Kibowen vs. Agricultural Finance Corporation**, which was decided in his favour on **19 March 2015**; after which the title was vested in him. He thereafter filed **Nakuru ELC No. 174 of 2015: Stephen Kibowen vs. Raymond Ruto & 5 Others** for eviction and obtained orders to that effect.

[6] The application was urged orally on **5 February 2020**, whereby **Mr. Kibii**, learned counsel for the plaintiffs reiterated the grounds set out on the face of the application and in the supporting affidavit. He urged the Court to find that the issues in contest herein were not canvassed in the previous suits, granted that the 2nd plaintiff's efforts to be enjoined to those suits were entirely unsuccessful. In particular, Counsel drew the Court's attention to the 1st defendant's letter dated **1 October 2014**, as proof that the sale was fatally flawed; and confirmation that the 1st defendant rescinded the auction after detecting an anomaly in the auction process, and proposed to refund the sums paid by the 3rd defendant. Thus, counsel took the view that the auction was null and void *ab initio* on account of failure by the chargee to issue and serve the requisite statutory notices; and therefore that no valid title could thereby be passed to the 3rd defendant. He submitted that, since these matters can only be inquired into at the hearing, it would be in the interest of justice for the orders sought to be granted in the interim.

[7] **Mr. Mabonga**, learned counsel for the 1st and 2nd defendants was of the view that the **Section 90** notice is only appropriate where there are arrears to be communicated for rectification by the charger. According to him, since in this instance, the loan itself had already matured in **2006**, the chargee was entitled to recall the entire loan as it did. He accordingly opposed the application. Likewise, **Mr. Konosi**, for the 3rd defendant, opposed the application reiterating the averments set out in the 3rd defendant's Replying Affidavit sworn on **19 June 2017** to the effect that the 3rd defendant lawfully bought the suit property in a public auction; and that when the 1st defendant attempted to renege on the auction, he filed **Nakuru ELC No. 218 of 2014** in which the court made a finding that he was entitled to the suit land. Counsel further submitted that since the suit property is registered in the 3rd defendant's name, he is at liberty to do whatever he pleases with it, including charging it for a loan.

[8] It was further the submission of **Mr. Konosi** that, as the charge was executed by the 1st plaintiff, the 2nd plaintiff has no *locus standi* to challenge the sale. In his view, the 1st plaintiff's recourse, in the circumstances can only be damages pursuant to **Section 99** of the **Land Act**; in which event, such a cause of action would lie against the 1st defendant as the chargee and not the 3rd defendant. Counsel relied on **Michael Matu vs. Martin Luther King Andati** [2017] eKLR and urged the Court to find that no *prima facie* case has been made herein by the plaintiffs to warrant the issuance of the orders sought. He also urged the Court to take into account the fact that, although the 3rd defendant bought the suit property in **2014**, he has been unable to take possession of it to date owing to the numerous applications by the plaintiffs. He therefore prayed that the application be disallowed.

[9] In his reply, **Mr. Kibii** submitted that there is no evidence placed before the Court to prove, either that the loan matured in **2006** or that the statutory notices were issued and served. On the valuation report, **Mr. Kibii** pointed out that non-compliance was conceded; and that this was the reason for nullification of the auction by the 1st defendant. He reiterated his stance that this Court has the power to interrogate the manner in which the suit property was sold and come to a just decision on the facts; and therefore that the authority relied on by **Mr. Konosi** is distinguishable. He prayed that the plaintiffs' application be allowed.

[10] I have given careful consideration to the application dated **30 May 2017**, the affidavits filed in respect thereof and the submissions made herein by learned counsel. **Order 40 Rule 1(a) of the Civil Procedure Rules**, which is cited as one of the enabling provisions pursuant to which the application has been brought, 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."

[11] There appears to be no dispute that the title for the suit property was charged to the 1st defendant as security for a facility of **Kshs. 3,264,000/=** and that, in the course of time, the 1st Plaintiff was unable to service the said facility. Consequently, the 1st defendant gave instructions to the 2nd defendant to have the charged property sold by way of public auction; which sale took place on **27 May 2014** and thereupon, the 3rd defendant bought the suit property for **Kshs. 5,000,000/=**. A title deed was exhibited to show that ownership of the property has since vested in the 3rd defendant. Nevertheless, the plaintiffs filed this suit on **21 March 2017** alleging that the auction was fraudulently conducted. Thus, they are seeking the following reliefs against the defendants jointly and severally:

[a] A declaration that the alleged auction and sale was unlawful, unfair, oppressive, null and void *ab initio*.

[b] A permanent injunction restraining the defendants from trespassing, encroaching or dealing in any manner with the suit property, L.R. No. LEMBUS/KILOMBE/157, or evicting the plaintiffs from the same.

[c] An order for the cancellation of the title of the suit land in favour of the 3rd defendant.

[d] Costs of the suit.

[e] Any other relief that the Court shall deem fit and just to grant.

[12] It is therefore the plaintiffs' prayer that, pending the hearing and determination of their suit, the 3rd defendant be restrained by way of a temporary injunction, from charging, selling, disposing off, alienating, transferring or interfering with the suit property. They also prayed for an order of inhibition to stop further dealings, transfer, or transactions over the suit property. Accordingly, the key issue for the Court's determination is whether the Plaintiff has satisfied the conditions set out in the case of Giella vs. Cassman Brown & Co. Ltd [1973] EA 358 wherein it was held that:

"The conditions for the grant of an interlocutory injunction are ...well settled in East Africa. 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."

[13] As to what amount to a *prima facie* case, the Court of Appeal, in Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others [2003] KLR 123 furnished the following helpful definition:

"A prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case in 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."

[14] This being an interlocutory application, the Court need not examine closely the merits or otherwise of the Plaintiff's case. As was stated in Nguruman Limited vs. Jan Bonde Nielsen & 2 Others: Civil Appeal No. 77 of 2012:

"...in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right, which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right, which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed."

[15] In the light of the foregoing principles, I have given due consideration to the Plaintiffs' application and noted that it comprises of two prongs, namely: that the Defendant did not serve the requisite statutory notices under **Sections 90 and 96** of the **Land Act**; and that the property was not valued by an independent valuer as required by **Section 97** of the **Land Act**. To begin with, **Section 90** of the **Land Act**, is explicit that:

(1) If a chargor is in default of any obligation, fails to pay interest or any other periodic payment or any part thereof due under any charge or in the performance or observation of any covenant, express or implied, in any charge, and continues to be in default for one month, the chargee may serve on the chargor a notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be.

(2) The notice required by subsection (1) shall adequately inform the recipient of the following matters--

(a) the nature and extent of the default by the chargor;

(b) if the default consists of the non-payment of any money due under the charge, the amount that must be paid to rectify the default and the time, being not less than three months, by the end of which the payment in default must have been completed;

(c) if the default consists of the failure to perform or observe any covenant, express or implied, in the charge, the thing the chargor must do or desist from doing so as to rectify the default and the time, being not less than two months, by the end of which the default must have been rectified;

(d) the consequence that if the default is not rectified within the time specified in the notice, the chargee will proceed to exercise any of the remedies referred to in this section in accordance with the procedures provided for in this sub-part; and

(e) the right of the chargor in respect of certain remedies to apply to the court for relief against those remedies.

(3) If the chargor does not comply within ninety days after the date of service of the notice under subsection (1), the chargee may--

- (a) sue the chargor for any money due and owing under the charge;
- (b) appoint a receiver of the income of the charged land;
- (c) lease the charged land, or if the charge is of a lease, sublease the land;
- (d) enter into possession of the charged land; or
- (e) sell the charged land.

(4) If the charge is a charge of land held for customary land, or community land shall be valid only if the charge is done with concurrence of member of the family or community the chargee may--

(b) apply to the court for an order to--

- (i) lease the charged land or if the charge is of a lease, sublease the land or enter into possession of the charged land;
- (ii) sell the charged land to any person or group of persons referred to in the law relating to community land.

16] Section 96 of the Land Act, on the other hand provides that:

(1) Where a Chargor is in default of the obligation under a charge and remains in default at the expiry of the time provided for the rectification of the default in the notice served on the Chargor under Section 90 (1), a Chargee may exercise the power to sell the charged land.

(2) Before exercising the power to sell the charged land, the Chargee shall serve on the Chargor a notice to sell in the prescribed form and shall not proceed to complete any contract for the sale of the charged land until at least forty days have elapsed from the date of the service of that notice to sell.

[17] There appears to be no response from either the 1st defendant or the 2nd defendant; and therefore the allegations by the Plaintiffs are un rebutted. From the bar, their counsel, **Mr. Mabonga**, simply stated that the loan had matured and therefore that there was no need to serve the notices. However, as rightly pointed out by **Mr. Kibii**, no effort was made by the 1st defendant to exhibit the statements of account to give the Court a clearer picture of the status of the account as at the time of the auction. Moreover, the 1st defendant is said to have admitted these anomalies when they were brought to its attention by the plaintiffs. This it did vide its letter dated **1 October 2014** to **M/s Konosi & Company Advocates** thus:

“...The above sale conducted by M/s Kolato Auctioneers held on 27.05.2014 was cancelled by the Corporation when anomalies surrounding the auction were noticed.

In a meeting with Mr Isack Langat of Kolato Auctioneers held on 11.06.2014, the issues were brought to his attention and he was instructed NOT to receive any more payments arising from the purported auction. Being our agent, he should have refrained from receiving subsequent cheques.

In view of the above circumstances, we return the following seven (7) cheques totaling Ksh 5 million for your onward transmission to your client Stephen Kibowen...”

[18] Further to the foregoing, it is a requirement of Section 97 of the Land Act states that:

(1) A Chargee who exercises a power to sell the charged land, including the exercise of the power to sell in pursuance of an order of court, owes a duty of care to the Chargor, any Chargee under a subsequent charge or under a lien to obtain the best price reasonably obtainable at the time of sale.

(2) A Chargee shall, before exercising the right of sale, ensure that a forced sale valuation is undertaken by a Valuer.

(3) If the price at which the charged land is sold is twenty-five per centum or below the market value at which comparable interests in land of the same character and quality are being sold in the open market-

(a) *There shall be a rebuttable presumption that the Chargee is in breach of the duty imposed by subsection (1); and*

(b) *The Chargor whose charged land is being sold for that price may apply to a court for an order that the sale be declared void, but the fact that a plot of charged land is sold by the Chargee at an undervalue being less than twenty-five per centum below the market value shall not be taken to mean that the Chargee has complied with the duty imposed by subsection (1).*

[19] The contention of the plaintiffs is that no valuation was undertaken as required by Section 97 aforesated. Hence, I would agree that the

Plaintiffs have shown, albeit on a *prima facie* basis, that the duty of care owed to them by dint of **Section 97(1)** of the **Land Act**, was not discharged before the intended sale, noting that **Section 97(2)** is couched in peremptory terms. Other than compliance with the provisions of **the Land Act**, it was imperative for the 2nd defendant to obey the stipulations of **Rule 15(d)** of the **Auctioneers Rules**; which apparently was also not complied with. Thus, the plaintiffs have demonstrated that they have a right **which has apparently been infringed by the defendants, in respect of which an answer is required of the defendants. Although Mr. Konosi tried to justify the sale on the basis of the 3rd defendant's Replying Affidavit, it is trite that the answer can only be fully interrogated at the hearing of the main suit.**

[20] As to whether the Plaintiff stands to suffer irreparable loss and whether this is a matter for which damages would be adequate recompense, it is now well settled that where there is breach of the law, an applicant cannot be compelled to accept damages as recompense. Thus, in **Kanorero River Farm Ltd and 3 others –vs- National Bank of Kenya Ltd (2002) 2 KLR 207**, Ringera, J. (as he then was) held as follows at page 216:

“I would for those reasons alone accede to the Plaintiff’s prayer for interlocutory injunction in respect of the two properties on the grounds that the 1st and 2nd Plaintiffs have a very strong prima facie case with a probability of success. I would not be deterred by any argument that the National Bank could compensate them in damages if it failed at the trial. In my opinion, no party should be allowed to ride roughshod on the statutory rights of another simply because it could pay damages.”

[21] Likewise, in the case of **Joseph Siro Mosioma vs. Housing Finance Company of Kenya Limited & 3 Others [2008] eKLR**, it was held that:

“...damages is not automatic remedy when deciding whether to grant an injunction or not. Damages is not and cannot be substitute for the loss which is occasioned by a clear breach of the law, in any case, the financial strength of a party is not always a factor to refuse an injunction. More so a party cannot be condemned to take damages in lieu of his crystallized right which can be protected by an order of injunction.”

[22] The same position was taken in **Sharok Kher Mohamed Ali & Another vs. Southern Credit Banking Corporation [2008] eKLR** thus:

“... a party deprived of his property through an illegal process would suffer irreparable loss and/or damage. In any case, a party entitled to a legal right cannot be made to take damages in lieu of his right. In essence the damages and/or loss that would be suffered by the Plaintiffs would be significant if an injunction is not granted. My position is that a party in contravention of the law cannot be rewarded for his contravention. (see also **Olympic Sports House Limited vs. School Equipment Centre Limited [2012] eKLR)**

[23] As to whether the balance of convenience is in favour of the Plaintiff, the decision of the Court of Appeal in **Charter House Investments Ltd vs. Simon K. Sang and Others Civil Appeal No. 315 of 2004** is instructive, that:

“Injunction is an equitable and discretionary remedy, given when the subject matter of the case before the court requires protection and maintenance of the status quo. The award of temporary injunction by courts of equity has never been regarded as a matter of right, even where irreparable injury is likely to result to the applicant. It is a matter of sound judicial discretion, in the exercise of which the court balances the convenience of the parties and possible injuries to them and to third parties.

[24] As matters stand, the plaintiffs are in possession of the suit property; and therefore the balance of convenience tilts in favour of their continued occupation pending the final orders of the court in this matter. Moreover, it is imperative that the Court opts for the lower rather than the higher risk of injustice. This was held to be so in the case of **Suleiman –vs- Amboseli Resort Ltd (2004) 2 KLR 589** in which **Ojwang Ag. J** (as he then was) quoted the following words of **Justice Hoffmann** in the English case of **Films Rover International vs. Cannon Film Sales Ltd (1986) 3 All ER 772**:

“The principal dilemma about the grant of interlocutory injunctions, whether prohibitory or mandatory, is that there is by definition a risk that the Court may make the ‘wrong’ decision, in the sense of granting an injunction to a party who fails to establish his right at the trial (or would fail if there was a trial) or alternatively, in failing to grant an injunction to a party who succeed (or would succeed) at trial. A fundamental principle is therefore that the Court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been ‘wrong’ ...”

[25] In the instant matter, it is my considered view that the path leading to the lower risk of injustice would be to maintain the status quo now prevailing. Accordingly, I would grant orders in the plaintiffs’ favour in the following terms:

[a] That a temporary injunction be and is hereby issued restraining the defendants either acting by themselves, their servants and/or agents from alienating, advertising for sale, offering for sale, selling, taking possession of, leasing, transferring and/or otherwise disposing off the whole of that parcel of land known as LEMBUS/KILOMBE/157 pending the hearing and determination of this suit.

[c] That the costs of the application be in the cause.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 15TH DAY OF MAY, 2020

OLGA SEWE

JUDGE