



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL SUIT NO 3 OF 2020

KABIYET AGRO AND GENERAL ENTERPRISES.....APPLICANT

VERSUS

BENARD ROP.....1ST RESPONDENT

EASTERN AND SOUTHERN TRADE DEVELOPMENT) (PTA) BANK.....2ND RESPONDENT

GARAM INVESTMENT AUCTIONEERS.....3RD RESPONDENT

RULING

By an application dated 03rd July 2020 **KABIYET AGRO AND GENERAL ENTERPRISES (the applicant) seeking orders:**

1. THAT temporary orders of injunction be issued against the respondents their agents, servants, employees and/ or assignees from auctioning, adversely interfering, and/or in any way dealing with the suit property known as **LR NO. ELDORET MUNICIPALITY BLOCK 10/81** as advertised in the Daily Nation scheduled for sale by public auction on 10th July 2020 pending hearing and determination of this application, and eventually, the main suit

2. Costs of this application

1. The application is premised on grounds that the 1st respondent (**BENARD ROP**) who is the Receiver, acting as the agent of the 2nd respondent has advertised sale by way of public auction in The Daily Nation, and served the applicants by way of registered post, an auctioneer's notice dated 3rd June 2020, sale by public auction scheduled for 10th July 2020, the parcel of land known as **LR NO. ELDORET MUNICIPALITY BLOCK 10/81**, together with a milk processing plant/factory together with the machinery installed thereon

2. That the 1st respondent has moved with speed to only secure the interests of his Principal at the expense of the Applicant's interest and that of its directors, who have been kept in darkness, and only ambushed by the advert of sale by public auction and auctioneer's notice dated 03/06/2020.

3. The applicant laments that the intended sale is not a coincidence, but a well calculated opportunistic time, when the Principal director/proprietor **HON JOHN KIPKORIR SAMBU** is unwell and has just arrived from **INDIA**, where he has been receiving treatment for the past 6 months for a condition which has also impaired his mental judgment. That the other directors of the Applicant i.e. **RHODA CHESANG SAMBU AND FELIX KIPCHUMBA SAMBU**; have tried to reach the 1st respondent to inform him of the current status, financial position, outstanding loans, request for the milk processing plant/factory, inspection of the company by potential buyers who would then buy off the company's indebtedness, but have fallen on deaf ears, hence clogging their right to redeem the charged property. The directors are apprehensive that unless temporary orders of injunction are issued to restrain the respondents from conducting the sale, the applicant will suffer loss and prejudice

4. The background to this matter is that on 8/06/2005, the applicant borrowed a sum of USD 1,117,000 as development funds from the 2nd respondent, so as to build the applicant's milk processing plant/factory within Eldoret town on parcel **No LR NO. ELDORET MUNICIPALITY BLOCK 10/81**. The applicant had pledged the milk processing plant/factory plus all the machinery thereon (all forming part of the land due to their permanent fixture) as security. Unfortunately, the applicant's milk processing enterprise did not pick up as had been expected, and it eventually closed. The 1st respondent was then appointed as the Receiver Manger of the applicant company by the 2nd respondent

5. The applicant contends that the 1st respondent has failed to appreciate that it is under receivership as opposed to being in liquidation, and

which makes its right to redemption inevitable, and sale by private treaty to realize a higher consideration/sale price which will raise funds sufficient to clear the 2nd respondent's loan through its directors namely **RHODA CHESANGA SAMBU AND FELIX KIPCHUMBA SAMBU**. The applicants view the intended sale by public auction as a deliberate move to frustrate its hopes of getting the property disposed of at a higher price, and force it to go for a lesser price to the applicant's detriment.

6. This matter had been filed under certificate of urgency, and when Mr Omusundi appeared before this court on 07/07/2020 seeking *exparte* interim orders of injunction on grounds that an auction was scheduled for 10th July 2020, I found it prudent not to grant any *exparte* orders, and directed that the application be served for inter-partes hearing, hence this hearing within the shortest time possible.

7. At the hearing, Mr Omusundi submitted that the intended sale has been advertised during the pendency of the suit, and at time when there were on-going negotiations on a without prejudice basis, with a view to resolving the matter. He argues that the step now taken by the respondents will render the suit nugatory as there will be nothing left to litigate on. Further, that the applicant has received communication from two Third Parties who have an interest in the subject property, and pleads to be given time to pursue their preferred mode of disposing the property, rather than through a forced sale. Mr Omusundi states ***"I pray that we continue engaging in the discussions, then we can give them our undertaking as proposed in paragraph 3 of their grounds of opposition"***

8. In opposing the application, Mr Mbaluto on behalf of the 1st respondent points out that the nature of the application is different from what the applicant's counsel has narrated in court – the crux of the application being the ill health of the principal director. He urges this court to take note that in law, a company is different from its directors, and the ailing director's state, does not impede the company's status.

9. Counsel further points out that the applicant company is under receivership, and no leave has been sought from the court or the Receiver Manager before filing this suit, thus rendering the suit totally defective. In addition, a preliminary objection had earlier been raised that the entire suit is *res judicata*, as the reliefs sought have been previously litigated upon in ELD ELC NO. 66 OF 2015. Counsel also submits, that the applicant has failed to disclose to this court that its indebtedness to the respondents as of 08/07/2020 stood at USD 6,188,458/20cts (i.e. in excess of Kshs 600,000,000/-) yet there has been no offer of payment or security.

10. As regards the purported negotiations, Mr Mbaluto submits that those were on a without prejudice basis which have no business finding their way to court. That the applicant has not met the threshold for grant of an injunction as one cannot argue that because there are no prejudice negotiations, then the auction should stop. This court is urged to consider directing the applicants to deposit security in the event that an injunction is granted

11. Mr. Omino while concurring with Mr Mbaluto adds that Odeny J in ELD ELC NO 66 OF 2015, while dismissing the claim held that the suit was defective for want of authority from the Receiver Manager to file the suit, and quips that the applicants are making the same mistake they made in that other case. That once placed under receivership, the directors became ***functus officio***, and have no business dealing with the company, and any offers ought to have been made through the Receiver Manager

12. As regards offers by potential buyers/ Third Parties, Counsel argues that if indeed such entities exist and really desire to purchase the property, they can attend the intended auction, and make their offers/bids there.

13. The applicant is accused of latches and deliberately delaying making this application despite the notice of the auction having been given a month ago, then waiting until the eleventh hour to scuttle the auction. That if the orders are granted then the applicant must pay the auctioneers charges of Kshs 475,000/ which is made up of Kshs 385,000/- for cancelling auction on land and buildings, and Kshs 90,000/- for cancelling the auction on the milk plant

14. Mr Omusundi in response urges the court to allow the prayer, saying a refusal will defeat the interest of justice.

Threshold in granting injunction:

15. The infamous case of ***Giella vs. Cassman Brown & Co. Ltd [1973] EA 358*** set out the principles to consider when dealing with an application seeking grant of injunctions as follows:

"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."

And in ***Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others [2003] KLR 123*** a prima facie case was defined thus:

"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."

16. The applicant does not deny that it owes the sum claimed, but asks to be given time to get itself organized by selling the property via private treaty. It at the same time admits that there have been on-going negotiations on a without prejudice basis, but naturally, a party cannot be forced into enter negotiations. The lament about a pending suit being rendered nugatory is self-defeating in the face of this proposal, and therefore the first limb in *Giella* as to whether a prima facie case with probability of success has been demonstrated, is not met.

17. As to whether the applicant shall suffer irreparable loss which cannot be adequately compensated by way of damages, what is demonstrated is a fear of under-pricing the property as opposed to what the applicant's private purchasers are offering. Such loss is easily

taken care of as pointed out by Mr. Omino, those potential purchasers are at liberty to attend the auction and offer the highest bids. In my view, that will cushion the applicants feared loss, and deflate whatever under-pricing or fears it harbours

18. That leaves the third limb, which is where tilteth the balance of convenience? The contest here is on Sale by private treaty versus public auction cum negotiations. This is a debt which has accrued from the year 2005. The applicant does not deny that over time it has escalated to over 600 million shillings, and indeed it is a common ground that the applicant's only option is to sell the property and machines so as to raise the sum owing. The more the applicant drags its feet weighing out when to sell and who to sell to privately, the more the amount increases –surely the respondents cannot be held at ransom. It is a lot fairer to conduct an auction, and bidders, including the applicant's choice bidders can attend the auction and pay the price agreed on between them. I am persuaded that the balance of convenience tilts heavily in favour of the respondents and away from the applicant

Locus standi and the issue of Receivership versus Liquidation:

19. **AT the risk of sounding like a broken record, let me echo the approach by Odeny (J) in ELDORET ELC NO 66 OF 2015 when she considered the very arguments raised on the issue of the applicant company's locus standi, as it was argued the being under receivership did not affect the directors, right to file a suit. The case of Mandev Ltd v M.K. and Sons [2010] eKLR was considered, and which held that once a company is under receivership, it lacks the legal competence to institute a suit or to be sued in its name, and such action can only be commenced through the Receiver Manager.**

20. **Competence of suit due to want of authority from the Receiver Manager was likewise addressed in the other suit and a finding made that the suit was defective for want of authority from the Receiver Manager before filing it. Indeed, this drains into the question as to whether similar issues have previously been addressed by a court of competent jurisdiction.**

21. **Res Judicata:** The doctrine of res judicata is set out in section 7of the Civil Procedure Act as follows:

7. No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court. Explanation. (1)—The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation. (2)—For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. (3)—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation. (4)—Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

22. **In ELDORET ELC NO 66 OF 2015 KABIYET AGRO AND GENERAL ENTERPRISES VERSUS BERNARD ROP & EASTERN AND SOUTHERN TRADE DEVELOPMENT) (PTA) BANK** the applicant had sought inter alia a declaration that the conduct of the 1st and 2nd respondents herein clogged their equity of redemption, and that they be allowed to sell the charged property by private treaty as a going concern. These are the same arguments being raised in the present application. They contemporaneously filed an application for orders of injunction to restrain the 1st and 2nd respondents herein, from selling the very suit property! I am in agreement with the respondents' counsel that the matters addressed in this application are res judicata and have no basis for further litigation

23. Consequently, I hold and find that the application has no leg upon which to stand and is dismissed with costs to the respondents.

E-delivered and dated this 10th day of July 2020

H.A. OMONDI

JUDGE

Mr Omusundi for applicant

Mr. Mbaluto for 1st respondent

Mr. Omino for 2nd and 3rd respondents