



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CORAM: D.S. MAJANJA J.

CIVIL CASE NO.1 OF 2019

(FORMERLY MIGORI HCCC NO. 14 OF 2018)

BETWEEN

EVANS ODHIAMBO AKUMU.....PLAINTIFF

AND

KEYSIAN AUCTIONEERS.....1ST RESPONDENT

GROFFINS SGB KENYA LTD.....2ND RESPONDENT

RULING

1. The application for consideration is dated 23rd November 2018 made under primarily **Order 40 rules 1, 2 and 4** of the **Civil Procedure Rules**. The plaintiff seeks, inter alia, an order that the Court be pleased to issue a temporary injunction against the 1st and 2nd respondents attaching, selling by private covenant or public auction the Land parcel known as Title Number East/Wasweta 1/7885 pending hearing and determination of the suit.

2. The plaintiff has not disputed the fact that he guaranteed a loan given to Forefront Opticians Limited by the 2nd defendant, Grofin SGB Kenya Ltd. In his deposition in support of the motion sworn on 23rd November 2018, the plaintiff, after setting out the nature of the relationship between the parties, states, inter alia, as follows:

[10] That he (the principal debtor) had been servicing his loan on a monthly basis until February 2018 when he realized that the bank claim was excessive as there was interest being charged on interest thereby making it impossible for him to meet his obligation to the 2nd defendant/Respondent.

[11] That on further examination then he realized that the 2nd Respondent Company Bank had inflated the cost by well over Eight Million Shillings(Kshs.8,000,000/=) through use of an inflated interest rate that was not communicated to me or to him not agreed upon contrary to my express request to them that we agree on an interest rate before disbursement.

[12] That on further examination investigation I realized that I'm being made to pay for both principal sum interest and interest as the both is amalgamated for both in the prevailing economic circumstances is an onerous burden for me to discharge.

[13] That due to the foregoing, the borrower I guaranteed has been boxed into a corner by the 2nd Respondent/Defendant Company/Bank making it impossible for him to meet his obligations

[14] That on 9th November 2018 I learnt with great dismay and shock that the 1st Defendant/Respondent Keysian Auctioneers had advertised an Auction of my property in the Daily Nation

3. From the plaintiff's deposition, part of which I have out above, it is apparent that his case is that he fears that his property will be sold because the principal debtor has defaulted on the loan.

4. At this stage, I am not required to make conclusive findings of fact. What is not disputed is that the plaintiff guaranteed the loan by charging his property. He has not alleged any fraud or misrepresentation that would impugn the guarantee and security documents. Further, Rishi Khubchandani, the 2nd respondent's officer, has shown in his replying affidavit sworn on 17th December 2018 that statutory notices

were sent to the plaintiff to his known and disclosed address duly supported by evidence by certificates of posting. In these circumstances, I cannot say that the plaintiff has established a prima facie case with a probability of success.

5. I am also not convinced that damages are not an adequate remedy. The suit property, as disclosed in the valuation report is not a matrimonial property but a commercial rental property. In any case, the plaintiff's spouse did give her consent for it to be charged. At the end of the day, the debt is due, it continues to accumulate interest and the statutory power of sale has accrued. The plaintiff has not given this court any grounds to intervene and stop the 2nd defendant from exercising its statutory power of sale.

6. For the reasons I have set out above, I dismiss the Notice of Motion dated 23rd November 2018 with costs to the defendants.

7. I now invite parties to take directions for hearing of the case.

DATED and DELIVERED at KISII this 12TH DAY of FEBRUARY 2019

D. S. MAJANJA

JUDGE

Mr Osewe instructed by Odero Osiemo and Company Advocates for the plaintiff.

Ms. Kageni instructed by Kairu Mbuthia Law LLP for the defendant.