



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

HCCC NO. 32 OF 2018

SAMUEL GATHU KAMAUPLAINTIFF

VERSUS

EQUITY BANK (K) LIMITEDDEFENDANT

RULING

1. The Plaintiff's Notice of Motion dated **25th January 2018** is for interlocutory injunction to restrain the Defendant from selling, by public auction, two properties, namely **L.R. NO. Muguga/Gitaru/365** and **Kiambaa/Kihara/6071** pending determination of this suit. The auction sale was scheduled for **26th January 2018**, now past.

2. The Defendant does not deny that the Defendant advance him loans from time to time which loans were secured by legal charges on the two properties. What he however raises as grounds to support his prayer for injunction is his allegation that he Defendant charged him unconscionable rates of interest, that the Defendant failed to serve him with Statutory Notice; and that the Defendant had failed to carry out a valuation of the property.

3. It transpired, when the Defendant filed its replying Affidavit, that the Plaintiff had previously filed another case where he pleaded the same facts as in this matter. That matter as case **HCCC NO. 205 OF 2017 SAMUEL GATHU KAMAU –VS- EQUITY BANK (K) LTD, ROBERT WAWERU MAINA T/A ANTIQUE AUCTIONEERS AGENCIES.** That suit was compromised by consent as follows:

“This matter coming up for hearing on 21st November 2017 before the Honourable Mr. Justice Fred A. Ochieng. AND UPON HEARING the Counsel for the Plaintiff and the Counsel for the 1st and 2nd Defendants:

IT IS HEREBY ORDERED BY CONSENT:

1. That the Decree issued by this Court on 23rd May, 2017 be and is hereby varied in terms of Orders (2) and (3) thereof on the following terms:

(1) That the Plaintiff do pay the 1st Defendant the sum of Kshs 715,047/- per month towards repayment of the outstanding amounts with the first instalment payable on or before 10th December 2017 and thereafter on or before the 10th day of each succeeding month.

(2) That the Plaintiff be and is hereby at liberty to apply to the 1st Defendant for restructuring of the facilities after successful payment of three (3) months instalments under order (1) above subject to terms to be agreed between the parties.

(3) That the auction by the 2nd Defendant slated for 21st November, 2017 be and is hereby stopped and the auctioneers costs shall be paid by the Plaintiff as shall be agreed within 21 days and in default of any agreement the same be taxed..

(4) That a fresh valuation be undertaken on the suit properties by a valuer of the 1st Defendant's panel of valuers and who shall be agreed between the Plaintiff and the 1st Defendant within 30 days. The costs for the said valuation shall be paid by the Plaintiff.

(5) That in default of payment of any instalment under order (1) above the 1st Defendant shall be at liberty to proceed with realization of the securities subject to compliance with the law.”

4. The existence of the above order was not disclosed by the Plaintiff when he first approached this Court for an *ex-parte* injunction. In other words the Plaintiff lacked utmost good faith when he came to Court *ex-parte*. That fact, on its own, is reason enough to deny the Plaintiff a hearing; see **MRAO LTD –VS- FIRST AMERICAN BANK OF KENYA LTD & 2 OTHERS [2003] eKLR.**

5. The issues raised by the Plaintiff, in the present application, were the same issues raised in the application in **HCCC No. 205 of 2017**. The Plaintiff, in that case, entered into a consent on settlement of the amount due to the Defendant. In that consent it was agreed that if the Plaintiff failed to pay the instalments, as agreed, the Defendant could proceed with the realisation of its security. The Plaintiff admitted, in this matter that he failed to pay his instalments when due.

6. The Plaintiff having not denied owing the Defendant and only states that the interest charged is unconscionable, an injunction cannot issue to restrain the Defendant from exercising its power of sale just because the amount due is in dispute.

7. The Plaintiff has failed to show *prima facie* case with probability of success. See **GEILA –VS- CASSMAN BROWN & CO. LTD [1973] EA 358**. Having so failed I will not proceed to consider the other principles of granting an injunction, enunciated in **GEILLA –VS- CASSMAN BROWN CASE (SUPRA)**.

8. The Notice of Motion dated 25th January 2018 is devoid of merit and is therefore dismissed with costs to the Defendant.

9. Orders accordingly.

DATED, SIGNED and DELIVERED at NAIROBI this 9TH day of MAY, 2019.

MARY KASANGO

JUDGE

Ruling Read and Delivered in Open Court in the presence of:

Sophie..... **COURT ASSISTANT**

..... **FOR THE PLAINTIFF**

..... **FOR THE DEFENDANT**