



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL SUIT NO. 30 OF 2018

JOSHUA MUSAU MUTISO.....PLAINTIFF

VERSUS

1. CYRUS ROBERT SALA NZIBU

2. FAULU MICROFINANCE BANK LTD.....DEFENDANT

RULING

1. Simultaneous with filing this suit, the plaintiff sought a temporary injunction against the 2nd defendant vide a notice of motion dated 4 December, 2018. He sought a temporary injunction restraining the 2nd defendant from advertising for sale, selling, taking possession of, alienating, disposing either by private treaty or public auction or in any other manner interfering with the title to Land Parcel No. **Mitaboni/Miumbuni/Ngoleni/2976, Land Parcel No. Mitaboni/Miumbuni/Ngoleni/3325, Land Parcel No. Mitaboni/Miumbuni/Ngoleni/2863 and Land Parcel No. Mitaboni/Miumbuni/Ngoleni/3308** pending hearing and determination of this suit.

2. The application is based on the grounds on the body of the motion and the supporting affidavit of the plaintiff. He states that he is the registered owner of Land Parcel No. Mitaboni/Miumbuni/Ngoleni/2976 measuring 0.38 Ha, Land Parcel No. Mitaboni/Miumbuni/Ngoleni/3325 measuring 0.83 Ha, Land Parcel No. Mitaboni/Miumbuni/Ngoleni/2863 measuring 0.04 Ha and Land Parcel No. Mitaboni/Miumbuni/Ngoleni/3308 measuring 0.18 Ha. That the 1st defendant obtained a loan facility from the 2nd defendant for a sum of KShs. 1,982,500/= and secured the same with a charge over the above-named land parcels. That the plaintiff is alleged to have executed the charge documents authorizing the creation of the said charges on 22nd February, 2017. That the plaintiff's wife Esther Ndele Musau is also said to have executed consent documents authorizing the creation of the said charges. That neither him nor his wife executed the said documents and their signatures were forged by the respondents. That the plaintiff only became aware of the creation of the said charges when he was served with a 45 days' redemption notice and notification for sale by Messrs. Maduwande Auctioneers notifying him that the said auctioneers had instructions from the 2nd defendant to sell the said parcels to recover the sum of KShs. 2,769,080/= being the amount due and owing on the loans as the 1st defendant had defaulted on the repayments. That registration of the said charges was obtained by fraud and forgery. That the plaintiff reported the said fraud and forgery to Machakos Police Station on 3rd October, 2018 vide OB No. 25/3/10/2018 and investigations are ongoing. That the property has been advertised for sale by way of public auction on 11th December, 2018. He stated that he became aware of the creation of the charges upon being served with the notification of sale and redemption notice. That he never consented to his properties being used to secure the loans granted to the 1st defendant and that he was not party to any of the proceedings in relation thereto. That the 2nd defendant did not serve the plaintiff with a notice of default as required under section 90 of the Land Act. That the plaintiff's wife was also not served with a notice of the intended sale as required under section 96 (3) (c) of the Land Act. That the 2nd defendant also failed to carry out a forced sale valuation as required under section 97 (2) of the Land Act and the values of the parcels as stated in the notification of sale are grossly undervalued. That the suit property is in danger of being alienated from the plaintiff and all the dealing in the title to the property herein by the defendants jointly and severally was illegal, fraudulent and therefore null and void *ab initio*. That if the sale is not stopped by an order of this court, the plaintiff stands to lose his rightful property and investment in respect of a charge registered without his consent. He stated that it is in the interest of justice that the orders sought be granted as prayed in order to preserve the substratum of this suit.

3. The 1st defendant who stated that he is a nephew to the plaintiff's wife filed a replying affidavit on 19th December, 2018. He contended as follows. That he has no knowledge of the whereabouts of the land parcels and has never been involved or participated in any dealings involving or relating to the said properties. That the plaintiff's son, Meshak Kyalo his long-time friend and due to the family bond and the strong friendship, has on several occasions and in good faith rendered assistance, including financial assistance to him. That in relation to the instant suit, Meshak Kyalo visited his home and pleaded with him to assist him obtain a loan of KShs. 3,000,000/= from the 2nd defendant to aid him pursue a business venture. That he persuaded him to allow him use his bank statements to obtain a loan in the 1st defendant's name. That in persuading him to assist him, Meshak Kyalo took him to his elder brother Ken Mutiso Musau who told him as follows:

“Kasini, ii ni vaatu imanthawa ni andu aingi veingi na maikwataa, yu tutonya umikwata ni vaati tutailete kulekya ikaa mana. Kasini

musainie ngasuvavaisi aive.” (“Cousin, this is an opportunity most people seek for from the bank and they don’t get it. Now that we have the opportunity in our hands, we should not lose it. Cousin, sign for him, I will supervise that he pays”). That to further persuade the 1st respondent, Meshak also took him to visit the plaintiff after which he later informed the 1st defendant that the plaintiff had agreed to his idea that he signs the loan for him. That he informed him so on their way back from the visit. That in good faith and on the promise and assurance that Meshak Kyalo would service the loan, the 1st defendant wrote and signed his name on the loan application form provided to him by Meshak. He stated that Meshak did not leave him with any copy of the documents that he had signed. That after several weeks, Meshak Kyalo visited his house and requested him to accompany him to the 2nd defendant’s offices at the OTC Branch in Nairobi where Meshak asked for one Elijah Mwiti, whom he said was an officer of the 2nd defendant.

4. That Meshak Kyalo introduced the 1st defendant to Elijah Mwiti as his cousin and introduced Elijah Mwiti to him as the 2nd defendant’s loan officer. Elijah Mwiti informed the 1st defendant that the reason for the visit was for him to verify his signature. He issued the 1st defendant with a loan application form and requested him to write his name and sign against it which he did. That before signing the loan application form, the 1st defendant explained to Elijah Mwiti that he was signing for the loan in place of Meshak Kyalo and that it was Meshak Kyalo Musau who was to benefit from and repay the loan amount to the 2nd defendant. That Meshak Kyalo joined in and assured Elijah Mwiti that he would repay the said loan so quickly that even the 2nd defendant would not realize that it had been repaid. That he witnessed Meshak Kyalo hand over the plaintiff’s passport photos, a document executed by the plaintiff and two original title deeds to Elijah Mwiti, which he attached to the loan application form which the 1st defendant had just signed.

5. He stated that after several weeks, Meshak informed him that the initial application for the loan of KShs. 3,000,000/= had been denied. That the 2nd defendant was offering a sum of KShs. 1,982,500/= and that the 1st defendant was required to visit the 2nd defendant’s offices at OTC Branch, Nairobi once again to sign the loan forms. That Meshak Kyalo once again visited the 1st defendant’s house and requested that he accompanies him to the 2nd defendant’s offices at OTC Branch, Nairobi where he signed the loan application form for the sum of KShs. 1,982,500/=. That he once again reminded Elijah Mwiti the loan officer that he was signing for the loan in place of Meshak Kyalo and that it was Meshak Kyalo Musau who was to benefit from and repay the loan amount to the 2nd defendant. That after a couple of weeks, Meshak Kyalo called the 1st defendant and informed him that the loan amount was ready for disbursement and that they needed to open an account with the 2nd defendant where the said money would be deposited. That he visited the 1st defendant’s house and requested that he accompanies him to the respondent’s offices at OTC Branch, Nairobi where they opened a bank account, account number 10020190472 in the 1st defendant’s name. That after a couple of weeks, Meshak Kyalo called the 1st defendant and informed him that the loan amount had been deposited in the account number 10020190472 and was ready for withdrawal. That in the company of Meshak Kyalo, the 1st defendant withdrew all the amount in two separate instances, the first time in Kisumu and the second in Rongai and gave all of it to Meshak Kyalo. That Meshak Kyalo has been repaying the said loan by making deposits in the bank account number 10020190427 as promised until sometime this year. That the 2nd defendant is in possession of all the bank statements confirming that Meshak Kyalo has been making payments towards the repayment of the said loan.

6. He stated that if at all the claims of forgery and fraud are genuine, then the 2nd defendant is solely to blame as it has issued a certificate of verification for all the parties that is the charger, the borrower and the chargor’s spouse confirming that they appeared before it for verification purposes. That the applicant has not attached any copy of application for loan and the letter of offer for the sum of KShs. 1,982,500/= to enable the court glean the terms and conditions under which the said loan was advanced. That the charge is preceded by an application for a credit facility and an offer which must be accepted by the borrower. That while the charge indicates that the applicant is the borrower, there is no evidence attached of a credit proposal issued to the 2nd defendant or a loan offer to the borrower by the 2nd defendant which would render credence to the contents of the charge and the averments of the plaintiff. That the plaintiff made very vague and general allegations of fraud and forgery with no iota of proof against the 1st respondent. that the 2nd defendant is in possession of all the documents relating to the said transaction of KShs. 1,982,500/= and he sought the court to enjoin Meshak Kyalo as a defendant in this case and consequently strike off the 1st defendant as a party to this suit.

7. The 2nd defendant filed grounds and a replying affidavit filed on 19th December, 2018 in opposition to the motion. The grounds are that the application has no merit and warrants dismissal. That it is an abuse of court process for reasons that; the same is intended to avoid the sale of the suit properties in realization of the 2nd defendant’s power of sale by alleging fraud and forgery in the execution of the charge documents over the suit properties; that the plaintiff duly executed the said charge documents in the presence of an advocate who has not sworn any affidavit refuting or denying such execution; that the plaintiff has not denied knowledge of the borrower and or supplying to him and to the bank the original titles to the suit properties that facilitated the registration of charges thereon; that he plaintiff could not have supplied the original titles necessary for the registration of the charges without his knowledge and consent to the 1st defendant to use the same as security for the loan taken; that the plaintiff alleges that he became aware of the charges when he was served with a 45 days’ redemption notice and immediately reported the matter to the police for investigations. That the same is not true and is very misleading for reason that the said redemption notice attached and marked JMM3 was issued on the 20th September, 2018 whereas the alleged police report and OB number was only procured on 3rd October, 2018; that no reason is given for the delay in reporting and which demonstrates prima facie that the said report was intentionally made for purposes of this court and to procure an injunction against the intended sale and that the borrower is in admitted default and an injunction would be manifestly prejudicial to the 2nd defendant, to issue the orders sought. That the applicant has admitted that the titles to the suit properties was provided as security for the grant of the loan advanced by the 2nd defendant to the principal borrower.

8. In the replying affidavit, Steve Biko who is the legal officer of the 2nd defendant stated that the 2nd defendant agreed to grant the 1st defendant a charge loan facility. That by a letter of offer dated 28th September, 2016, the 2nd defendant advanced the 1st defendant a loan facility of KShs. 2,950,000/- as per the terms and conditions contained therein. That the plaintiff subsequently executed four charge instruments all dated 22nd February, 2017 over the subject properties securing to the 1st defendant the sum of KShs. 2,950,000/- together with interest thereon. That the loan facility amount was disbursed and it was an express term that the same was to attract interest of 20% per annum together with an additional rate in the event of default. That the 1st defendant neglected and or failed to repay the outstanding loan amount leading to arrears in the loan facility whereupon in exercise of clause 13(a) of the letter of offer, the 2nd defendant issued a demand

for payment of the outstanding loan arrears. That on 5th April, 2018, the 2nd defendant issued the 1st defendant with another notice about his accounts and further with a notice of their intention to sell the charged property after the expiry of 40 days. That the 1st defendant continued to default in repayment and this prompted the 2nd defendant to give instructions to Maduwande Auctioneers to sell the charged properties by public auction in exercise of their statutory power of sale. That on 20th September, 2018, the auctioneers proceeded to issue the plaintiff with the 45 days redemption notice. The same was sent through registered post to the address as provided in the charge instrument. That the redemption notice was also duly served upon the 1st defendant who happens to be the plaintiff's son in person. That the 2nd defendant's intended action of realization of the loan by sale of the charged properties is a lawful exercise of their right under the charge and the applicable law. That the 2nd defendant's right should not be usurped by fraud allegations by the plaintiff against his son the 1st defendant all in an attempt to delay this process. That the plaintiff does not have a prima facie case and the application is only meant to frustrate the 2nd defendant from realizing what is lawfully owed to it. That the plaintiff entered into a contract by signing both the letter of offer and the charge instrument he undertook to bind himself with the terms of the agreement, which he clearly breached without any colour of right and is therefore undeserving of the orders that he seeks from this court. That the plaintiff duly executed the said charge documents in the presence of an advocate who has not sworn any affidavit refuting or denying such execution. That this application is merely set out as a collateral action intended to frustrate the 2nd defendant and ultimately an abuse of the court process. That same is intended to avoid the sale of the suit properties in realization of the 2nd defendant's power of sale by alleging fraud and forgery in the execution of the charge documents over the suit properties. That the plaintiff has not denied knowledge of the borrower and or supplying him and to the bank the original titles to the suit properties that facilitated the registration of the charges thereon. He contended that the 1st defendant could not have supplied the original titles necessary for the registration of the charges without the plaintiff's knowledge and consent to use the same as security for the loan taken. That the plaintiff alleges that he became aware of the charges when he was served with a 45 days' redemption notice and immediately reported the matter to the police for investigations. That the same is not true and is very misleading for reason that the said redemption notice attached and marked JMM3 was issued on 20th September, 2018 whereas the alleged police report and OB number was procured on 3rd October, 2018. That no reason is given for the delay in reporting the matter which demonstrates prima facie that the said report was intentionally made for purposes of this court and to procure an injunction against the intended sale. That the borrower admitted default and an injunction would be manifestly prejudicial to the 2nd defendant if the orders sought are granted. That the plaintiff has admitted that the titles to the suit properties were provided as security for the grant of the loan advanced by the 2nd defendant. That the loan facility is currently outstanding at KShs. 3,129,038.91/-. That the application is mischievous and lacks merit and warrants dismissal. That it is in the circumstances it is just, equitable and expedient that this court dismisses the application with costs.

9. The plaintiff filed a second further affidavit on 22nd January, 2019 wherein he made several averments. That he never gave consent to the 1st defendant taking a loan on behalf of Meshak Kyalo. That he never gave the 1st defendant or Meshak Kyalo his or his wife's identification card and title deeds to the subject properties to enable process the loan and that it is upon the 1st defendant to explain where he obtained the said documents. That Meshak Kyalo's whereabouts are unknown and he is a person of interest in the police investigations. That investigations are at an advanced stage and what is pending is the title document examiner's report on the signature samples. That he wishes that the advocate be summoned for cross examination on the alleged attestation of his signature and that of his wife. He denied that at no time did he execute the charge instruments in respect of the subject properties.

10. In submissions, the plaintiff contended that he and his wife were not served with notice of default and notice of intended sale as required under sections 90 and 96 (3) (c) of the Land Act respectively. That the 2nd defendant has failed to carry out a forced sale valuation as required under section 97 (2) of the Land Act and the values of the parcels as stated in the notification of sale are grossly undervalued. That the properties are in danger of being alienated from the plaintiff and shall suffer loss of his rightful property. In support of his case, the plaintiff cited **Mrao Limited v. First American Bank of Kenya Limited and 2 others (2003) KLR 137** and **David Ngugi Ngaari v. Kenya Commercial Bank Limited (2015) eKLR**.

11. The 2nd defendant's submission was essentially a reiteration of the averments in the grounds of opposition and replying affidavit. In support thereof, it relied on **Vivo Energy Kenya Limited v. Maloba Petrol Station Limited & 3 others (2015) eKLR**, **John Edward Ouko v. National Industrial Credit Bank Limited (2013) eKLR** and **Kiran Ramji Kotedia v. Trust Bank Ltd, HCCC No. 1319 of 1999 (UR)**.

12. The principles governing whether or not to grant an order for injunction were well settled in the landmark case of **Giella v. Cassman Brown & Co. (1973) E.A. 358**. That it must be established that there is a prima facie case with a probability of success, that irreparable loss shall be suffered in the event the order is not granted and in the absence of the two, the court shall consider on which party the balance of convenience tilts. This court's concern is therefore whether or not the plaintiff has prima facie shown that he has a right to the property, that the property is at a risk of being disposed and that the disposal shall occasion the plaintiff irreparable loss which would not be compensated by costs. In the event the court is in doubt, the application will be decided on a balance of convenience.

13. In deciding whether a prima facie case has been established, the court must not make definite findings of fact or law. Court of Appeal had this to say in **Mrao Ltd v. First American Bank Ltd & 2 Others (2003) KLR 125** in that regard. That:

“In civil cases, 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. The plaintiff herein has produced search documents dated 15th October, 2018 which indicate that he is the registered owner of the subject properties. He contends that he did not consent to the said titles being charged in respect to the subject loan and it is not in dispute that the properties are at risk of being disposed of by the 2nd defendant by way of an auction. In view of the search documents, I find that prima facie, the plaintiff has proved interest on the properties. He further contends that he and his wife did not have a hand in securing the loan and charging the titles as he has alleged fraud in the whole saga. In the circumstances, I find there is need to preserve the subject properties from alienation the same being the substratum of this suit. It is just and prudent to have the properties preserved as the parties litigate on the issues at hand. If the properties are not preserved pending the hearing then there is a high risk that the same may change ownership before the

dispute is determined fully and which will be prejudicial to the plaintiff/applicant who stands to suffer irreparable harm which cannot be compensated in monetary terms. No doubt land has an intrinsic value and that monetary value may not be attached as far as the applicant is concerned. I find in the circumstances that the balance of convenience tilts in favour of granting an order of injunction in favour of the plaintiff at this stage pending the determination of the suit.

15. In the end, I find merit in this application and it is allowed in the following terms:

a) Temporary injunction is hereby issued restraining the 2nd defendant from advertising for sale, selling, taking possession of, alienating, disposing either by private treaty or public auction or in any other manner interfering with the title to Land Parcel No. Mitaboni/Miumbuni/Ngoleni/2976, Land Parcel No. Mitaboni/Miumbuni/Ngoleni/3325, Land Parcel No. Mitaboni/Miumbuni/Ngoleni/2863 and Land Parcel No. Mitaboni/Miumbuni/Ngoleni/3308 pending hearing and determination of this suit.

b) Parties are directed to set down the suit for hearing on priority basis.

c) The costs shall be in the cause.

Orders accordingly.

Dated and delivered at Machakos this 18th day of June 2019.

D. K. KEMEI

JUDGE