



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 98 OF 2018

(Formerly Machakos Civil Suit No. 240 of 2012)

JOSPHAT IMBIAKA LUMADEDE

T/A DAYSEY ENTERPRISES.....PLAINTIFF

VERSUS

ROBERT WAWERU MAINA

T/A ANTIQUE AUCTIONS AGENCIES.....1ST DEFENDANT

EQUITY BANK COMPANY LIMITED.....2ND DEFENDANT

RULING

What is before Court for determination is the Plaintiff's Notice of Motion application dated the 4th July, 2012. Brought pursuant to Article 40 of the Constitution; section 1A, 1B, 3A and 63 of the Civil Procedure Act; Order 40 Rule 1 of the Civil Procedure Rules. The Applicant seeks for an order of a permanent injunction against the Defendants, their agents or servants from alienating, evicting, interfering or in any way dealing with land parcel numbers NGONG/ NGONG/ 23008 and 23009 hereinafter referred to as 'the suit lands', pending the outcome of the suit. The application is premised on the summarized grounds that the Plaintiff is the owner of the suit lands which the Defendants and or their servants have threatened to sell. The Plaintiff and his family are exposed to mental torture for fear of loosing their matrimonial home on land parcel number NGONG/ NGONG/ 23009. The Plaintiff stands to suffer irreparable loss and harm if the orders sought are not granted.

The application is supported by the affidavit of JOSPHAT IMBIAKA LUMADEDE where he reiterates his claim above and deposes that on 27th March, 2009 he was granted a renewal loan facility of Kshs. 3, 435, 000/= by the 2nd Defendant for funding of a construction Development project on NYAYO TEA ZONES DEVELOPMENT CORPORATION worth Kshs., 48, 230, 320/=. Further, the securities held by the 2nd Defendant are Motor Vehicles Registration Numbers KAQ 514 E (Toyota Hilux) KBK 504S (Mercedes Benz E 200) and a legal charge over the suit lands whose value exceeds Kshs. 20 million. He confirms servicing the loan and cleared an outstanding payment of Kshs. 13, 948, 187/=. He claims that the sum sought by the 2nd Defendant arose from the funding of the sixth (6th) phase of the project in the tune of Kshs. 3,435,000/= but the 2nd Defendant has now levied interest and other charges which are more than the principal sum advanced to the tune of Kshs. 6,535,283/=. He explains that the delay in servicing the loan resulted in the instability in Tunisia where the African Development Bank, the financiers of the project are situated. He avers that on 8th May, 2012, he received a Notification of Sale of Immovable Property (suit lands) from the 1st Defendant. Further, the 1st Defendant has proceeded to advertise the suit lands for sale by public auction. He contends that the accumulative value of the suit lands is Kshs. 16,600,000/= while the contested loan facility is Kshs. 6,535,283/=. He insists he is only indebted to the tune of Kshs. 3,435,000.

The application is opposed by the Defendants who filed a replying affidavit sworn by PURITY KINYANJUI the in charge Debt Collection at Equity Bank. She deposes that the 2nd Defendant has two loan facilities with the Bank wherein he charged the suit lands and motor vehicle registration number KBK 504 S. She insists the Applicant defaulted in repaying the loan. Further, that the application is calculated to deny the 2nd Defendant the right to exercise its statutory power of sale. The 2nd Defendant demanded for the repayment of the said loan owing, failure of which it would exercise its statutory power of sale. She contends that the interest rates skyrocketed because the Applicant took the first loan in 2008 while the second one was advanced in 2010. She reiterates that the Applicant has not tendered in court the disputed amount as a sign of good faith. She explains that when the Bank advanced the loans, the interest rate was 16% and has kept on increasing upto 24%.

The parties filed their submissions which I have considered.

Analysis and determination

The court has considered the materials presented and arguments canvassed by the respective parties in respect to the Notice of Motion dated 4th July, 2012 and analysed that the only issue for determination is whether the interlocutory injunction sought by the Plaintiff is warranted.

Section 90 (1) of the Land stipulates that ' **If a chargor is in default of any obligations, 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.** '

Section 90 (3) of the Land Act further stipulates that ' **if the chargor does not comply within two months after the date of the 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 charge 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.**

The principles for granting of temporary injunctions were settled in the case of **Giella Vs. Cassman Brown & Co. Ltd (1973) EA 358** as follows: "**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.**"

Bearing this principle in mind, it behoves this honourable court to interrogate whether the Applicant has established a prima facie case. The Court notes that the Plaintiff/Applicant is not disputing the loan and has even confirmed what he deems to be the outstanding balance.

It is a long established legal rule that "**. . . when part of amount claimed is admitted or proved to be due, a Chargee cannot be restrained by an injunction.**" Which position has clearly been stated in the case of **LABELLE INTERNATIONAL LTD. AND ANOTHER – VS – FIDELITY COMMERCIAL BANK & ANOTHER, CIVIL CASE NO. 786 OF 2002. I note from 2012 when the Plaintiff admitted his indebtedness, he has not indicated whether he has finalized repaying the loan. Since he does not dispute being served with a notification of Sale, and in associating myself with the decisions cited above, I find that he has not established a prima facie case to warrant the orders sought.**

As to whether the Plaintiff will suffer irreparable harm that cannot be compensated by way of damages, I note the suit lands have been charged to the 2nd Defendant. Further, that the Plaintiff admits that he owes monies to the 2nd Defendant.. In the case of **Case of Nguruman Ltd. Vs. Jan Bonde Nielsen CA No. 77 of 2012**, it was held that ' **...the applicant must establish that he 'might otherwise' suffer irreparable injury which cannot be adequately compensated remedied by damages in the absence of an injunction, this is a threshold requirement and the burden is on the applicant to demonstrate, prima facie, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot 'adequately' be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy.** '

In relying on the case above and based on the circumstances at hand, I find that the Plaintiff's alleged injuries are speculative as he Charged the suit lands. Further that once he charged the suit lands, they became a security, which could be sold by the 2nd Defendant in the event of default.

On the question of balance of convenience, I note the Plaintiff is claiming that the interest rate on the loan is exorbitant and has doubled. In the case of **Andrew M. Wanjohi – Vs- Equity Building Society & 2 other [2006] eKLR** it was expressed that ' **In my considered view if the 1st and 2nd Defendants are restrained from selling off until the suit was heard and determined, there is a very real risk that the debt may outstrip the value of the suit property, as the borrower has never made any repayments for more than three years. That fact, coupled with the status of the 1st Defendant and 2nd Defendants, persuades me that the balance of convenience is in favour of the said defendants. If the property was sold, the Plaintiff can find other accommodation. And if it were finally held that the property should not have been sold, the 1st and 2nd Defendants would be able to compensate the Plaintiff.** ...

In relying on the above case, and facts as presented, I find the balance tilts in favour of the 2nd Defendant whose statutory power of sale has crystallized as the Plaintiff charged the suit lands to secure a loan advanced to it which it has since defaulted in repaying.

It is against the foregoing that I find the Plaintiff's Notice of Motion dated the 4th July, 2012 unmerited and will dismiss it with costs.

Dated signed and delivered in open court at Kajiado this 5th day of March, 2020.

CHRISTINE OCHIENG

JUDGE

IN THE PRESENCE OF:

Parties absent

Court Assistant- Mpoye