



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL SUIT NO. 8 OF 2018

JOSEPH MUTHURI IKUNYUA & 32 OTHERS.....PLAINTIFFS

VERSUS

CO-OPERATIVE BANK OF KENYA LIMITED & 14 OTHERS.....DEFENDANTS

RULING

1. Before me is a Motion on Notice dated 29th March, 2018 brought under **Order 40 Rules 1 and 2 of the Civil Procedure Rules, Articles 40 and 159 of the Constitution of Kenya, and Rule 3 of the High Court (Practice and Procedure) Rules** pursuant to **Section 10 of the Judicature Act**. The applicants seek a temporary injunction to restrain the 1st and 2nd defendant, their agents or servants from conducting the planned public auction or sale of L.R. MERU MUNICIPALITY BLOCK 11/268 (**hereinafter “suit property”**) pending the hearing and determination of the suit.

2. The grounds upon which the Motion is grounded are set out in its body and the supporting affidavit sworn by Joseph Muthuri Ikunyua on 29th March, 2018. These were that; the 1st defendant has instructed the 2nd defendant to proceed to sell the suit property which is irregular, unlawful and without any justification. An advertisement has been placed in the Daily Newspaper on 4th April, 2018 (**“JMI1”**) inviting bidders to buy the plaintiffs’ property when the same is founded on non disclosure of facts and fraudulent. That the defendants were doing so without the involvement and knowledge of the plaintiffs.

3. The plaintiffs averred that the suit property was charged to secure a loan of Kshs. 45,000,000/= on 27th October, 2011 (**“JMI 2”**) of which they have managed to repay over Kshs. 60,000,000/-. That however, the 1st defendant is now claiming over Kshs.268,000,000/- has failed to account how the loan had reached that amount. The plaintiffs claimed that there was collusion between the defendants to defraud them, the shareholders, of the suit property using illegal means.

4. In conclusion, the plaintiffs alleged that the defendants had failed to account for their illegal action and unless orders sought are granted, the plaintiffs would unlawfully lose their prime property and thus suffer irreparable loss and damage. They concluded that unless the application is allowed, they would suffer irreparable loss and damage as they shall loose a prime property within the central business district in Meru Town.

5. The application was opposed vide the 1st and 2nd Defendants replying affidavit sworn on 28th May, 2018 by Sarah Too, the Remedial Management Officer of the 1st defendant. She deponed that the plaintiffs have no *locus standi* to bring the suit on behalf of the 3rd defendant to allegedly protect the suit property which was name of Ntiminyakiru Rural Co-operative Savings and Credit Society Limited, the 3rd defendant. That the application was *res judicata* having been determined in **Meru ELC Case No. 258 of 2016 – Rise Sacco (Formerly Ntiminyakiru Sacco) vs Co-operative Bank of Kenya & Muga Auctioneers & General Merchants**.

6. The 1st and 2nd defendant produced copies of documents forming exhibit marked **“ST -1” to “JC 20”** in support of their replying affidavit. They contended that the 3rd defendant sought and was granted a mortgage banking facility from 1st defendant which was accepted vide the letter of offer dated 6th July, 2011. That the facility was well within the borrowing powers of the 3rd defendant and was also secured by an approval from the Ministry of Co-operative Development (**“ST 4 (a) and “ST 4 (b)”**) whereby the facility was disbursed to the 3rd defendant and secured a charge over the suit property on 13th September 2011.

7. It was further contended that by another Letter of Offer dated 22nd June, 2013, the 1st defendant restructured, consolidated and rescheduled the terms loan, overdraft and all other facilities, other than the mortgage for an aggregate sum of Kshs. 136,000,000/- which was repayable by debiting 3rd defendant’s account in 20 consecutive half yearly installments on 30th June and 30th November, of each year of Kshs. 6,800,000/-.

8. That the 3rd defendant fell into arrears and was informed of the default. That despite demand being made, the 3rd defendant continued to poorly manage the loan facilities which prompted the 1st defendant to begin the recovery process in exercise of its statutory power of sale.

On 15th April, 2014, a 90 days statutory notice was issued to the 3rd defendant which was followed with a 40 days' notice when the default persisted.

9. That despite further accommodation being extended to the 3rd defendant to enable it effect repayment, the 3rd defendant still fell back on payment and persisted in its breach of contract. That in addition, the 3rd defendant had variously admitted and acknowledged the debt.

10. That in the premises, it was contended that the plaintiff's contention that the planned sale of the suit property was irregular and in bad faith was untrue for the 1st defendant had followed due process in law. That the plaintiffs have always been aware of the debt but were only awoken by the imminent sale. The current application was therefore a gross abuse of the court process.

11. I have considered the affidavits on record and the submissions of counsel. This is an injunction application. The principles applicable are well know; that the applicant should establish a prima facie case with a probability of success; that if the order sought is not granted the applicant will suffer loss not capable of being compensated by damages and that if the court is in doubt, it should consider the balance of convenience. In this regard, the issues that arise for determination in this application are:-

a) do the plaintiffs have locus standi?

b) is this matter res judicata?

c) should a temporary injunction issue in the circumstances of this caser?

12. Locus standi is defined under the **Bryan Garner, The Black's Law Dictionary Seventh Edition, 1999, St. Paul, Minn** as:

"The right to bring an action or to be heard in a given forum".

13. In this case, the plaintiffs who are members of the 3rd defendant, a co-operative society, have brought this action in relation to a loan agreement that was entered into by the 3rd defendant on a charge over the suit property.

14. Under Section 2 of the SACCO Societies Act, a SACCO is defined as:-

"... a savings and credit co-operative society registered under the Co-operative Societies Act, 1997 (No. 12 of 1997);"

15. In this regard, a SACCO is a co-operative society governed by the Co-operative Societies Act, CAP 490 of the Laws of Kenya. Upon registration as a co-operative society, a SACCO enjoys certain privileges as set out in **Section 12 of CAP 490** which provides that:-

"Upon registration, every society shall become a body corporate by the name under which it is registered, with perpetual succession and a common seal, and with power to hold movable and immovable property of every description, to enter into contracts, to sue and be sued and to do all things necessary for the purpose of, or in accordance with, its by-laws."

16. Just like a company a co-operative society is recognized as a separate legal entity from its members for it has the capability to own property, to sue or be sued and enter into contracts in its own name. In this regard, the 3rd defendant, as a body corporate, entered into a banking facility with the 1st defendant separate from its members and holds the suit property independent of its members. See **Salomon v A Salomon and Co Ltd [1897] AC 22**

17. In **Omondi v National Bank of Kenya Limited and Others [2001] EA 177**, the court held:-

"The property of the company is distinct from that of its shareholders and the shareholders have no proprietary rights to the company's property apart from the shares they own. From that basic consequence of incorporation flows another principle: only the company has capacity to take action to enforce its legal rights."

18. This principle applies in all fours with cooperative societies of which the 3rd defendant is one. The members of a cooperative society do not own the property of the society and have no proprietary rights thereon. Accordingly, the plaintiffs, qua members of the 3rd defendant having no proprietary interest in the suit property have no locus to bring the present suit.

19. The plaintiffs alleged that the 4th to the 15th defendants were the initial directors of the 3rd defendant who have since been removed. Their claim is that the said defendants should be compelled to account for the plaintiffs' properties and monies allegedly being demanded by the 1st defendant before any exercise of statutory power of sale because the said claim is full of fraud.

20. I am of the view that these are matters that concern the business of the co-operative society and may as well fall within the jurisdiction of the tribunal as set out in **Section 78 (1) of CAP 490** which provides:-

"(1) If any dispute concerning the business of a co-operative society arises—

(a) among members, past members and persons claiming through members, past members and deceased members; or

(b) between members, past members or deceased members, and the society, its Committee or any officer of the society; or

(c) between the society and any other co-operative society,

it shall be referred to the Tribunal.”

21. The 2nd issue is the issue of *res judicata*. It was contended that the same issue raised herein had been raised in the Meru ELR court Land Case No. 258 of 2016 by the 3rd defendant. I have seen the ruling of that court delivered on 31st May, 2017. The court held:-

“1. The applicant is to pay the 1st defendant a sum of Kshs 27 Million within 7 days from the date of delivery of this ruling failure of which the injunctive orders stand as dismissed.

2. A temporary injunction is hereby issued for a period of 6 months only against the defendants/respondents restraining them, their agents or anyone working at their behest from selling or disposing the plaintiffs Plot No. Meru Municipality Block 11/268.

3. The injunction orders are not to be construed in any way as halting applicant’s obligations and responsibilities in respect of the monies it owes the 1st defendant. Applicant should continue servicing the loan as per the contract.

4. Applicant is to pay the costs appertaining to or incidental to this application.”

22. Looking at both cases, the one before the ELC court was brought by the SACCO itself and in the current case, it is brought by its members. I agree with Ringera J, when he stated held in **Omondi v National Bank of Kenya Limited and Others (Supra)** that:-

“Parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit. They are bound to bring all their cases at once.”

23. The issues raised in both cases are the same. The adding of parties or changing their roles does not change the situation. It remains that what is being impugned is the 1st defendant’s attempted exercise of statutory power of sale. That won’t do. The issue of temporary injunction pending the hearing of the suit is therefore *res judicata*.

24. On the foregoing, can an injunction issue? It is clear that the plaintiffs have not established a prima facie case with any probability of success. The first limb of ***Giella vs. Cassman Brown case*** having failed to be proved, the arises no reason to address the other two limbs.

25. If however, there was need to address them, the plaintiff’s having no proprietary interest in the suit property cannot suffer any loss or damage if the suit property is sold. The can maintain a claim for damages against the 4th to 15th defendants for negligence or other claim. Further, the balance of convenience is in allowing the 1st defendant to recoup its outlay advanced to the 3rd defendant.

25. In this regard, I find the application to be without merit and I dismiss the same with costs to the 1st and 2nd defendants.

DATED and DELIVERED at Meru this 20th day of September, 2018.

A. MABEYA

JUDGE