



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 12 OF 2016

TURBO HIGHWAY ELDORET LTD..... PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LTD..... DEFENDANT

R U L I N G

BACKGROUND

1. The Plaintiff/Applicant **Turbo Highway Eldoret Limited** is a limited liability company which owns some three leasehold properties in Eldoret town. The three properties are **Eldoret Municipality Block 2/8, Eldoret Municipality Block 2/9** and **Eldoret Municipality Block 2/10**. In or around the year 2012, the applicant approached the respondent for an overdraft facility.
2. The respondent gave the applicant **Kshs.125,000,000/=** and the respondent offered the three properties as security (charged property). The applicant started repaying the loan but later experienced difficulties in repayment. It approached the respondent to restructure the loan to enable it repay but this seemed not to work. The applicant then approached the respondent and informed it that it had made arrangements to sell off its other properties in order to raise funds to offset the loan due. It took time for the applicant to sell its properties forcing the respondent to start the process of realising the security offered.

APPLICANT'S APPLICATION

3. The applicant filed a notice of motion dated 4/11/2015 in which it sought an injunction against the respondent restraining it or its servants and agents from advertising for sale, selling, disposing of, auctioning, transferring or in any manner interfering with the charged properties. The applicant also sought for an order of accounts giving a complete statement of account in respect of the overdraft facility.
4. The applicant contends that there was no statutory notice given before the respondent advertised the charged properties for sale. That the respondent did not comply with the provisions of the **Land Act No. 12 of 2012**. That the respondent did not comply with the provisions of the Banking Act with regard to interest. The applicant contends that the respondent kept on fluctuating interest and that the applicant does not know what is due from it.
5. The applicant further contends that the charged properties are in a prime area and that if they are sold, it cannot get other properties in a similar location. That it is serious in repaying the loan facility given time.

RESPONDENT'S CASE

6. The respondent has opposed the applicant's application based on a replying affidavit sworn by its manager in the legal department. The respondent contends that all the necessary notices were given in accordance with the relevant Acts. The auctioneers gave a 45 days notice of sale of the charged properties. The respondent argues that the applicant has never disputed the amount owed and that it is only doing this for the first time through this application.
7. The respondent contends that the applicant approached it with a proposal to have the facility restructured to accommodate the applicant. This was done but when the applicant did not repay the facility as agreed, they cancelled the arrangement and declined to restructure the facility again. It contends that the applicant is not being candid in this matter. That the applicant has a winding up petition against it which it failed to disclose. The respondent therefore argues that the applicant has not demonstrated a case for grant of the orders prayed for.

ANALYSIS OF THE SUBMISSIONS BY THE APPLICANT AND RESPONDENT

8. It was argued by the applicant that there was no statutory notice given in accordance with the **Land Act of 2012**. Contrary to this arguments, the respondent has shown that on 12/3/2015 a statutory notice under **Section 90** was given. This notice was served by registered post. A copy of the notice and certificate of posting were provided by the respondent. The notice indicated the amount due and required the applicant to comply.
9. There was also notification of sale issued by Joyland Auctioneers giving the applicant 45 days notice. Service of this notice has been acknowledged by the applicant in paragraph 9 of the applicant's supplementary affidavit. Though the applicant denies receiving the other statutory notices, I do not find any weight in this assertion because the respondent has demonstrated that service was by registered post. The applicant is a limited liability company therefore service by registered post was sufficient.
10. The applicant complains that interest has been going up and down and that this is contrary to the Banking Act. The applicant has not given a single instance when interest was varied. It has just merely alleged that interest kept on fluctuating. If the applicant had pointed out that interest changed from a certain figure to another one, then the court would have considered, whether the provisions of **Section 44** of the Banking Act were complied with. This court cannot assume that there was change in interest rates if the same is not pointed out. In any case, this is an issue which can only be canvassed during the hearing of the main suit.
11. The applicant has annexed documents in its application showing that it has been willing to repay the facility. It has even been making arrangements to sell some of its other properties to enable it repay the loan. There was no suggestion in any of those documents that there was a dispute as to the amount owed or interest charged. The applicant seems only to complain that most of the amounts it is paying is going to reduce interest rather than the principal amount.
12. The applicant has been given statements showing what it owes the respondent. It is on the basis of the statements that the applicant has been approaching the respondent to restructure the facility. The applicant came to court after the charged properties were advertised for sale. The issues being raised in this application are merely meant to assist the applicant not to meet its obligations.
13. The applicant is arguing that if the charged properties are sold, it will not get similar ones in a similar area. The court is not interested in such arguments. The concern of the court is to ensure that everything is done in accordance with the law. The court is not supposed to assist a defaulting party by affording it time to sell its other properties to meet its obligations.
14. It is patently clear that the applicant has only come to court not because any of the procedures

required have not been complied with but because it wants to have some breathing space. There has never been any dispute as to the amount owed or interest charged. I therefore find that there are absolutely no grounds upon which this court can grant an injunction. The applicant is facing a winding up petition. This is an indication that it is in financial problems. This will seriously affect the respondent from recovering the advanced money. The applicant's argument that the winding up cause has nothing to do with this application is misplaced. An applicant approaching the court for an equitable remedy is obliged to disclose all material facts. I find that the applicant's application lacks merits. The same is hereby dismissed with costs to the respondent. Orders of injunction which have been in force are hereby vacated.

It is so ordered.

Dated, signed and delivered at Kitale on this **7th** day of **April, 2016**.

E. OBAGA

JUDGE

In the presence of Ms. Tigoi for Mr. Mutiso for Applicant and Mr. Weche for Mr. Kenei for Respondent.

Court Assistant – Isabellah.

E. OBAGA

JUDGE

07/04/2016