



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI HIGH COURT
COMMERCIAL & ADMIRALTY DIVISIONS
CIVIL CASE NO. 481 OF 2015

BOSIRE GILBERT ISOE.....PLAINTIFF/APPLICANT

VERSUS

FAMILY BANK (K) LIMITED.....1ST DEFENDANT/RESPONDENT

TIMELESS DOLPHIN AUCTIONEERS.....2ND DEFENDANT/RESPONDENT

RULING

1. By a Notice of Motion dated 1.10.2015 the plaintiff/applicant prays for orders;

a. Spent

b. Spent

c. THAT this Honourable court be pleased to issue temporary injunction orders directed to the defendants jointly and severally restraining them, acting either by themselves or any other person acting on their instructions, from selling, auctioning, or in any other way alienating the Plaintiff's suit property being LR No.12715/5211 until the hearing and determination of this application.

d. THAT this Honourable court be pleased to issue temporary injunction orders directed to the defendants jointly and severally restraining them, acting either by themselves or any other person acting on their instructions, from selling, auctioning, or in any other way alienating the Plaintiff's suit property being LR No.12715/5211 until the hearing and determination of this suit.

e. THAT this Honourable court be pleased to issue temporary injunction orders directed to the defendants jointly and severally restraining them, acting either by themselves or any other person acting on their instructions, from selling, auctioning, or in any other way alienating the Plaintiff's suit property being LR No.12715/5211 until the hearing and determination of the suit HCCC 342 of 2015 by the Plaintiff against the Principal debtor Rufus Mbaya Mugwika.

f. THAT costs be in the cause.

2. The application is supported by an affidavit of the Plaintiff sworn and filed on 1.10.2015 and a further affidavit by the Plaintiff filed on 17.1.2016. The application is based on the grounds that the Plaintiff is a

charger/guarantor to a credit facility granted to a third party amounting to Kshs.7 million. The Plaintiff property was used as security.

3. The Plaintiff and the Principal borrower had a joint venture in which they were to service the credit facility herein with Plaintiff and third party servicing Kshs. 3 million. The principal borrower defaulted servicing the facilities which at the time of lodging the instant application stood at ksh.4.7 million.

4. The above stated default prompted the 1st Defendant instruct the 2nd Defendant to advertise suit property/security for sale on 16.10.2015 by way of a public auction. The Plaintiff avers that the borrower is a man of means and is intentionally refusing to service the loan. He laments that the security is his residential home and thus sale of the same will afflict him irreparable loss. He has already sued the borrower vide HCC 342/2015 to recover amount to pay the outstanding debt.

5. The Plaintiff replying affidavit and the further affidavit reiterates the same grounds above.

6. The Respondent opposes the application via affidavit sworn on 16.11.2015 and filed on 17.11.2015. The 1st Defendant cases is that at the request of one Rufus Mbaya Mugwika (borrower) advanced a facility that was secured by LR No.1275/5211 and a charge registered in favour of the 1st Defendant. The property is owned by the Plaintiff.

7. The borrower defaulted in repaying loan and thus the 1st Defendant issued a statutory notice informing the Plaintiff of the intention to exercise its remedies over the charged property in accordance with section 90 of the Land Act.

8. The 1st Defendant thereafter instructed the 2nd Defendant to issue notification and advertise for sale of the security charged. The aforesaid was preceded by valuation of the same property. The 1st Defendant thus prays for dismissal of the application. The parties agreed to canvass application via written submissions which they filed and exchanged.

9. I have gone through the pleadings, affidavits and the submissions on record. The court finds the issue arising is whether the Plaintiff has established the threshold for grant of interim injunctions.

10. In the case of **PATRICK WAWERU MWANGIA VS. HFCK LTD (2013)** eKLR relying on **GIELA VS. CASMAN BROWN (1973) EA 358** emphasized on the principles set out therein which have to be established for grant of interim injunctions namely;

- Prima facie case with probability of success.
- That failure to grant orders the Applicant would suffer irreparable loss and;
- If court in doubt on above 2 to decide case on balance of probabilities.

11. The Plaintiff submits that since the amount borrowed by the 3rd Party was shared with Plaintiff taking Ksh.4 million and borrower Kshs.3 million and thus he has been servicing his portion, he has established a prima facie case. Further to that he has sued the borrower via Hcc 342/2015 to recover the amount to settle outstanding debt herein. Further it is argued that , since the 1st Defendant advanced the amount to the borrower and it is not named in the charger as charge and cooperative bank is the named charge, the loan advanced is thus unsecured and the 1st Defendant cannot exercise power of sale.

12. The 1st Defendant in a rejoinder submits is not denied charge dated 8.4.2014 was executed by the Plaintiff and same secured grant of Ksh. 7 million which was disbursed to the borrower.

13. The issuance of default of payment and issuance of statutory notice is not denied. The material before court discloses that there is an existing loan facility granted by the 1st Defendant as charged as Plaintiff's

property. The default is not denied nor the service of statutory power of sale.

14. S.90 of Land Registration Act had been complied with. Valuation was also conducted in line with the requirement of the law.

15. The Plaintiff having conceded that the loan was advanced to the borrower using his property as security via a charge document of 8.4.2014 the Plaintiff is stopped from claiming that the 1st Defendant is not the Bank in the said charge documents.

16. In any event equity works to the substance rather than the form. The Applicant also submits that at the time of the advertisement of suit property for sale via auction there existed status quo orders. This issue is not raised in the affidavit. In any event the plaintiff contempt application dated 13.10.2015 remains pending in the court file and the Applicant never bothered to prosecute the same.

17. The prima facie case as defined in **MRAO CASE VS. FIRST AMERICAN BANK** Case has not been established in the foregoing circumstances. We need not go to the other 2 principles once the court finds that a prima facie case has not been established. But the court can allude to the fact that the plead by the Plaintiff that the sale of his house will render him homeless, the same holds no water.

18. In consideration of whether a prima facie case has been established or that he will suffer irreparable damages when he executed the charge offering his property as security, he conceded to the sale of the same in event there is default in payment of the loan advanced. He is thus estopped from crying or lamenting that he will suffer irreparably and be rendered homeless by sale of his home. He has sued the borrower to pay him for either the amount in default in payment of the loan or in event the bank sells his property, for compensation for the same property.

19. The court thus finds no merit in the application before the court and makes the following orders;

1. The Notice of Motion dated 1.10.2015 is dismissed.
2. Cost to the 1st Defendant.

Written, dated and signed at Nairobi this 5th day of May 2016.

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C. KARIUKI

JUDGE

Dated, signed and delivered in court at Nairobi this 6th day of May, 2016.

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O. SEWE

JUDGE