



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 563 OF 2015

PAUL SITEIYA LOORKIPONY 1ST PLAINTIFF

NAPOLEON WAKUKHA MURENDE 2ND PLAINTIFF

-VERSUS-

MOLYN CREDIT LIMITED 1ST DEFENDANT

REGENT AUCTIONEERS 2ND DEFENDANT

RULING

1. The application before the court is a **Notice of Motion** dated and filed herein on 10th November 2015 by the Plaintiff. The application seeks to secure the following surviving prayers:

1. The Respondents whether by themselves, their agents or servants be restrained by a temporary injunction from doing any of the following acts, or any of them, that is to say from interfering with the first Plaintiff's right of possession, advertising for sale, disposing of, selling by public auction or otherwise howsoever at any other time completing by conveyance or transfer of any sale concluded by auction or private treaty leasing letting otherwise howsoever interfering with the ownership of title to occupation of and management of all that piece of land known as Lr No. KAJIADO/KISAJU/10733 pending hearing and determination of this suit.

2. The court be pleased to make an order directing the First Respondent to furnish the Plaintiffs with a complete sets of account statements, account opening forms, mandate forms, letters of offer, charges from the date of inception of the relationship with the Plaintiffs showing the actual makeup of the purported debt from zero to its current figures before the inter-parties hearing of this application.

*3. The court be pleased to issue an order under the doctrine of *lis pendens* and section 106 of the land registration act that during the pendency of this suit, pending its final determination in accordance with the law, all further registration or change of registration in the ownership, leasing, sub leasing, allotment, user, occupation possession or in any kind of right, title or interest in the charged property within any land registry, government department and all other registering authorities is hereby prohibited in all that piece of land known as Lr no Kajiado/Kisaju/10733*

4. This court do make an order that proper accounts be taken and furnished by the First Defendant and that all necessary inquiries involving accounts be made as follows

a. The Actual amounts lent

b. Actual interest charged

c. Actual penalties charged

d. Costs of this application be provided for.

2. The application is premised on the grounds set up therein and is supported by affidavit of **Paul Siteiya Loorkipony** sworn on 10th November 2015.

3. The Applicant's case is that the First Defendant has instructed the Second Defendant to sell by public auction all that piece of land known as **LR No. Kajjado/Kisaju 10733** which property is registered under the name of the First Plaintiff, which auction is set to take place on 18th November 2015, (now past). The said sale is pursuant to exercise of a charge's power of sale under an alleged charge executed between the Second Plaintiff and the First Defendant. It is alleged that the First Respondent has unlawfully registered on 21st January 2015 a charge against the Plaintiff's title for Kshs.7,200,000 and a further inhibition to further transfer or to encumber the property without any justification or consent of the Plaintiffs. The 1st Plaintiff's case is that he has never executed any charge or guaranteed any charge with the First Defendant and the said sale is unlawful as the First Plaintiff is not indebted to the First Respondent. Further, the Plaintiffs' case is that the purported sale is unlawful as the First Defendant has not issued any notice of default or notice of exercise of statutory power as envisioned under **section 90 (1) and 90 (2) of the Land Act**. Further, it is claimed that the First Defendant has failed to provide or furnish the Plaintiffs with statements of their alleged accounts and copies of the charge which it purports to act upon. The Applicant is anxious that the Plaintiffs property is in real and imminent danger of being disposed to third parties and removed from the jurisdiction of this court unless the proposed auction is stopped and the First Respondent is prohibited from disposing of the property.

4. The application is opposed by the Defendants vide a Replying Affidavit of **MOSES ANYANGU** sworn on 15th April 2015 but filed on 15th April 2016. The Respondents' case is that the Applicants defaulted in making the repayments as contracted and on 3rd March 2015 the 1st Respondent issued a Demand Notice to the Applicants. The Applicants did not honour the demands. The 1st Respondent consequently issued to the Applicants demand that they pay the outstanding amount through a Statutory Notice dated 18th May 2015 but the Applicants again refused and/or failed to settle the outstanding amounts which by then had accumulated to Kshs.12,661,235/= as at 14th May 2015. After the Applicants refused to pay the amount within the statutory given time the 1st Respondent instructed the 2nd Respondent who issued a Notification of Sale which was served on Applicants on 1st September 2015 and that the sale by Public Auction was to be done on 18th November, 2015. The property was subsequently advertised for sale in the Daily Nation of 2nd November 2015.

5. It is the Respondent's case that they complied with all the requirements of the Law as to Notices and advertisements before the sale.

6. The Respondents submitted that the Applicants filed an ex-parte Application on the 10th November, 2015 where they prayed for Orders for a Temporary Injunction to restrain the Respondents and/or their agents from disposing of or interfering with the suit property. On 16th November, 2015 a Temporary Injunction was issued restraining the Respondents from interfering with the suit property or the sale by public auction on the same. The said Order was conditional upon the Applicants paying the 1st Respondent Kshs.7,500,000/= on or before 16th February, 2016 failure to which, the 1st Respondent would be allowed to exercise its Statutory Power of Sale after following due process. The Applicants

requested for an extension of time to pay the amount. The Court again allowed the Applicants to pay Kshs.3,500,000/= on or by the 18th day of March, 2016 and a payment of the balance of Kshs.4,000,000/= on or by the 31st day of March, 2016. On 14th March, 2016, the Plaintiffs/Applicants forwarded post dated cheques contrary to the Court Order. All cheques fell outside the 18th March, 2016 date, apart from three which fell within the March 31st, 2016 deadline. The cheques upon presentation to the 1st Defendant/Respondents bankers were returned them to the 1st Defendant/Respondent unpaid due to insufficient funds. The matter was mentioned on the 14th April, 2016, to confirm the payment, but since there was non compliance the Court discharged the Interim Orders.

7. It is the Respondent's case that the Applicants did apply for the loan, received the money, charged the suit property, but have failed to repay the same, and that, the order being sought herein cannot be given.

8. I have considered the application and opposition to it. The only issue I raise for determination is whether the 1st Defendant complied with statutory requirements before they sought to sell the property of the Plaintiff by public auction.

9. From the Replying affidavit of the Respondents, this court is satisfied that the 1st Plaintiff/Applicant applied for loan facilities herein, which he was granted and which loan was subsequently secured by the charge dated 14th January 2015. There is no reason for this court to invalidate the said charge which is properly witnessed and executed by all the relevant parties. At pages 26 to 32 of the Replying Affidavit, the 1st Respondent has demonstrated that all the required statutory notifications were given to the Plaintiffs. The Statutory Notice was issued on 18th May 2015 and at page 27 is a certificate of posting. At page 29 is a copy of the Auctioneer's Notice. At page 30 is the Notification of sale, while at page 31 is the advertisement for sale. At pages 33 – 39, there is clear evidence that the Plaintiffs attempted to negotiate the repayment of the loan, and issued several cheques to the 1st Defendant, which cheques were dishonoured when presented to the bank.

10. Indeed, the Applicants filed an ex parte Application on the 10th November, 2015 where they prayed for Orders for a Temporary Injunction to restrain the Defendant/Respondents and/or their agents from disposing of or interfering with the suit property. This court issued conditional injunctive orders which the Applicants failed to comply with. This was further compounded by the Applicants issuing cheques which were dishonoured by the bank. It is clear to this court that the Plaintiffs' application before the court lacks merit, and does not establish a case for injunctive reliefs as alleged or at all.

11. Save that the Respondent is hereby directed to furnish the Plaintiffs with upto date statements of accounts, the Plaintiffs application under reference is herewith dismissed with costs to the Respondents, and the interim orders herein lifted accordingly.

Orders accordingly.

E. K. O. OGOLA

JUDGE

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 8TH DAY OF JULY, 2016

LADY JUSTICE G. NZIOKA

JUDGE

Ruling Read in open court in the presence of:

..... for Plaintiff

..... for Defendant

Teresia – Court Clerk