



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND COURT CASE NO. 217 OF 2014

MUSA ANGIRA ANGIRA PLAINTIFF

VERSUS

INDUSTRIAL & COMMERCIAL DEVELOPMENT

CORPORATION DEFENDANT

RULING

1. The plaintiff by a plaint dated 4th June 2014 filed in court on 5th June 2014 instituted the present suit seeking inter alia a declaration that the discharge of charge dated 2nd September, 2013 issued in regard to a charge registered over **LR No. Suna/Wasweta II/216** (hereinafter referred to as **“the suit land”**) and registered on 10th September 2013 was lawful and legitimate and further a declaration that the registration of the caution by the defendant on 3rd February 2014 and the reinstatement of the charge on 4th February 2014 over the suit land was irregular and illegal.

2. Simultaneously with the plaint the plaintiff filed a Notice of Motion dated 4th June 2014 expressed to be brought under Order 40 Rules 1, 2, 4 and 10 of the Civil Procedure Rules and Sections 1A, 1B, 3A and 63 (e) of the Civil Procedure Act and Sections 90 (2), 96 (2) and 97 of the **Land Act**, No. 6 of 2012 and seeks the following substantive orders:-

1. That the court do grant an order of temporary injunction restraining the defendant either by herself, agents, servants and/or anyone claiming under the said defendant, from exercising the statutory power of sale over and in respect of LR No. Suna/Wasweta II/216 and in particular, advertising for sale, selling vide public auction and/or private treaty, currently scheduled on the 6th day of June 2014 or any other date, disposing of, transferring, leasing, alienating, clogging and/or in any other manner interfering with the plaintiff's/applicant's rights and/or interests therein, whatsoever and/or howsoever, pending the hearing and determination of the instant suit.

2. That the costs of the application be borne by the defendant/respondent.

3. The application is supported on the grounds set out on the body of the application and on the supporting affidavit sworn in support of the application by **Musa Angira Angira** the plaintiff herein on 4th June 2015. The defendant in opposition to the plaintiff's application has filed a replying affidavit sworn by one **Peter Mugi Kuruga** debt recovery manager of the defendant on 9th July, 2014.

4. The facts giving rise to this matter as set out in the parties pleadings and the affidavit in support and in

opposition to the plaintiff's Notice of Motion are rather intriguing. It is agreed by both parties that the plaintiff was sometime in 1974 advanced a loan of kshs. 30,000/= by the defendant and as security for the loan the plaintiff offered his parcel of land title number **Suna West/Wasweta II/216** against which the defendant registered a charge in its favour. The plaintiff asserts that he repaid the loan fully and as consequence the defendant executed a discharge of charge of the property which the plaintiff duly registered. The plaintiff does not demonstrate how or when he repaid the loan to the defendant but asserts that the defendant confirmed the full repayment of the loan sum and proceeded to prepare and release the discharge of charge over the property as per the copy of discharge of charge annexed and marked "**MA1**". The discharge of charge is dated 2nd September 2013 and is shown to have been registered on 10th September 2013. It is the plaintiff's contention that following the registration of the discharge of charge his property was freed from all encumbrances and asserts that the defendant's registration of a caution and the subsequent re-instatement of the charge was irregular, unlawful and illegal since the defendant had executed the discharge of charge which had been validly registered against the title.

5. The plaintiff further states upon demanding that the defendant withdraw the caution that they had placed against the title the defendant responded that the discharge of charge registered against the title was not prepared and/or executed by them the defendant that they proceeded to have the charge fraudulently and irregularly restored against the suit property and on that basis have purported to instruct M/s Keysian Auctioneers to advertise and sell the property by public auction in purported exercise of the chargees power of sale conferred under the re-instated charge. The plaintiff argues that notwithstanding the defendant has no right to have the property sold by public auction, there has been no compliance with the provisions of sections 90, 96 and 97 of **the Land Act, No. 6 of 2012** to entitle the auctioneers to offer the property for sale at a public auction. The plaintiff asserts no statutory notice was served upon him as required under the said provisions of the law and thus the right to realize the security has not arisen and the auction by the auctioneer to advertise the property for sale is premature and in the premises the court ought to grant a temporary injunction as prayed.

6. The defendant in response to the plaintiff's averments and assertions vide the replying affidavit filed in opposition to the plaintiff's application admits that the plaintiff was advanced a loan of kshs. 30,000/= sometime in the year 1975 but avers that the plaintiff defaulted in repayment of the loan and presently the loan arrears stand in excess of kshs. 6,000,000/= as shown in the loan account statements annexed and marked "**PMK2**". The defendant states that inspite of the plaintiff being issued several letters of demand as exhibited and marked **PMK 3(a)** and **3(b)** dated 29th May 2009 and 1st February 2013 respectively the plaintiff never made any satisfactory repayment proposals for the loan. Instead the defendant avers that the plaintiff sometime in the year 2013 fraudulently procured a forged discharge of charge to be registered against the suit property as per the copy annexed and marked "**PMK4**". The defendant states the discharge of charge registered by the plaintiff did not emanate from the defendant and was a forgery.

7. The defendant depones that upon discovering the plaintiff had fraudulently procured the registration of an illegal and invalid discharge of charge to be registered against the suit property, the defendant in order to protect its interest in the suit property as chargee had a caution registered and consequently caused the discharged charge to be reinstated and the land register to be rectified in that respect. The defendant contends contrary to the plaintiff's averments that he had completed the repayment of the loan, so that the discharge of charge was issued to him in acknowledgement of that fact, the truth is that the plaintiff had not, and the plaintiff has tendered no proof to show that he infact had cleared the loan arrears. The defendant in response to the plaintiff's averment that the requisite statutory notice of its intention to exercise its statutory power of sale had not been served on the plaintiff stated that such a notice was served on 25th June 2013 and the exercise of its power of sale was properly and legally invoked.

8. The plaintiff swore a further supporting affidavit on 7th April 2015 in response to the defendant's replying affidavit where he basically reiterated the contents of his earlier affidavit sworn in support of the application. The plaintiff denied the defendant's assertion that the discharge of charge was forged maintaining that he was issued the discharge by the defendant after he had cleared his indebtedness to the defendant. The plaintiff reiterated that he was not served with a statutory notice as required and therefore the right to sell the security had not arisen.

9. The parties filed written submissions to ventilate and articulate their positions. The plaintiff's submissions dated 7th April 2015 were filed on the same date. The defendant's submissions dated 10th August 2015 were filed on 12th August 2015. I have considered the pleadings the Notice of Motion application, the affidavits in support and in opposition and the submissions filed by the parties. The issue for determination by the court at this stage is whether on the evidence and material placed before the court, the plaintiff has satisfied the conditions upon which a temporary injunction can be granted to warrant the court to grant an injunction.

10. The conditions upon which a temporary injunction will be granted are now fairly well settled and the case of **Giella –vs- Cassman Brown & Company Ltd [1973] E. A 358** remains the leading authority and has been notoriously cited as authority that an applicant for a temporary injunction must show or demonstrate that he:

(i) Has a prima facie case with a probability of success;

(ii) Stands to suffer irreparable damage that cannot be compensated by an award of damages unless the injunction is granted.

(iii) Where the court entertains a doubt the court may determine the application on consideration of the balance of convenience.

11. The fulcrum of the plaintiff's suit and indeed the application is that he claims he redeemed his loan through payment and upon completing the payment he was duly issued with a discharge of charge which was duly executed by the defendant and was registered and consequently there is no charge against which the defendant can exercise a power of sale. The defendant counters that the discharge of charge was not issued by them and the copy the plaintiff has exhibited is but a forged document which was fraudulently obtained. The defendant points to inconsistencies in the purported discharge vis-à-vis what they claim to be a sample of their conventional discharge of charge in support of their claim that the discharge was a forgery. The plaintiff for his part claims it is the defendant who fraudulently connived with the land registrar to register a caution and to reinstate the discharged charge. Thus both parties allege fraud as against the other. Proof of fraud is on a standard higher than on a balance of probabilities.

12. The cases of **Koinange & 3 Others –vs- Koinange [1986] KLR 23** and **Peter Kimaru Njuguna – vs- Pius Karuri Kiguni & Another [2009] eKLR** held that: **“In a case where a party alleges fraud such a party needs to prove it and through the standard of proof is not proof beyond any reasonable doubt, it is proof higher than a balance of probabilities”**.

13. It is my view that at this interim stage such proof of fraud cannot be established on the basis of affidavit evidence and the annexures and that a party needs to speak to it viva voce so that he/she can be cross-examined. Thus in the circumstances of this case, the issues of the alleged fraud can only be ventilated at the trial where viva voce evidence will be adduced.

14. The defendant in this matter has further disputed service of the requisite statutory notice of sale upon him as required under section 96 (2) of the **Land Act, 2012** which provides as follows:-

“Before exercising the power to sell the charged land, the charge shall serve on the chargor a notice to sell in the prescribed form and shall not proceed to complete any contract for sale of the charged land until at least forty days have elapsed from the date of the service of the notice to sell.”

15. The defendant has annexed to the replying affidavit the letter dated 25th June 2013 marked **“PMK7”** which they state was the statutory notice but the plaintiff denies receipt of this letter. No evidence of posting of this letter has been tendered and in the absence of such evidence it cannot be ascertained whether or not indeed the letter was posted. A copy of the certificate of posting would have dispelled any doubts that the letter was dispatched. The burden of proof rests with the chargee to show the notice was served on the chargee. On the evidence tendered I am not able to hold that the defendant has discharged

this burden. To the extent that I entertain some doubt as to whether the statutory notice was appropriately served on the chargor I will give the plaintiff the benefit of the doubt.

16. My reading and understanding of section 96 (2) of the **Land Act** is that apart from the chargee giving the chargor the statutory 3 months notice of its intention to exercise its power of sale, a further notice of not less than 40 days has to be given to the chargor before the charged property is advertised for sale. The court in the cases of **Fast Security Limited –vs- Equity Bank [2014] eKLR**, **Albert Maribo Cordeiro & Another –vs- Vishram [2015] eKLR** and **Palmy Company Limited –vs- Consolidated Bank of Kenya Limited [2014] eKLR** took the same position that a separate notice has to be served under section 96 (2) of the Act.

17. In **Fast Security Limited –vs- Equity Bank** (Supra) the court stated thus:

“Before exercising the power of sale however as above the chargee must give a further notice as required under section 96 (2).”

Hon. Justice **Angote** in the case of **Josiah Kamanja Njenga –vs- Housing Finance Corporation of Kenya & Another Malindi ELC No. 1’B’ of 2014** while considering the application of section 96 (2) of the Land act stated thus:-

“In the absence of a notice clearly indicated to be a notice under section 96 (2) of the Land Act, I am not able to legally pronounce that such notice was issued...”.

18. The statutory notice served by the defendant on the plaintiff, even if admitted the same was served on the plaintiff, which however the plaintiff denies such notice in my view would only qualify as a notice under section 90 (1) of the **Land Act** and it would still have been necessary for the chargee to serve a notice under section 96 (2) of the Act before the property could be sold in exercise of the power of sale. Section 90 (1) provides:-

90 (1) If a chargor is in default of any obligation, fails to pay interest 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 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.

19. Section 90 (2) of the Act provides the details/particulars the notice issued under section 90 (1) must contain while section 90 (3) provides the remedies the chargee has in case of none compliance with the notice issued under section 90 (1). Section 90 (3) provides:-

90 (3) If the chargor does not comply within 2 months after the date of 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 charged 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;

20. Section 96 (1) quite clearly envisages the prior service of the notice under section 90 (1) before the notice contemplated under section 96 (2) may be served on the chargor. I have reviewed this matter and considered the notices attached to the defendant’s replying affidavit and I am not persuaded that the defendant complied with section 96 (2) before proceeding to have the property offered for sale by the

auctioneers for sale by public auction. Without service of the notice under section 96 (2) of the **Land Act, 2012** the defendant would have not been entitled to sell the charged property and on this account, I am persuaded the plaintiff has established he has a prima facie case within the meaning of what constitutes a prima facie as defined in the case of **Mrao Limited –vs- First American Bank of Kenya Ltd & 2 Others [2003] KLR 125**. Additionally the issues/facts in this case are seriously in dispute as both the plaintiff and the defendant allege fraudulent dealing by the other as discussed hereinabove. In a suit such as the present one where the issues are disputed by the parties the court has a duty to preserve the subject matter of the suit until the suit is heard and determined so that the subject matter is not interfered with and/or disposed of until the suit is finally determined.

21. Before I conclude this ruling there is another aspect of the matter that has caused me considerable concern and I wish to let out for the parties to reflect on as they prepare the suit for trial. It is admitted that the charge giving rise to this matter was registered in 1974 for the paltry sum of kshs. 30,000/=. As at the present moment it is indicated by the defendant that the amount is well over kshs. 6,000,000/=. What efforts did the defendant take to recover this sum over the many years? Is a chargee free to go to sleep and after over 30 years seek to enforce its security and if so is there a limitation on the amount a chargee can recover under such a charge? Definitely these are matters to be addressed at the trial and I say no more.

22. Having come to the conclusion that the plaintiff has demonstrated a prima facie case on the material presented and noting that the issues in dispute in this matter are highly contested the court is of the view that the order that is merited in this matter is one conserving and/or preserving the property until the suit is heard and determined on merit rather than an injunction in the terms sought by the plaintiff. I accordingly make an order directing that the parties maintain the obtaining status quo where the suit property title **No. Suna/Wasweta II/216** will be preserved until this suit is heard and determined and specifically the defendant will not take any steps to enforce the charge it holds against the property pending the hearing and determination of the suit.

23. To facilitate the hearing and determination of the suit the court directs that the parties make full compliance with Order 11 of the Civil Procedure Rules within 30 days of the date of this ruling and thereafter have the suit fixed for pre-trial directions without delay. The costs of the application shall be in the cause.

Ruling dated, signed and delivered at Kisii this 4th day of December, 2015.

J. M MUTUNGI

JUDGE

In the presence of:

..... for the plaintiff

..... for the defendant

J. M. MUTUNGI

JUDGE