



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

HCC NO. 175 OF 1999

THOMAS OWEN ONDIE.....1ST PLAINTIFF/APPLICANT

EDA AMOKOBE INGITIA.....2ND PLAINTIFF/APPLICANT

=VRS=

NATIONAL BANK KENYA1ST DEFENDANT/RESPONDENT

CENTRAL BANK OF KENYA.....2ND DEFENDANT/RESPONDENT

R U L I N G

The application before me is for a Temporary Injunction to restrain the Defendants from selling, advertising, alienating or doing any other thing that would deprive the Plaintiffs of two properties i.e L.R. NO. **ELDORET MUNICIPALITY/BLOCK 9/1015** and **L.R. NO. BUKHAYO/LUPIDA/1980**.

The said relief is asked for because the Applicants had filed an appeal to challenge the dismissal of their suit against the Defendants. And whilst the appeal was still pending, the Defendants had issued a Notice to the Plaintiffs, indicating their intention to sell the Plaintiffs' two properties cited above.

In order to put the whole application with its proper perspective, it is necessary to re-state, briefly, the history between the parties.

In 1982, the 1st Plaintiff, **THOMAS OWEN ONDIEK**, was employed by the 1st Defendant, National Bank of Kenya Limited.

Meanwhile, the 2nd Plaintiff, **EDDAH AMAKOBE INGUTIA**, is the wife of the 1st Plaintiff.

It is common ground that the 1st Plaintiff borrowed a loan from the National Bank, whilst he was still their employee. As security for the said loan, **Thomas Owen Ondiek** (hereinafter cited as “**Thomas**”) mortgaged his two properties, **L.R., L.R. NO. ELDORET MUNICIPALITY/BLOCK 9/1015 and L.R. NO. BUKHAYO/LUPIDA/1980**. Those two properties will henceforth be cited as “***the suit properties***”.

The National Bank terminated the employment of Thomas on 9th April, 1999.

As the Plaintiff felt aggrieved by that action, he filed a case against the National Bank. The said case was **THOMAS OWEN ONDIEK -VS- NATIONAL BANK OF KENYA LIMITED, ELD.HCCC NO. 115 OF 1999**.

That case was heard and determined by **Nambuye J.**, who held that the termination was unlawful. The learned Judge ordered the National Bank to pay to Thomas, the sum equivalent to his three (3) months' salary.

Thomas had also filed this suit in 1999. The initial claim was for General Damages for loss of business. The Plaintiff was amended twice, culminating in the Further Amended Plaintiff dated 9th October, 2008.

The claims in that Further Amended Plaintiff were General Damages for defamation of **Thomas**; General and Aggravated Damages for Defamation of **Thomas**; Special Damages of Kshs 14,573,160; General Damages for loss of business; A Declaration that Thomas should only pay to the National Bank the sum of Kshs 1,285,650/50; Special Damages for loss of business profit of Kshs 5/= for every single shilling investable per year since 1999 to date; General Damages for trespass and humiliation suffered by the Plaintiff; Costs of the suit; and Interest on the Damages.

After **P. M. Mwilu J.** (as she then was) had heard the whole case, she dismissed the suit on 2nd June, 2011.

Being dissatisfied with the Judgment, Thomas and his wife filed a Notice of Appeal on 8th June, 2011.

On 23rd May, 2013, the National Bank sent a Statutory Notice to **Thomas**, informing him that the bank intended to sell the properties which he had charged to it, as security for the loans he had borrowed.

Thereafter, on 3rd October, 2013, the bank wrote to Thomas, notifying him that if he did not pay the outstanding amount of Kshs 3,975,256.85, within 40 days, the bank would sell the two securities.

Thomas received the Notice on 18th October, 2013. He then rushed to court, with the current application, seeking to stop the threatened sale.

Mr. Miyienda, the learned advocate for the applicant, submitted that if the suit property was sold, his client would be prejudiced.

But **Mr. Omusundi**, the learned advocate for National Bank submitted that the application was misconceived, as the prayers sought have no nexus with the Judgment which the court delivered on 11th June, 2011.

Indeed, the Plaintiff is deemed to appreciate the absence of any such nexus, hence the failure to make any reference to the Judgment in this application.

But the applicant insists that there is a nexus between the suit property and the appeal because the applicant had given the property as security when he borrowed money from the Defendant, at a time when he was working for the said bank.

Therefore, as his case was dismissed, and he was challenging the said dismissal before the Court of Appeal, the applicant insists that the property was included within the appeal. As far as Thomas was concerned, he may be unable to pay his liabilities before the appeal was determined.

Having given due consideration to the application, I find that the Notice of the intended sale of the suit property was not pegged on the Judgment delivered on 2nd June, 2011. I say so because it was not as a result of the dismissal of the Applicant's suit that the Defendant got the legal right to sell the suit property.

The legal right to sell the said property flowed directly from the mortgage.

The Plaintiffs appear to have acknowledged that Thomas owes money to the National Bank. Therefore that is a definite debt.

On the other hand, he hopes that the Court of Appeal will find the bank liable to to compensate him. But that hope may or may not become a reality. Therefore, it cannot be open to the Applicants to argue that the bank should not exercise their legal right, which had already accrued, to await the determination of a claim which may well be dismissed.

And, as the Plaintiffs say that they may be unable to repay the loan unless the appeal was determined in a manner that was favourable to them, justice demands that the bank should not be prejudiced by being put on hold to await the contingency.

The only way to forestall the intended sale is by servicing the loan. As the Plaintiffs are not servicing the loan currently, this Court cannot stop the bank from realizing the security.

If the sale was stopped, and the Plaintiffs finally lost the appeal, the debt due may well end up exceeding the value of the security. In that event, the stoppage of the sale would have prejudiced all the parties.

But if the properties were sold, and the appeal was successful, the bank would simply have sold-off that which the Plaintiffs knew would be sold if Thomas had defaulted; and Thomas would be compensated.

The Plaintiffs have failed to satisfy me that they are deserving of the interim injunction. Accordingly, the application dated 29th October, 2013 is dismissed, with costs.

DATED, SIGNED AND DELIVERED AT ELDORET, THIS 5TH DAY OF FEBRUARY, 2014.

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FRED A. OCHIENG

JUDGE.