



No. 196

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO. 343 OF 2013

DAMARA VIEW HOTEL LTDPLAINTIFF

VERSUS

K-REP BANK LTD1ST DEFENDANT

JOSEPH GIKONYO T/A GARAM INVESTMENTS.....2ND DEFENDANT

RULING

1. The plaintiff brought this suit on 8th August 2013 seeking a declaration that the intended sale of all that parcel of land known as LR No. Central Kasipul/Kamuma/4558 (hereinafter referred to only as “**the suit property**”) is illegal, null and void and an injunction to restrain the defendants from exercising statutory power of sale over the suit property without serving a statutory notice. The plaintiff’s suit was brought on the grounds that the plaintiff had secured a loan facility from the 1st defendant in the sum of Kshs. 2,500,000.00 which loan was secured by a charge over the suit property. The suit property is registered in the name of one, **George Amenity Asiyo** who is one of the directors of the plaintiff. The plaintiff claimed that on 1st August 2013 the plaintiff learnt that the 1st defendant had planned to sell the suit property through the 2nd defendant by public auction. The plaintiff claimed that the sale of the suit property that the 1st defendant had intended to carry out was fraudulent and irregular in that the 1st defendant had not served the plaintiff with the requisite statutory notice pursuant to which the 1st defendant’s power to sell the suit property could have arisen.
2. Together with the plaint, the plaintiff filed an application dated 7th August 2013 for a temporary injunction to restrain the defendants from selling the suit property pending the hearing and determination of this suit. The plaintiff’s application was supported by affidavit and further affidavit of George Amenity Asiyo, a director of the plaintiff sworn on 7th August 2013 and 17th September 2013 respectively. In the said affidavits, the plaintiff’s said director claimed that the 1st defendant had granted to the plaintiff a loan facility secured by a charge over the suit property. The plaintiff claimed that on 1st August 2013 he learnt from a third party that the 1st defendant had planned to sell the suit property by public auction on 9th August, 2013 through the 2nd defendant. The plaintiff’s said director claimed the 1st defendant had not served the registered owner of the suit property or any of the directors of the plaintiff with a statutory notice and notification of sale. The plaintiff’s said director claimed that in the absence of a statutory notice, the intended sale of

the suit property by the defendants is premature, irregular and illegal. While admitting that the plaintiff is in arrears in loan repayments, the plaintiff's said director contended that the value of the suit property sought to be sold by the defendants far exceeds the outstanding loan amount. The plaintiff's said director contended that he will suffer irreparable harm unless the orders sought are granted. The plaintiff's said director annexed to his affidavit sworn on 7th August, 2013 among others, a copy of a hand bill that was prepared by the 2nd defendant through which the suit property was advertised for sale on 9th August 2013.

3. The plaintiff's application was opposed by the defendants. The defendants filed a replying affidavit sworn by one, Erick Ondimu Matoke, the 1st defendant's branch manager at Kisii on 4th September 2013. In the said affidavit, the 1st defendant's said manager stated that between 26th March 2011 and 24th May 2011 the 1st defendant advanced to the plaintiff a loan in the sum of Kshs. 2,500,000.00 which loan was secured by a charge over the suit property. The said loan was to be repaid by the plaintiff in sixty equal monthly installments of Kshs. 73,378.31 with effect from April, 2011 until payment in full. The 1st defendant's said manager stated further that the plaintiff defaulted in its monthly loan repayments with the effect that as at 15th August 2013 the balance outstanding on the plaintiff's loan account stood at Kshs. 2,458,657.50 which amount continued to attract interest. The 1st defendant's said manager stated that following this default, the 1st defendant served the plaintiff with several demand notices and when the payment was not forthcoming the 1st defendant served the plaintiff with statutory notices of its intention to sell the suit property unless the outstanding loan amount was paid in full. The said statutory notices were served upon the plaintiff and its directors by way of registered post. The 1st defendant's said manager stated that despite the said notices, the plaintiff still failed to pay the loan amount that was advanced to it by the 1st defendant thereby rendering the sale of the suit property by public auction inevitable. The 1st defendant's said manager stated that upon the expiry of the said statutory notices, the 1st defendant instructed the 2nd defendant to put up the suit property for sale by public auction and that the 2nd defendant followed all the necessary rules and procedures before setting down the suit property for sale which sale according to the 1st defendant was lawful and justified. The 1st defendant's said manager annexed to his replying affidavit; a copy of the charge dated 13th March, 2012 executed by George Amenya Asiyo in favour of the 1st defendant over the suit property to secure a loan in the sum of Kshs. 2,500,000.00, a copy of the plaintiff's loan statement which showed that as at 15th August 2013, the loan amount outstanding was Kshs. 2,458,657.05, copies of demand letters addressed to the plaintiff by the 1st defendant dated 9th August 2012 and 28th January 2013, copies of statutory notices addressed to the plaintiff and its directors dated 22nd February 2013 and 22nd April 2013, copies of certificates of posting of the said statutory notices, a copy of a letter of instruction to the 2nd defendant to put up the suit property for sale by public auction, copies of the redemption notice and notification of sale served upon the registered owner of the suit property notifying him that the suit property would be sold by public auction on 9th August 2013 unless an outstanding loan amount in the sum of Kshs. 2,603,478.04 as at 3rd June 2013 was paid in full and a copy of certificate of posting of the said redemption notice and notification of sale.
4. On 22nd August 2013, the court directed that the plaintiff's application be heard by way of written submissions. The plaintiff filed its submissions on 3rd October 2013 while the defendants filed their submissions on 24th October 2013. I have considered the plaintiff's application together with the affidavit filed in support thereof. I have also considered the defendants affidavit filed in reply to the application. Finally, I have considered the written submissions by the advocates for the parties and the cases cited. The law on temporary injunction is now settled. As was held in the case of **Giella –vs- Cassman Brown & Co. Ltd (1973) E. A. 358**, an applicant for interlocutory injunction must demonstrate that he has a prima facie case against the defendant with a probability of success and that unless the order is granted, he will suffer irreparable harm. If the court is in doubt, the court will determine the application on a balance of convenience. In this case, the plaintiff has not denied that the 1st defendant advanced to the plaintiff a loan in the sum of kshs.

2,500,000.00 secured by a charge over the suit property registered in the name of George Amenya Asiyo. The plaintiff has also not denied that it has defaulted in the repayment of the said loan. The plaintiff has not denied that the 1st defendant has a right under the said charge to sell the suit property in the event of default in the loan repayment. What the plaintiff has disputed is the service upon it of the statutory notice. The plaintiff has not denied that its postal address is P.O. Box 598-40222 Oyugis which is the address through which the 1st defendant served the plaintiff and the registered owner of the suit property, George Amenya Asiyo with statutory notices, redemption notice and notification of sale.

5. The 1st defendant has tendered proof of service of the said notices upon the plaintiff and the registered proprietor of the suit property by way of registered post in the form of certificates of posting. With that kind of evidence, the onus shifted to the plaintiff to prove that he never received the said notices. The plaintiff has not persuaded me that he never received the said notices. The plaintiff's director who is also the registered proprietor of the suit property denied even the receipt of the redemption notice and notification of sale that were served by hand upon his co-director and wife Francisca A. Asiyo by the auctioneer on 5th June 2013 despite the fact that the auctioneer described his said wife in great detail and even gave the particulars of her cell phone number through which they communicated which details and particulars neither the plaintiff's said director nor his said wife has denied. I am satisfied on the material before me that the plaintiff and the registered proprietor of the suit property were served with the requisite statutory notice and notification of sale. It follows therefore that the sale of the suit property that was scheduled for 9th August 2013 was lawful and proper. I would wish to add that in any event, the plaintiff who is not the registered proprietor of the suit property was not entitled to be served with a statutory notice.
6. Due to the foregoing, the plaintiff has failed to establish that it has a prima facie case with a probability of success against the defendants. Even if the plaintiff had established a prima facie case, I would still not have granted the injunction sought. This is because, as the defendants advocates pointed out in their submission, the plaintiff is not the registered proprietor of the suit property and as such would not suffer any harm even if the suit property is sold. The upshot of the foregoing is that the plaintiff's application dated 7th August 2013 has no merit. The same is hereby dismissed with costs to the defendants.

Delivered, dated and signed at Kisii this 14th day of March 2014.

S. OKONG'O

JUDGE

In the presence of:-

Mr. Mageto for the Plaintiff

Mr. Nyanchoga holding brief for Asati for the Defendants

Mobisa Court Clerk

S. OKONG'O

JUDGE