



REPUBLIC OF KENYA

High Court of Kisii

Civil Suit 341 of 2012

SOSPETER NYAKUNDI NYANGAU

(Suing on his own behalf and, as a manager of the estate

of ADAMS OSEKO).....PLAINTIFF

VERSUS

ECOBANK KENYA LIMITED..... DEFENDANT

RULING

1. The plaintiff brought this suit against the defendant on 18th September, 2012 seeking a permanent injunction to restrain the defendant from selling by public auction all that parcel of land known as LR. No. Kisii Municipality/Block III/407 (hereinafter referred to as "the suit property"), a declaration that the defendant is in breach of an agreement that was entered into between the Plaintiff and the defendant and general damages for breach of contract. The Plaintiff's claim as pleaded in the Plaint dated 17th September, 2012 is that, at all material times, the plaintiff and his brother, Adams Oseko who is now of unsound mind were and still are the registered proprietors of the suit property which is a business cum-residential property situated within Kisii town. The Plaintiff who is a building contractor trading in the name and style of Boston General Agencies was awarded a tender by St. Elizabeth Girls Secondary school, Nandi Hills, on 11th May, 2011 for the construction of a science laboratory, a dormitory block and Sanitary services at a cost of Ksh. 15,918,679.50. To enable the plaintiff to carry out the tender, the plaintiff approached the defendant for a loan of Ksh. 2,200,000.00 which loan was secured by a first charge over the suit property. The Plaintiff claims that it was an express or implied term of the contract between the plaintiff and the defendant for the said loan facility that the same was to be repaid from the payments received by the plaintiff from St. Elizabeth Girls Secondary School under the tender aforesaid. The Plaintiff claims that although he has executed the works that he had tendered for, St. Elizabeth Girls Secondary School is yet to pay him in full the amount that was agreed upon for the said works. In view of this development, the Plaintiff has not met his repayment obligations to the defendant. The Plaintiff claims that in breach of the contract between the plaintiff and the defendant on the terms of the loan repayment as aforesaid, the defendant instructed auctioneers to put up the suit property for sale by public auction to recover the outstanding loan amount although the defendant is aware that the plaintiff is yet to receive full payment from St. Elizabeth Girls Secondary School. The Plaintiff claims that the suit property is occupied by the plaintiff's mother and brother who are both of unsound mind and that this is the only property owned by them. The Plaintiff claims therefore that the plaintiff and members of his entire family would suffer irreparable loss if the property is sold by the defendant. It is on the foregoing grounds that the plaintiff has sought the reliefs that I have set out herein above.

2. Together with the Plaint, the Plaintiff lodged an application by way of notice of motion also dated

17th September, 2012 seeking interlocutory injunction to restrain the defendant from selling by public auction the suit property pending the hearing and determination of this suit. The Plaintiff's application is brought on the grounds set out on the face thereof and on the affidavit of the Plaintiff sworn on 17th September, 2012. In his affidavit in support of the application, the Plaintiff has reiterated the contents of the Plaintiff that I have already highlighted herein above in detail and it is not necessary to reproduce the same here once again. In summary, the plaintiff has deposed that the plaintiff did charge the suit property to secure a loan of Ksh.2,200,000.00 that was advanced to the plaintiff by the defendant to enable the defendant to fulfill his contractual obligations to St. Elizabeth Girls Secondary School which had awarded to the plaintiff a tender for the construction of certain buildings at the school. The plaintiff has deposed that it was agreed between the plaintiff and the defendant that the said loan would be repaid from the proceeds of the building contract that the plaintiff had entered into with the said St. Elizabeth Girls Secondary School. The Plaintiff has deposed that although the defendant is aware that the plaintiff has not been paid in full under the contract they had with St. Elizabeth Girls Secondary School which has resulted in the plaintiff not being able to meet his obligations to the defendant, the defendant has proceeded to instruct auctioneers to sell the suit property. The plaintiff has deposed that this step taken by the defendant is in breach of the agreement that had been reached between the plaintiff and the defendant with regard to the loan repayment. The Plaintiff has deposed that he has a prima facie case against the defendant and that, unless the orders sought are granted, he stands to suffer irreparable loss. The plaintiff has deposed in conclusion that the defendant will suffer no prejudice if the orders sought are granted. The plaintiff has annexed to his affidavit in support of the application various documents the material ones of which are the following, a copy of a letter dated 11th May, 2011 by which St. Elizabeth Girls Secondary School notified the Plaintiff that he had been awarded a tender, a copy of a letter dated 30th July, 2012 addressed to the plaintiff by Valley Auctioneers demanding the payment of a total sum of Ksh. 2,800,642.28 as at 30th June, 2012 within 45 days failure to which the suit property would be put up for sale by public auction and a copy of notification of sale dated 30th July, 2012 from Valley Auctioneers notifying the plaintiff that the suit property would be sold on 27th September, 2012 unless the plaintiff pays the said sum of Ksh.2,800,642.28 by that date.

3. The Plaintiff's application is opposed by the defendant. The defendant filed a replying affidavit sworn on 15th October, 2012 by Joshua Ngari who is the defendant's Nakuru branch manager. The defendant has denied the plaintiff's claim in its entirety and has termed the plaintiff's application for injunction as frivolous, vexatious and an abuse of the court process. Mr. Ngari has deposed that, through a request for credit facility agreement dated 22nd June, 2011, the defendant advanced to the plaintiff a contract financing facility loan of Ksh. 2,200,000.00 and a performance bond facility of Ksh. 795,933.00 on terms and conditions contained in the said agreement. Following the execution of the said agreement, the plaintiff executed a charge over the suit property in favour of the defendant to secure the said sum of Ksh.2,200,000.00. According to the defendant, there is nothing in the said request for credit facility agreement or in the charge document express or implied as to the plaintiff's source of funds for repaying the two facilities that were availed to the plaintiff by the defendant. The defendant has denied the plaintiff's claim that it was agreed between the plaintiff and the defendant that the monies advanced to the plaintiff by the defendant would be paid from the proceeds of the building contract that the plaintiff had with St. Elizabeth Girls Secondary School. The defendant claims that the plaintiff failed to adhere to the terms of the contract between the plaintiff and the defendant with the result that as at 31st March, 2012, the plaintiff owed the defendant a sum of Ksh.2,588,776.20 on which interest continues to accrue. The defendant claims that despite several demands and reminders, the plaintiff failed to pay the outstanding amount thereby leaving the defendant with no alternative but to realize their security by putting up the suit property for sale. The defendant claims that before putting up the suit property for sale, they have complied with all necessary legal procedures as concerns valuation and notices. It is the defendant's contention that the plaintiff was well aware of the mental status of his mother and brother when he was putting up the suit property as a security and that this was the only property owned by the plaintiff and his brother. In the circumstances, the plaintiff cannot use the mental condition of his mother and brother to stop a lawful process. It is the defendant's contention that the plaintiff has not denied his indebtedness to the defendant and as such the plaintiff has not established a prima facie case against the defendant with a probability of success. In conclusion, it is the defendant's contention that the plaintiff's application is merely intended to circumvent the plaintiff's obligations under the request for credit facility agreement

and the charge so as to frustrate the defendant's efforts to recover the amounts lawfully due and payable to the defendant by the plaintiff. The defendant contends that the Plaintiff from his conduct is not deserving of the orders sought. The defendant has annexed to the affidavit of Joshua Ngari copies of, the Request for Credit Facilities Agreement that was entered into between the plaintiff and the defendant dated 22nd June, 2011, the charge executed by the defendant in favour of the plaintiff over the suit property dated 8th August, 2011, the defendant's statement of account with the plaintiff for the period August, 2011 and September, 2012, the valuation report for the suit property dated 25th May, 2011 and the statutory notice that was served upon the defendant before the suit property was put up for sale dated 19th April, 2012.

4. By a consent letter dated 11th September, 2012 signed by the advocates of both parties and filed in court on 11th October, 2012, the parties agreed to canvass the application by way of written submissions. The plaintiff and the defendant's advocates filed their respective submissions on 31st January, 2013. I have considered the plaintiff's application, the affidavit filed in support thereof and the Plaintiff's advocates submissions. I have also considered the defendant's affidavit in opposition to the application and the defendant's advocates submissions. This is the view that I take on the matter;

5. For the plaintiff to succeed in the present application, the plaintiff has to satisfy the court that the plaintiff has a prima facie case with a probability of success against the defendant and that unless the orders sought are granted, the plaintiff will suffer irreparable harm. If the court is in doubt as to the above, the court will determine the matter on a balance of convenience. These principles were set out in the case of **Giella –vs- Cassman Brown & Company Limited [1973] E.A. 358** and have remained our law on interlocutory injunction to date.

6. The point to start therefore is to answer the question whether the plaintiff has on the material placed before the court established a prima facie case with a probability of success against the defendant based on a breach of contract. The court will thereafter consider whether the plaintiff has demonstrated that he will suffer irreparable harm if the orders sought are not granted. I have already summarized above the Plaintiff's case and the defendant's response to it. The plaintiff has claimed that there was express or implied agreement between the plaintiff and the defendant that the loan that was advanced by the defendant to the plaintiff would be repaid from the monies that the plaintiff was supposed to receive from the building contract that the plaintiff had entered into with St. Elizabeth Girls Secondary School. The onus was upon the plaintiff to prove the existence of such contract express or implied. The plaintiff has placed no material before the court documentary or otherwise to prove the alleged contract. There were only two (2) material contracts between the plaintiff and the defendant. The first one was referred to as "**Request for credit facilities**". This contract contained the terms and conditions under which the defendant availed to the plaintiff contract financing loan facility of Ksh.2,200,000.00 and performance bond loan facility of Ksh. 795,933.00. A part from the statement in the preamble to this agreement that the contract financing facility was to be used by the plaintiff to complete the construction of science laboratory, a dormitory block and sanitary services for St. Elizabeth Girls Secondary School under a contract that was awarded by the said school to the plaintiff and that the purpose of the performance bond facility was to enable the defendant to issue a Performance Bond to St. Elizabeth Girls Secondary School on behalf of the plaintiff under the terms of the said contract that was awarded by the said school to the plaintiff, there is nothing in this contract which expressly provides that the plaintiff would repay the monies made available to him under the two facilities from the payments received from St. Elizabeth Girls Secondary School. There is also nothing from which it can be inferred or implied that such arrangement was agreed upon by the parties. The other contract was the charge executed by the plaintiff over the suit property in favour of the defendant to secure the said facilities. Again, there is no express agreement under this charge that the monies secured thereunder would be payable from the proceeds of the building contract that the plaintiff had entered into with St. Elizabeth Girls Secondary School and none can be inferred or implied. As was stated by Scrutton J. in the case of **Reigate-vs-Union Manufacturing Co.,[1918]1K.B.592** which has been cited by the plaintiff, a term can only be implied into a contract if it is necessary in the business sense to give efficacy to the contract. I cannot see how the contract between the parties herein could not be effectively completed without implying into it an agreement by the parties that the defendant would only be paid as and when the plaintiff receives payment

from St. Elizabeth Girls Secondary School. I don't see how the defendant could have agreed to lend money on such terms. Such a term would materially vary the terms of the contract that was agreed upon by the parties instead of aiding in its completion and as such cannot be implied. The consideration for the defendant agreeing to lend money to the plaintiff was the undertaking on the part of the plaintiff to repay the same on the terms and conditions that were agreed upon under the request for credit facilities agreement aforesaid. I don't see how implying a term that would make the plaintiff's obligations conditional after the defendant has complied with its term of the bargain give efficacy to the contract the parties had entered into. I have not found the other cases cited by the plaintiff relevant. Both are concerned with the issues of promissory estoppel which do not apply to this case because, first, promissory estoppel is not pleaded and secondly, the plaintiff has not brought out facts upon which promissory estoppel can be inferred. Due to the foregoing, it is my finding that the plaintiff has failed to establish that he has a prima facie case with a probability of success against the defendant. Having held that the Plaintiff has failed to establish a prima facie case with a probability of success, I am not obliged to consider whether or not the plaintiff is likely to suffer loss which cannot be compensated in damages unless the orders sought are granted. I want to state however that, if I was to determine this issue, I would have held against the Plaintiff on the same. The Plaintiff claims that the suit property is the only property that the plaintiff and his brother who is of unsound mind own. The plaintiff claims further that his said brother and mother who is also of unsound mind reside in the suit property. Due to the foregoing, it is the plaintiff's contention that it is not only the plaintiff but the plaintiff's entire family will suffer irreparable loss which cannot be compensated in damages if the orders sought are not granted. When the plaintiff utilized the suit property as a security to secure a loan from the defendant, he was well aware of the medical condition of his brother and mother, the fact that they were staying in the suit property and that if he defaulted in the repayment of the loan the suit property would be sold. In the circumstances, if the plaintiff was to suffer any loss, it is a loss that was foreseeable and one which has not resulted from circumstances created by the defendant but by the plaintiff himself. Such loss cannot justify the granting of the orders sought. This is not to say that this court is underrating the gravity of the situation in which the plaintiff finds himself or that the court is not sensitive to the plight of the plaintiff's brother and mother. The court's view is that in the present application, the issue of the medical condition of the plaintiff's brother and mother is not being raised in good faith but as an excuse and a cover up for the plaintiff's failure and reluctance to fulfill his contractual obligations. If the issue was being raised in good faith, it would have been brought up for consideration by the court in an application for relief brought under **Section 103** of the **Land Act, No. 6 of 2012** and not in a suit of this nature in which the plaintiff is seeking to stop the sale of the suit property on other grounds.

7. I am in agreement with the submission by the defendant's advocates that the Plaintiff's Notice of Motion application dated 17th September, 2012 is lacking in merit. The same is hereby dismissed with costs to the defendant.

Dated, signed and delivered at Kisii this 12th day of April, 2013

S. OKONG'O,

JUDGE.

In the presence of:-

Mr. Nyambati for Kerosi for the plaintiff.

No appearance for the defendant
Mobisa Court Clerk

S. OKONG'O,
JUDGE.