



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

ELC CASE NO. 22 OF 2017

DAVID ARAP SITIENEL.....PLAINTIFF

=VERSUS=

PHILIP KIPKEMEI BETT.....1ST DEFENDANT

LETSHEGO KENYA LIMITED.....2ND DEFENDANT

JOGEDAH AUCTIONEERING SERVICES....3RD DEFENDANT

JUDGMENT

Introduction

1. Sometime in the year 2015 the 1st defendant applied for a loan of Kshs. 1,700,000 from the 2nd Defendant. As security for the said loan, the 2nd defendant charged the plaintiff's titles No. KERICHO/KIMOLWET/533 and KERICHO/KIMOLWET/555. The 2nd defendant advanced a sum of Kshs. 800,000 to the 1st defendant which was to be repaid by 36 monthly instalments of Kshs. 32, 196.80. The 1st defendant defaulted in repayment of the said loan and the 2nd defendant advertised the plaintiff's properties for sale by public auction. This is what prompted the plaintiff to institute this suit seeking an injunction to restrain the 2nd and 3rd defendants from selling, transferring or doing any other act which is prejudicial to the plaintiff's interest in the said titles. He also seeks an order that the 1st defendant be directed to meet his obligations under the charge.

Background

2. The plaintiff's case is that even though his two titles were charged to secure a loan of Kshs. 1,700,000, the amount disbursed to the 1st defendant was only Kshs. 800,000. He therefore argues that one title would have been sufficient to secure the loan of Kshs. 800,000 as his two parcels of land are valued at Kshs. 2,500,000. He also argues that the intended sale is irregular and unprocedural as the 2nd defendant has not exhausted all the avenues to recover the loan before resorting to the sale of the plaintiff's property. He avers that 1st defendant has his own property which could be used to secure the loan and he ought to be compelled to pay so that the plaintiff's titles can be released to him.

3. In his Defence filed on 15th November 2017 the 1st defendant admits that the 2nd defendant disbursed to him a sum of Kshs. 800,000 and not Kshs. 1,700,000 as stated in the plaint. He denies that he has other properties which can be used to secure the loan. He further denies that he was served with any notices before the suit property was advertised for sale.

4. The 2nd and 3rd defendants filed a joint defence on 22nd June 2017. The 2nd Defendant admits that it advanced to the plaintiff a loan facility of Kshs. 800,000 secured by the plaintiff's two titles but states that the 1st defendant defaulted in repayment of the same and was in arrears of Kshs. 613,341.14 as at 31st May 2017. The 2nd defendant further states that pursuant to the agreement between the 1st and 2nd defendant, they were entitled to sell the charged properties in the event of default by the 1st defendant. The defendants maintain that in the circumstances, the suit is misconceived, incompetent and bad in law.

5. The suit was set down for hearing and each of the parties testified.

Plaintiff's case:

6. The Plaintiff testified that he is the registered owner of land parcels number KERICHO/KIMOLWET 553 and 555. He stated that in 2015 the 1st defendant who is his friend requested him to allow him to use his two titles as security for a loan of Kshs. 1,700,000 from the 2nd defendant and he acceded to the said request. It was his testimony that after the 1st defendant got the loan he was unable to service it as his

business had gone down. This prompted the 2nd defendant to advertise the plaintiff's property for sale.

7. The plaintiff admitted that he understood his obligations as a guarantor and that he received the statutory notice from the 2nd defendant before the property was advertised for sale. His main complaint is that the two titles should not have been charged to secure a loan of Kshs. 800,000 as in his estimation the two parcels of land are valued at approximately Kshs. 2, 500,000. He testified that the 1st defendant had told him that his business had now picked up and he was in a position to repay the loan. He also stated that the 1st defendant had his own property which could be charged to secure the loan. He therefore prays that the 2nd defendant be restrained from selling his property and that the 1st defendant be compelled to repay the loan. He produced a copy of the letter of offer, statutory notice, Notification of sale and Bank statement as Plaintiff's exhibits 1 to 4 respectively.

Defence case

8. Eric Ndunga who is the branch manager of Letshego's Kericho branch testified as DW1 on behalf of the 2nd and 3rd defendants. He testified that the 1st defendant applied for a loan of Kshs. 800,000 from the 2nd defendant on 18.2.2015. Before he was given the loan, he signed a letter of offer dated 18.2.2015 in which he accepted to repay the loan within 36 months by instalments of Kshs. 32,196.00. The loan was secured by the plaintiff's two titles, KERICHO KIMOLWET/553 and 555. Both the 1st defendant and the plaintiff signed the letter of offer in which they committed themselves to repay the loan. He testified that the 1st defendant started defaulting as soon as the first instalment was due. The 2nd defendant's officers made a personal visit to the 1st defendant to persuade him to pay the loan but this did not yield any fruits. The 2nd defendant then issued the plaintiff and 1st defendant with a 3 months' statutory notice after which they advertised the suit property for sale. He produced the bank statement which showed that at the time the suit property was advertised for sale the 1st defendant had paid only Kshs. 223,778 and the outstanding amount was Kshs. 759,759.00.

9. In cross-examination, he could not explain why the statutory notice indicated that 1st defendant had been given a loan of Kshs. 1,700,000 as the amount in the letter of offer was Kshs. 800,000. He was also unable to explain why they had charged two titles for a loan of Kshs. 800,000. He could not produce a valuation report to show whether the properties had been valued before they were advertised for sale. Asked whether they would agree to substitute the security, he stated that this would only be possible if the 1st defendant continued making payment. He however stated that the loan was supposed to be repaid within 36 months.

10. The 1st defendant testified as DW 2. He relied on his witness statement filed in court on 17th November 2017. He testified that even though he applied for a loan of Kshs. 1,700,000, he was only given Kshs. 800,000. The said loan was secured by a charge over the 1st defendant's title No. KERICHO/KIMOLWET/555. It was his testimony that since he was not given the amount he had applied for, his business performed poorly and he was unable to service the loan as required. This led the 2nd defendant to advertise the charged property for sale. His evidence that he had not been served with any statutory notice is at variance with his witness statement. Even though he testified that he was willing to repay the outstanding loan, he was unable to demonstrate that he had tried to reschedule the payments since the property was advertised for sale. In re-examination, he stated that he did not have any free property which could be charged to the 2nd Defendant.

At the end of the hearing counsels for all the parties were given time to file their submissions which I have considered.

Issues for determination:

11. From the pleadings, evidence on record and rival submissions, the following issues arise for determination:

- i. Whether the 2nd defendant followed the laid down procedure before advertising the plaintiff's property for sale.
- ii. Whether the plaintiff has met the conditions for grant of an injunction.
- iii. Whether the 1st defendant should be compelled to meet his obligations under the charge.

Analysis and determination

12. It has been submitted by counsel for the plaintiff that the 2nd defendant did not exhaust the other options under section 90(3) of the Land Act no. 6 of 2012 before advertising the plaintiff's properties for sale.

13. Section 90(3) of the Act provides that if after being served with a 3 months' statutory notice the chargor does not comply within two months after the date of service of the notice under subsection 1, the chargee may

- a. sue the chargor for any money due 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

14. Section 96(1) on the other hand provides that:-

“...where a chargor is in default of the obligations under a charge and remains in default at the expiry of the time provided for the rectification of that default in the notice served on the chargor under section 90 (1), a chargee may exercise the power to sell the charged land.”

15. There is no legal requirement that the chargee must exhaust all the other remedies under section 90(3) before exercising its statutory power of sale. However, before conducting the sale the chargee is required to ensure that forced sale valuation of the charged property is undertaken by a valuer in line with section 97(2) of the land Act. In the case of **Koileken Ole Kipkolonka Orumoi V Mellech Engineering & 2 Others (2015) eKLR** the court relied on the case of **David Kuhiguka V Equity Bank Ltd** where Havelock J stated as follows:

“The obligation of a chargee to ensure that a forced sale valuation is undertaken by a valuer comes under section 97 of the Land Act 2012 – “Duty of chargee exercising power of sale.” To my mind such a duty is obligatory”

16. In the instant case, even though the debt is not denied and the relevant notices were issued, there is no evidence that a valuation of the charged property was conducted before the proposed sale. It would be unconscionable to allow the 2nd defendant to sell the plaintiff’s 2 parcels of land for a debt of Kshs. 800,000 without ascertaining the value of the said properties. It is therefore my finding that the legal procedures were not strictly followed and the proposed sale was unlawful.

17. The second issue I have to determine is whether the plaintiff has met the conditions for the grant of an injunction as laid down in the case of **Giella V Cassman Brown & Co Ltd 1973 EA 358**.

18. The first condition is that the plaintiff must establish a prima facie case with a probability of success. In the case of **Mrao V First American Bank of Kenya Limited (2003) eKLR** Bosire JA (as he then was) stated as follows:

“A prima facie case is... one which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”

19. Arising from my finding on the first issue, the plaintiff has demonstrated that his rights have been infringed as his properties were advertised for sale without a valuation being undertaken. The other issue that arose with regard to the statutory notice is that the amount for which the properties were charged is stated as Kshs. 1,700,000 whereas the letter of offer has a figure of Kshs. 800,000. The court was unable to confirm the correct figure as the 2nd defendant did not produce the charge document nor did he supply the plaintiff and the 1st defendant with copies thereof. The other question that is left unanswered is why the 2nd defendant charged two properties for a loan of Kshs. 800,000. All this leads me to the conclusion that the balance of convenience tilts in favour of the plaintiff.

20. The last question I must consider is whether the plaintiff is entitled to an order that the 1st defendant be compelled to meet his obligations under the charge. The 1st defendant is the principal debtor and his relationship with the 2nd defendant is contractual. From his evidence, he does not deny that he is indebted though he believes he can get away by giving excuses. It is a pity that he does not feel the pressure to pay the outstanding loan as the charged property belongs to the plaintiff. Be that as it may, the court cannot force him to meet his obligations as there is a binding contract between him and the 2nd defendant and the procedure to be followed by the 2nd defendant in the event of default is laid down in the charge document and the Land Act.

21. On the basis of the foregoing, the plaintiff ‘s suit succeeds only to the extent that the 2nd and 3rd defendants are restrained from selling the plaintiff’s parcels of land known as L.R No. KERICHO/KIMOLWET/ 553 and 555 on the basis of the statutory notice issued on 16.6.2016. I however direct that as long as the debt remains unpaid, the 2nd defendant may issue fresh notices and conduct a forced sale valuation of the suit property in accordance with section 97 of the Land Act before the sale.

22. As the plaintiff and 1st defendant have admitted the debt I will not award any costs.

Dated, signed and delivered at Kericho this 10th day of January 2019.

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J.M ONYANGO

JUDGE

In the presence of:

1. Miss Sitati for the Plaintiff
2. No appearance for the Defendants

3. Court Assistant - Emmanuel