



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CIVIL CASE NO. 1398 OF 2016

NZAMBA KAVILI.....PLAINTIFF/APPLICANT

=VERSUS=

KCB BANK KENYA LIMITED.....DEFENDANT/RESPONDENT

RULING

1. This is the Notice of Motion dated 8th November 2016 brought under Section 1A, 1B and 3A of the Civil Procedure Act, Order 40 Rule 1, 2, 3 and 4 of the Civil Procedure Rules 2010.

2. It seeks order:-

1. Spent

2. Spent

3. That this honourable court be pleased to restrain the defendant by itself, servants, agents and any person claiming through the defendant, from entering into, alienation of or interfering with the plaintiff's quiet possession of that piece of or parcel of land known as Mulango/Wikililye/644 pending the hearing and determination of the suit herein.

4. That costs of this application be provided for.

3. The grounds are on the face of the application and are set out in paragraph a to f.

4. The application is supported by the affidavit of Nzamba Kivili, the plaintiff/applicant herein sworn on the 8th November 2016.

5. The application is opposed. There is a replying affidavit sworn by Peter Daudi Nzulwa, a Business Banker based at the defendant's Kilifi branch sworn on the 28th November 2017.

6. On the 9th March 2017 the court directed that the Notice of Motion be canvassed by way of written submissions.

The plaintiff's/applicant's submissions

7. The plaintiff/applicant is a director of Nzamaco Metal Works Limited. The said company holds and operates current account NO. 1107274427 at the defendant's/respondent's Kilifi branch. The company secured an overdraft facility from the defendant's/respondent's Kilifi branch for its business operations and the plaintiff/applicant charged the suit property title Mulango/Wikililye/644 to the bank to secure the loan. The company also operated an asset based finance account No. MG 1218800096 in respect of motor vehicle registration No KBR 993T Trailer ZD 8144.

8. The bank in its statutory notice dated 8th March 2016 amalgamated the two accounts purporting that the two accounts are secured by the suit property which is false. This was unlawful and contrary to the contractual obligation of the parties. The plaintiff/applicant is ready and willing to settle the overdraft facility of Kshs 1,800,000/- secured by the suit property. The suit property is his matrimonial home together with his wife and five children. The plaintiff/applicant has established a prima facie case to warrant the orders sought. He is likely to suffer irreparable loss if the sale is not stopped. He prays that the application be allowed.

The defendant's/respondent's submissions

9. The plaintiff/applicant voluntarily offered the suit property as security for loan amounting Kshs.1, 800,000 on the 30th June 2012. He further indicated that the suit property would also act as security for the existing mortgage family account No. MG1218800096. The property offered as security is duly recognized as a matrimonial property and thus spousal consent obtained in support of the security documents.

10. The defendant/respondent lawfully proceeded to execute their statutory power of sale under Section 90 of the Land Act, 2012. It has put forward the cases of **Giella vs Cassman Brown & Co. Ltd [1973] EA 358; Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others [2003] KLR 125; Labelle International Ltd & Another vs Fidelity Commercial Bank & Another [2003] EA 541; Habib Bank AG Zurich vs Pop In Kenya Ltd [1999] LLR 3069.**

11. The plaintiff/applicant has not established a prima facie case with a probability of success. He has also failed to demonstrate how he will suffer irreparable injury which cannot be compensated by an award of damages. It has also put forward the case of **Matex Commercial Supplies Ltd & Another vs Euro Bank Ltd (in liquidation)**. It prays that the plaintiff's/applicant's application be dismissed with costs.

12. I have considered the pleadings, the notice of motion, the affidavit in support and the annexures. I have considered the replying affidavit and the annexures, the written submissions of counsel and the authorities cited. The issues for determination are:-

i. Whether or not the plaintiff/applicant's application meets the threshold for grant of temporary injunction.

ii. Who should bear costs.

13. The principles were set out in the precedent setting case of **Giella vs Cassman Brown & Company Ltd [1973] EA 358**. In the case of **Mrao Ltd vs First American Bank of Kenya Ltd [2003] 125** the Court of Appeal stated what amounts to a prima facie case. I am guided by the above authorities.

14. It is the plaintiff/applicant's case that the defendant/respondent amalgamated the two accounts purporting that they were secured by the suit property. That is unlawful. He also claims that the suit property is his matrimonial home with his wife and their children.

15. I have gone through paragraph 4 and 6 of the affidavit of Peter Daudi Nzulwa, a business banker with the defendant/respondent Kilifi Brank. I find that the averments therein contradict the plaintiff's/applicant's claim that the two accounts were not secured by the suit property. In paragraph 12 of the said replying affidavit he depones:-

“that the plaintiff duly acknowledged that the subject property is a matrimonial home which is not disputed PDN - “5” contains a spousal consent executed on the 26th July 2016 which confirms that the securities registered with respect to the matrimonial property herein were duly prepared and registered.”

The averments in this paragraph have not been rebutted by the plaintiff/applicant.

16. I have gone through annexure PDN -2. The same speaks for itself. In clause 4 the security being offered is LR No. Mulango/Wikililye/644. It is not therefore not true as claimed by the plaintiff/applicant that the suit property was security for the overdraft only.

17. In the case of **Njenga vs Njenga (1991) KLR 401 Bosire J** (as he then was) held that :-

“an injunction being a discretionary remedy is granted on the basis of evidence and sound legal principles”.

I am not persuaded by the facts presented by the plaintiff's/applicant's that he deserves the orders sought.

18. Attached to annexure PDN 5 is an affidavit of consent of spouse sworn by Winfred Mawia Nzamba in which she gave full consent to the creation of the charge. From the foregoing the issue of the suit property being matrimonial does not arise.

19. There is no doubt that the plaintiff/applicant is the registered owner of the suit property which property was offered as security for a loan. There is no doubt that the plaintiff/applicant has defaulted on the loan repayments hence the statutory notice issued by the defendant/respondent is lawful. The plaintiff/applicant has not made any proposal on how he will repay the loan. I rely on the cited case of **Labelle International Commercial Bank & Another [2003] 2 EA 541** where it was held that:-

“It is now established law that when part of the amount is admitted or proved to be due a charge cannot be restrained by an injunction”.

20. In the case of **Kenleb Cons Ltd vs New Gatitu Services Station Ltd & Another 1990 KLR 557 Bosire J** (as he then was) held that:-

“to succeed in an application for injunction an applicant must not only make a frank and full disclosure of all relevant facts to the just determination of the application but must also show that he has a right, legal or equitable, which requires

protection by injunction.”

I am not satisfied that the plaintiff/applicant herein deserves this kind of protection.

21. The plaintiff /applicant was afforded a credit facility by the defendant/respondent whose repayment was secured by a charge over the suit property and he has defaulted in making repayments of the facility. I find that he has failed to establish a prima facie case with high chances of success at the trial. I also find that he has failed to demonstrate that he stands irreparable which cannot be compensated by an award of damages if these orders are not granted. I rely in the case of **Ooko vs Barclays Bank of Kenya Ltd [2002] KLR 394**.

22. I am also of the view that the balance of convenience tilts in favour of the defendant/respondent.

23. In conclusion, I find that the plaintiff/applicant’s application has failed to meet the threshold for grant of temporary injunction. I find that the same lacks merit and it is dismissed with costs to the defendant/respondent.

It is so ordered.

Dated, signed and delivered in Nairobi on this 13TH day of FEBRUARY 2019.

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L. KOMINGOI

JUDGE

In the presence of:-

.....Advocate for the Plaintiff

.....Advocate for the Defendant

.....Court Assistant