



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT NYAHURURU

ELC CASE NO 3 OF 2018

ABDUL NGANGA WAINAINA.....PLAINTIFF/APPLICANT

VERSUS

AGRARIAN CREDIT SERVICES LTD.....1ST RESPONDENT /RESPONDENT

JOSEPH KARIUKI T/A MUIBAU AUCTIONEERS...2ND RESPONDENT /RESPONDENT

RULING

1. On the 31st January 2018, this court delivered its ruling pursuant to an application by way of Notice of Motion dated 12th January 2018 wherein the Plaintiff/ Applicant herein had sought orders of injunction restraining the Respondent/Defendants from alienating disposing, selling by public auction or private treaty or otherwise dealing with his property LR No. Nyandarua/Ol Kalou/6328 in any manner.
2. The ruling directed the 1st and 2nd Respondents to refrain from selling the suit property until proper notices had not been issued. They were further directed to carry out the forced sale valuation as required under Section 97 of the Land Act.
3. While the matter was pending its full hearing, Counsel for the Plaintiff/Applicant filed another application under certificate of urgency dated the 12th June 2018, wherein he sought for orders of injunction against the Respondent/Defendants who had now advertised the property for sale without issuing the requisite notices and having a current valuation report as directed by the court in its ruling of 31st January 2018.
4. Pursuant to the filing and serving of the said application, the Defendant/Respondents herein filed their ground of opposition dated 3rd October 2018 wherein they sought for the Applicant/Plaintiff's application to be dismissed as the same was not brought in good faith for reasons that ever since obtaining the loan from the Defendant, the Applicant/Plaintiff herein registered a charge on property No. LR No. Nyandarua/Ol Kalou/6328 in favour of the 1st Respondent as security of the loan.
5. That thereafter the Applicant has never remitted a single cent towards repayment of the loan of the loan. That instead he had sought protection of the court and despite the reprieve given to him by the court on the 31st February 2018, he has not taken advantage of the same to settle the loan facility. That further he had not met the required legal threshold to be granted the injunctive orders so sought. That his actions have caused grave injustice and hardship to the Respondent/Defendants. That the Applicant is bent on delaying this matter and had not come to court with clean hands
6. On the 4th October 2018, by consent parties agreed to have the application disposed of by way of written submissions.
7. I have considered both the applications herein as well as the submissions and authorities herein.

Matters for determination;

- i. Whether the Defendant/Respondents served the Plaintiff/Applicant with a Statutory Notice pursuant to section 90(2) of the Land act
 - ii. Whether service of the statutory Notice was properly effected upon the Plaintiff/Applicant.
 - iii. Whether the conditions for issuance of an injunction have been met herein.
8. At the risk of duplication the ruling delivered on the 31st January 2018, I note that this court had given reprieve to the Applicant for reasons that the 1st Respondent herein had not adhered to the laid down provision under section 90(2), 92(2) and 96(2) of the Land Act wherein they had not served the Applicant with the mandatory statutory notices. In the said ruling, I had also clearly directed that once the

said notices were served upon the Applicant, the 1st Respondent herein was at liberty to sell the security in accordance with the Auctioneers Act and Rules.

9. Although the Applicant's submission is to the effect that the 1st Respondent had advertised the security contrary to the direction issued in the ruling dated the 31st January 2018, on the contrary, I find that a Statutory Notice dated the 8th May 2018, was issued through registered post as well as through hand delivery addressed to the Applicant by the Respondent's Advocates, listing the status of the accounts held by the Applicant with the Respondent Bank.

10. The letter demanded that a total sum of Ksh. 2,208,360/- together with Ksh 50,000/=-, the amount required to rectify the default accruing as from 3rd August 2010, be paid immediately.

11. The letter gave three months' notice as provided for under the provisions of Section 90(2) of the Land Act to wit:

Before exercising the power to sell the charged land, the chargee shall serve on the chargor a notice to sell in the prescribed form and shall not proceed to complete any contract for the sale of the charged land until at least forty days have elapsed from the date of the service of that notice to sell.

12. It is worth noting that a Statutory Notice issued under Section 90(2) of the Land Act, prompts a process, which leads to the chargee ultimately exercising its remedies outlined under Section 90(3) of the Act. The notice is issued where the chargor is in default of any obligation under the charge or has failed to pay interest or any other periodic payment and such default continues for one month.

13. The Statutory Notice in the present case, in my humble view, was in accordance with the stipulated provisions under Section 90(2) and 96(2) of the Land Act and therefore the acts of the 1st Respondent in seeking to exercise its chargee's statutory power of sell were lawful in the circumstance.

14. I also find that there was proper service of the Statutory Notice effected upon the Applicant, the first being on the 5th May 2018 through his postal address 2 Manyatta, another dated on 8th May 2018 posted in the same manner whereby on the 12th July 2018 the Applicant was served with a Redemption Notice.

15. Looking at the final issue as to whether the conditions for issuance of an injunction have been met, this court is guided by the principles governing the grant of interlocutory injunctions as set **Giella v Cassman Brown & Co Ltd [1973] EA 358** to the effect that:

- a. The applicant must show a prima facie case with a probability of success;
- b. An interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not be adequately compensated by an award of damages;
- c. If the court is in doubt, it will decide an application on the balance of convenience.

16. A prima facie case in civil cases is a case in 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.

17. Has the Applicant in the present application established a prima facie case?

18. Section 90(1) of the said Land Act Cap 280 (Laws of Kenya) provides as follows:-

If a chargor is in default of any obligation, fails to pay interest or any other periodic payment or any part thereof due under any charge or in the performance or observation of any covenant, express or implied, in any charge, and continues to be default for one month, the chargee may serve on the chargor a notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be.

19. Having found that the Statutory Notice was properly effected, and that a substantial amount of money given to the Applicant as a loan facility, had been utilized by the Applicant who had not repaid any money as well as the accruing interest, the suit properties offered herein by way of security to the 1st Defendant Bank for the loan facilities availed to the Applicant, became a commodity which the chargee, the 1st Defendant Bank, could sell off in order to recover monies lent to the Applicant together with the interest thereof.

20. In the case of **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others (2003) KLR 125**, Kwach, JA (as he then was), had this to say:

‘I have always understood that it is the duty of any person entering into a commercial transaction particularly one in which a large amount of money is involved to obtain the best possible legal advice so that he can better understand his obligations under the documents to which he appends his signature or seal. If courts are going to allow debtors to avoid paying their just debts by taking some of the defences I have seen in recent times for instance challenging contractual interest rate, banks will be crippled if not driven out of business altogether and no serious investors will bring their capital into a country whose courts are a haven for defaulters. I agree entirely with the Commissioner of Assize Shah that the appellant was not entitled to an injunction upon any one of the grounds urged on its behalf.’

21. I find that the Applicant has not established a prima facie case for issuance of an injunction herein.

22. The court of appeal in the case of **Kenya Commercial Finance Co. Ltd –vs- Afraha Education Society (2001) IEA 86** cited by **Gitumbi, J** with approval in the case of **Joseph Wambua Mulusya –vs- David Kitu & Another (2014) eKLR** observed as follows:-

“The sequence of steps to be followed in the enquiry into whether to grant an interlocutory injunction is sequential so that the second condition can only be addressed if the first one is satisfied”.

23. I need not consider the other two conditions for the grant of temporary injunction as established in the **Giella –vs- cassman Brown Ltd case (supra)** as the conditions are sequential such that when the first condition fails then there is no basis upon which the court can give an injunction unless the court was entertaining a doubt as to whether or not a prima facie case had been established.

24. Consequently, I find that the application under determination has no merit as the Applicant has not satisfied the tests for granting the injunction sought as laid down in the **Giella v Cassman Brown case (supra)**. Accordingly, I dismiss the application dated 12th June 2018 with costs to the Respondent.

25. Parties to comply with the provisions of order 11 within the next 21 days for the hearing of the main suit herein.

Dated and delivered at Nyahururu this 5th day of February 2019.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE