



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KISII

CASE NO. 151 OF 2017

STEPHEN J. ONUONGA

T/A AS PACIFIC INTESTATE CONTRACTORS.....PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK.....DEFENDANT

R U L I N G

1. The plaintiff was advanced a loan by the defendant of kshs. 2,000,000/= in 2015 and as security for the loan the plaintiff offered his land parcel number **Central Kitutu/Daraja Mbili/2751** which was charged in favour of the defendant to secure the repayment. The plaintiff vide the plaint filed herein on 25th July 2017 avers that the loan facility was predicated on payments made by Kisii County Government for contractual services rendered on behalf of the County Government. However, the plaintiff averred that the County Government has delayed in effecting payment for services rendered resulting in default in the loan repayment which has prompted the defendant to call up the loan and to that end the defendant has caused the security to be advertised for sale pursuant to its power of sale under the charge. The plaintiff vide the plaint seeks an order of injunction and for enlargement of time to enable him to redeem the security.

2. Simultaneously with the plaint the plaintiff filed a Notice of Motion under a certificate of urgency and interalia sought the following orders:-

1. That pending the hearing and determination of this suit this Honourable Court be pleased to issue an order of injunction restraining the defendant/respondent by herself, her agents, servants and/or anyone claiming through her from selling by public auction the plaintiff's land parcel No. Central Kitutu/Daraja Mbili/2751 due for public auction allegedly on 27th June, 2017 as per newspaper advert on 19th July 2017.

2. That this court be pleased to issue an order of inhibition inhibiting the respondents or any other person from selling the plaintiff's property Central Kitutu/Daraja Mbili/2751 and preserve the same.

3. That costs of the application be provided for.

3. The application is supported on the grounds set out on the body of the application and in the affidavit sworn in support by Stephen Onuonga the plaintiff/applicant. The plaintiff avers that the defendant has advertised the charged property for sale by public auction in purported exercise of its power of sale conferred by the charge. The plaintiff contends the property is matrimonial property and is thus protected under the provisions of Section 28 of the Land Registration Act 2012. The plaintiff further avers he has been repaying the loan and had paid in aggregate a total sum of kshs. 1.8 Million as at the time the defendant purported to exercise its power of sale. The plaintiff denies he has been served with any demand for default and states he is ready and willing to clear any outstanding balance and seeks a reprieve to enable him to redeem his security.

4. The defendant filed grounds of opposition to the plaintiff's Notice of Motion. The defendant asserts that the loan was not paid within the stipulated time and there was no reason for the defendant to be restrained from exercising its statutory power of sale after the requisite notices were given. The defendant contends the plaintiff has failed to satisfy the threshold for issue of an injunctive relief as established in the case of **Giella -vs- Cassman Brown & Co. Ltd [1973] E. A 358**. The defendant further contended that the plaintiff's application is defective and constitutes an abuse of the court process.

5. Both the plaintiff and the defendant admit there was a charge registered against land parcel number Central **Kitutu/Daraja Mbili/2751** to secure a loan facility to kshs. 2,000,000/= advanced to the plaintiff by the defendant. However, neither the loan offer nor the charge has been exhibited by either of the parties. The terms of the loan offer and the charge are therefore not available to the court for perusal to satisfy itself what the terms and conditions were. The plaintiff has deposed that he was never served with the requisite demand and statutory notice before the Auctioneers advertised the charged property for sale. The defendant though indicating that the requisite notices were issued and served did not tender any evidence to demonstrate the statutory notices were indeed served on the plaintiff. The defendant did not depone any

affidavit in response to the plaintiff's affidavit in support of the application. The plaintiff's averment that he was not served with the requisite demand and statutory notice before the charged property was advertised for sale by public auction remains unchallenged as there was no demonstration that indeed any demand and statutory notices were served on the plaintiff.

6. The plaintiff however admits having been advanced a loan by the defendant which he secured the repayment of by charging his parcel of land **Central Kitutu/Daraja Mbili/2751**. Although the plaintiff states he had been paying the loan and had up to the time of the advertisement of his property for sale paid a cumulative total of about kshs.1.8Million, there is no proof that he had fully repaid the loan and/or that he had not fallen in default of payment. Neither party has furnished a copy of the loan account to demonstrate how the payments were effected and/or the liability on the statement of account. That although the plaintiff depones under paragraph 3 of the supporting affidavit that copy of loan statement was annexed as "SJO-01" no such annexure was attached. There is no proof therefore the plaintiff had defaulted in the payment of the loan and/or that the defendant's right to exercise the power of sale had arisen.

7. In an application for injunction such as the present one, the applicant has to satisfy the conditions for grant of an injunction. (See the case of **Giella -vs- Cassman Brown & Co. Ltd [1973] E. A 358**). The applicant had to demonstrate a prima facie case with a probability of success; that unless the injunction is granted he would suffer irreparable harm which an award of damages would not adequately compensate; and, if the court is in doubt, it can determine the application on a balance of convenience having regard to the attendant circumstances.

8. In the present matter the issue for determination is whether the applicant has satisfied the threshold to warrant grant of injunctive relief. I have earlier in this ruling indicated that no offer letter or copy of the charge was exhibited and neither was any loan statement exhibited by the parties. In the absence of this information the court has no basis to make an evaluation to determine whether or not there has been any default on the part of the plaintiff in regard to his obligations under the charge. The situation is not helped by the lack of any demonstration by the defendant that appropriate demand and service of the requisite statutory notice was served on the plaintiff. In those circumstances the court is not in a position to determine whether or not the defendant's right to exercise its power of sale had accrued.

9. The court will not ordinarily interfere with a chargee's exercise of its statutory power of sale where it is demonstrated there has been default and the chargor has been issued the appropriate demands to rectify the default and has been served with the requisite statutory notice under Sections 90(1) and 96(2) of the Land Act, 2012 and has failed to rectify the default and/or redeem the security. These provisions of the law are intended to ensure that the chargor is afforded the opportunity to exercise his equity of redemption of the property held as security.

10. In the present matter although there is indication that the plaintiff still has outstanding balance on the loan, there is no demonstration in my view that the defendant has complied with the law before seeking to exercise its power of sale. Thus, though I am not satisfied that the plaintiff has demonstrated he has a prima facie case with a probability of success, I am nonetheless inclined to grant an order restraining the defendant from proceeding to realize the security held without serving the plaintiff with requisite statutory notice as required under the law to enable the plaintiff to redeem his property if he is minded to do so.

11. The upshot is that I decline to grant the plaintiff injunctive relief in the terms sought in the Notice of Motion dated 25th July 2017. Instead and in the event that the plaintiff has not redeemed the property, I direct the defendant to initiate the realization process of the security held afresh by issuing to the plaintiff the appropriate notices envisaged under Sections 90(1) and 96(2) of the Land Act 2012 before advertising the charged property for sale by public auction. As neither party can be said to have been successful in the instant application, I order each party to bear their own costs of the application.

12. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT KISII THIS 20TH DAY OF MARCH 2019.

J. M. MUTUNGI

JUDGE

In the Presence of:

Mr. Nyambati for the plaintiff

N/A for the defendant

Ruth Court Assistant

J. M. MUTUNGI

JUDGE