



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE No. 106 OF 2017

PETER ONSONGO OGETO.....PLAINTIFF

VERSUS

SHEM OSIAGO MORUMBWA.....1ST DEFENDANT

CO-OPERATIVE BANK OF KENYA LTD.....2ND DEFENDANT

RULING

1. This ruling is in respect of plaintiffs' Notice of Motion dated 4th July 2018, an application through which the plaintiff seeks an order that in the event that the 2nd defendant exercises its statutory power of sale then the surplus from the sale of land parcel number Njoro/Ngata Block 2/4636 (Kirobon 'A') (the suit property) be deposited in court as security pending hearing and determination of the suit and that in the event the 1st defendant herein services his outstanding loan with the 2nd defendant then title documents in respect of the suit property be deposited in court as security pending hearing and determination of the suit. The application is supported by an affidavit sworn by the plaintiff. The 1st defendant opposed the application through a replying affidavit while the 2nd defendant responded through Grounds of Opposition.

2. The applicant deposed in the supporting affidavit that although the court dismissed his application for injunction vide a ruling delivered on 20th June 2018, the found that he had established a prima facie case. That in the event of the 2nd defendant exercising statutory power of sale it would be bound to hand over to the 1st defendant any surplus from the proceeds of the sale. That if that happens, the applicant will be unable to enjoy any fruits of a judgment in his favour in this matter. That it is in the interest of justice that the orders be granted.

3. The 1st defendant deposed in his replying affidavit that the application is a fresh attempt at getting an injunction which had been denied, that matters of his bank account with the 2nd defendant are private and confidential and that no sufficient grounds have been established to require the defendants to provide security.

4. In its grounds of opposition the 2nd defendant took the position that the application is res judicata in view of the ruling delivered on 20th June 2018, that granting the prayers would amount to an undue and illegal clog of its statutory power of sale, that there is no privity of contract between the applicant and the 2nd defendant and that the court lacks jurisdiction to grant the orders sought.

5. The application was heard by way of written submissions. Both the applicant and the 2nd defendant filed submissions but the 1st defendant did not file any. I have anxiously considered the application, the affidavits filed, grounds of opposition and the submissions. The issues that arise for determination are whether the matter is res judicata and whether the applicant is entitled to security as sought pending hearing and determination of the suit.

6. Res judicata as a principle has found expression in **Section 7** of the **Civil Procedure Act** which provides:

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

7. Thus, for res judicata to apply in a particular matter, there must have been a previous suit in which the matter was in issue; the parties in both matters must be the same or litigating under the same title; the previous matter must have been heard and determined by a competent court and the issue is raised once again in the new suit.

8. The 2nd defendant's argument that the matter is res judicata is founded on prayer 2 of the present application which sought an order that status quo be maintained pending inter parte hearing of the application. Needless to state, the prayer became spent the moment the

application was heard inter partes. To the extent that prayers 3 and 4 of the application essentially seek security pending hearing and determination of the suit, I find that that is an aspect that was neither sought nor determined in the ruling dated 20th June 2018. The said ruling dealt purely with whether or not an injunction pending hearing and determination of the suit could be granted. I therefore find that the present application is not res judicata. That resolves the first issue for determination.

9. The final issue for determination is whether the applicant is entitled to security pending hearing and determination of the suit. It is not clear what kind of security the applicant wishes the court to order. I say so because the present application is brought under the generic provisions of **sections 1A, 1B and 3A of the Civil Procedure Act** and **Order 51 Rule 1 of the Civil Procedure Rules**. None of those provisions deal with security before judgment. Instead, security before judgment is provided for under **Order 39 Rule 1 of the Civil Procedure Rules** as follows:

Where at any stage of a suit, other than a suit of the nature referred to in paragraphs (a) to (d) of section 12 of the Act, the court is satisfied by affidavit or otherwise—

(a) that the defendant with intent to delay the plaintiff, or to avoid any process of the court, or to obstruct or delay the execution of any decree that may be passed against him—

(i) has absconded or left the local limits of the jurisdiction of the court; or

(ii) is about to abscond or leave the local limits of the jurisdiction of the court; or

(iii) has disposed of or removed from the local limits of the jurisdiction of the court his property or any part thereof; or

(b) that the defendant is about to leave Kenya under circumstances affording reasonable probability that the plaintiff will or may thereby be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit,

the court may issue a warrant to arrest the defendant and bring him before the court to show cause why he should not furnish security for his appearance:

Provided that the defendant shall not be arrested if he pays to the officer entrusted with the execution of the warrant any sum specified in the warrant as sufficient to satisfy the plaintiff's claim; and such sum shall be held in deposit by the court until the suit is disposed of or until the further order of the court.

10. Alternatively, security can be sought under **Order 39 Rule 5** which provides:

(1) Where at any stage of a suit the court is satisfied, by affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him—

(a) is about to dispose of the whole or any part of his property; or

(b) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the court,

the court may direct the defendant, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the court, when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the decree, or to appear and show cause why he should not furnish security.

(2) The plaintiff shall, unless the court otherwise directs, specify the property required to be attached and the estimated value thereof.

(3) The court may also in the order direct the conditional attachment of the whole or any portion of the property so specified.

11. It must be remembered that at this stage, none of the parties' has established his case through a hearing on the merits. The outcome of the case upon hearing could go either way. The court must therefore be careful not to saddle any of the parties with obligations that ordinarily ought to be left for the final determination of the suit. As is apparent from a reading of both **Order 39 Rule 1** and **5**, an applicant who seeks security should demonstrate that the defendant is actuated by an intention to delay the plaintiff, or to avoid any process of the court, or to obstruct or delay the execution of any decree that may be passed against him. If the sale that the applicant is apprehensive of occurs, it will be pursuant to rights and obligations that lawfully arise between the 1st and 2nd defendants pursuant to both a statutory and contractual relationship between them as chargee and chargor. I do not see how such an outcome can be construed to be aimed at obstructing or delaying the execution of any decree herein. Further, there is no suggestion that the defendants are foreigners or that they are about to leave the jurisdiction of the court.

12. One of the orders that the applicant has sought is that in the event the 1st defendant herein services his outstanding loan with the 2nd defendant then title documents in respect of the suit property be deposited in court as security pending hearing and determination of the suit. It would be futile to grant such an order considering that suit property is charged in favour of the 2nd defendant. The title can only be free once it is discharged following settlement of the rights and obligations that exist between the 1st and 2nd defendants pursuant to the charge document.

13. All in all, I am not persuaded that the applicant has made a case for granting the orders sought. Notice of Motion dated 4th July 2018 is dismissed with costs to the defendants.

Dated, signed and delivered in open court at Nakuru this 30th day of May 2019.

D. O. OHUNGO

JUDGE

In the presence of:

Ms Ngugi holding brief for Mr Mwangi for the plaintiff/applicant

No appearance for the 1st defendant/respondent

No appearance for the 2nd defendant/respondent

Court Assistants: Beatrice & Lotkomoi