



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERICHO

ELC CASE NO. 10 OF 2019

SAMWEL KIPNGENO TONUL.....PLAINTIFF/APPLICANT

VERSUS

LETSHEGO KENYA LTD.....1ST DEFENDANT/RESPONDENT

JAGEDAH AUCTIONEERING SERVICE.....2ND DEFENDANT/RESPONDENT

RULING

1. By Notice of Motion dated 19.2.2019 the Plaintiff/Applicant seeks a temporary injunction to restrain the Respondents by themselves, their agents or servants from selling, alienating, leasing, advertising for sale, taking possession and/or doing anything that is detrimental to land parcel no. KERICHO/CHEMAGEL/3608.

2. The application is based on the grounds stated on the face of the Notice of Motion and the applicant's affidavit sworn on the 19.2.2019. It is opposed by the Defendants/Respondents through their Grounds of opposition dated 5th March 2019 and the Replying affidavit of Winnierohi Wafula, the legal officer of the 1st Defendant sworn on the 27th March 2019.

3. Briefly stated, the Plaintiff's case is that on 20.11.2014 the 1st Defendant advanced the Plaintiff a loan of Kshs. 5,500,000 which was secured by a charge of the Plaintiff's title no. KERICHO/CHEMAGEL/3608. The loan was repayable by 60 monthly installments at an agreed interest of 12%. It is the plaintiff's contention that even though he has been dutifully repaying the loan, he was served with a 90-day statutory notice demanding that he repays the outstanding sum of Kshs. 2,230,498/= failing which his property would be sold. He was subsequently served with a 40- day redemption notice and notification of sale. The plaintiff contends that the 1st defendant unilaterally increased the interest without any notice to him and is therefore in breach of the loan agreement.

4. The 1st Defendant refutes the Plaintiff's allegations and in her affidavit the 1st Defendant's legal officer depones that the Plaintiff poorly serviced the loan and fell into arrears prompting the 1st Defendant to issue him with a demand notice to rectify the default and subsequently with a 90-statutory notice. Despite the said notice the Plaintiff did not rectify the default after which the 1st Defendant issued a 40 day notification of sale. The said notices have been annexed to the legal officer's affidavit. The 1st Defendant denies that it has manipulated the interest and takes issue with the loan calculator used by the Plaintiff to calculate the outstanding amount as it has not been approved for standard use. The 1st Defendant contends they have followed due process by issuing all the requisite notices in compliance with the Land Act and their right to exercise their power of sale has therefore accrued.

5. The application was canvassed by way of written submissions and both parties filed their submissions which I have considered.

Issue for determination:

6. The only issue for determination is whether the plaintiff has satisfied the conditions for the grant of injunctive relief.

Analysis and Determination

7. In order for the court to exercise its discretion in granting injunctive relief the applicant must meet the conditions set out in the case of **Giella V Cassman Brown & Company Ltd 1973 EA 358** which are as follows:

“First, the applicant must show that he has a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be

compensated by damages. Thirdly, if the court is in doubt, it will decide the application on a balance of convenience.”

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”

8. Counsel for the 1st Defendant has submitted that the Plaintiff has not demonstrated that he has *prima facie* case with a probability of success as he has admitted the he has been served with the relevant statutory notices. He submits the fact the Plaintiff disputes the interest charged is not a ground for stopping the 1st Defendant from exercising its statutory power of sale. Counsel has cited the cases of **James Otiang Okoth & Another v NIC Bank (2017)eKLR** where the court stated as follows:

“In as much as the aforesaid allegations may be true, it is now settled that a dispute over the amount of interest owing or the rate of interest per se, is not a valid ground for restraining a chargee from exercising a crystallized power of sale. In Halsbury’s Laws of England Vol 32 (4th Edition) para 725 it is opined that:

“The mortgagee will not be restrained from exercising his power of sale because the amount is in dispute or because the mortgagor has begun a redemption action, or because the mortgagor objects to the manner in which the sale is being arranged. He will be restrained however, if eh mortgagor pays the amount claimed into court, that is, the amount which the mortgagor claims to be due to him, unless on the terms of the mortgage, the claim is excessive”.

9. Similarly, in **Bharman Kanji Shah and Another v Shah Depar Devji**, it was observed that :

“The court should not grant an injunction restraining a mortgagee from exercising his power of sale solely on the ground that there is a dispute as to the amount due under the mortgage.”

10. In the instant case apart from disputing the amount due, the plaintiff has not raised any other ground to demonstrate that he has a *prima facie* case with a probability of success. That being there position, there is no need for the court to examine the other conditions for grant of injunctive relief.

11. In the circumstances, I find no merit in the Plaintiff’s application and I dismiss it. The costs of this application shall be in the cause.

Dated, signed and delivered at Kericho this 21st day of June, 2019.

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J.M ONYANGO

JUDGE

In the presence of:

1. Mr. Nyadimo for Mr. J.K.Rono for the Plaintiff/Applicant
2. Miss Sitati for Mr. Ochieng for the Defendant/Respondent
3. Court Assistant - Rotich