



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

ELC CASE N0 35 OF 2019

ROBERT KIPYEGON CHEPKWONY.....PLAINTIFF

VERSUS

BARCLAYS BANK OF KENYA LIMITED.....1ST DEFENDANT

GARAM INVESTMENTS (AUCTIONEERS).....2ND DEFENDANT

RULING

Introduction

1. This ruling is in respect of the Plaintiff/Applicant's Notice of Motion dated 29th May 2019 in which the Plaintiff seeks a temporary injunction restraining the Defendants jointly and severally either by themselves or their agents or servants from advertising for sale, selling, alienating or disposing of land parcel number KERICHO/MANRET/270 pending the hearing and disposal of this suit.
2. The application is anchored on the 8 grounds stated on the face of the Notice of Motion as well as the Plaintiff's Supporting Affidavit dated 30th May 2019. The Plaintiff depones that he is a former employee of the 1st Defendant who retired voluntarily on 30th April 2017. It is the Plaintiff's contention that he has never been served with a statutory notice. The Plaintiff also argues that the amount stated in the notice dated 10.4.2018 includes unsecured loans which are not the subject of the charge and they should not form the basis for the sale of the Plaintiff's land.
3. The application is opposed by the Defendants through the Replying affidavit of Samuel Njenga, the legal officer of the 1st Defendant. He depones that by the time he retired that Plaintiff was indebted to the 1st defendant to the tune of of Ksh.4,919,847.70 in respect of various loans which was secured by title no. Kericho/Manaret/270. He annexed a copy of the bank statement in respect of the said loans.
4. The 1st Defendant further depones that a 90 day statutory notice was sent to the Plaintiff by registered post. It is the 1st Defendant's contention that the court ought to legitimize what the parties have agreed and the court cannot grant an injunction where the debt is admitted and a statutory notice has been issued accordingly.
5. The application was argued orally and counsel for the Plaintiff submitted that the chargee's statutory power of sale had not accrued as no statutory notice had been issued to the Plaintiff in accordance with Section 90 of the Land Act, 2012. He submitted that the notice was sent to an address in Nakuru whereas the Plaintiff's address as per the charge document is in Sotik. Counsel further submitted that the notification of sale was irregular as it was issued by the 2nd Defendant instead of the 1st Defendant. He argues that the 1st Defendant has purported to recover unsecured loans by exercising its statutory power of sale which is irregular.
6. In his submissions counsel for the Defendants submitted that it is not in dispute that the Plaintiff is indebted to the Defendant and that there is a charge of the suit property. The main contention is that proper notices were not served upon the Plaintiff. He made reference to annexure SN3 which is a copy of the statutory notice sent to the plaintiff. He further submitted that the notification of sale was issued by the 1st defendant's advocates. He submitted that the plaintiff had not come to court with clean hands as he was clearly in default and had therefore not demonstrated that he has *prima facie* case with a probability of success. He cited the cases of **Giella v Cassman Brown 1973 E.A 358** for the principles upon which the courts should grant an injunction; **Gesa Building Engineering Ltd v George Ngure Chira & Another (2019) eKLR** for the proposition that if the court finds that there is no *prima facie* case, it need not consider the other two principles and the case of **Sammy Japheth Kavuku v Equity Bank Limited & Another (2014) eKLR** for the proposition that an injunction should not be granted if the applicant does not have clean hands and no court of equity will aid a man to derive advantage from his own wrong.

Issue for determination.

7. The singular issue for determination is whether the Plaintiff has met the conditions for the grant of an injunction.

Analysis and determination

8. 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 it will decide the application on a balance of convenience.”

9. 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”

10. Counsel for the Plaintiff submitted that the Plaintiff had established a *prima facie* case with a probability of success as the 1st Respondent’s power of sale had not accrued since he did not serve the plaintiff with a statutory notice in accordance with section 90 (1) of the Land Act ,2012 as the 1st respondent used a wrong address. Counsel for the 1st Respondent countered this argument by referring to the 90-day notice annexed to the 1st Respondent’s Replying affidavit. A look at the said notice shows that it is addressed to the Plaintiff but the address provided is different from the one provided in the charge instrument. The address in the charge is P.O Box 243 20227 Sotik while the one in the notice is P.O Box 66-200-100 Nakuru. The certificate of posting shows that the notice issued by the firm of Muriu Mungai & Company Advocates on behalf of the 1st Defendant was sent to Nakuru. Counsel for the 1st defendant explained that a copy of the notice was sent to the Plaintiff’s wife using the address in the charge instrument but the counsel for the plaintiff insisted that the Plaintiff had not received the notice.

11. Section 90(1) of the Land Act specifically provides that a 90-day notice be served upon the chargor as a prerequisite for the exercise of the chargee’s statutory power of sale. There is no two way about it and a notice sent to the wrong address is no notice at all. The argument that the chargor is deemed to have been served if his wife received a copy of the notice cannot hold as this would amount to service through a proxy which is not acceptable in law. In any event, since the notices were sent by registered post, there is a possibility that the plaintiff’s wife never received her copy. It is therefore my finding that the Plaintiff has established a prima facie case with a probability of success.

12. The second condition that the Plaintiff was required to prove is whether he is likely to suffer irreparable loss. In his supporting affidavit the Plaintiff has deponed that he has been repaying the loan and if his land is sold, he is likely to suffer irreparable loss. Even though the Plaintiff has been making payments, it is common ground that he is in arrears. It may therefore be argued that he has not come to court with clean hands. However, given my finding above, I am persuaded that selling his land without according him adequate notice and contrary to the express provisions of the Land Act would occasion him irreparable loss.

13. Turning to the last point on where the balance of convenience tilts, it is my finding that taking into account the unique circumstances of this case the balance of convenience tilts in favour of the Plaintiff.

14. In view of the foregoing, I find merit in the Plaintiff ‘s application and I grant it. A temporary injunction is hereby issued restraining the Defendants/Respondents from selling the Plaintiff’s parcel of land known as L.R No. KERICHO/MANARET/270. I however direct that as long as the debt remains unpaid, the 1st defendant may issue fresh notices to the Plaintiff and proceed to exercise its statutory power of sale.

15. Each party shall bear their own costs

Dated signed and delivered at Kericho this 19th day of June, 2019.

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J.M ONYANGO

JUDGE

In the presence of:

1. Mr. J.K.Rono for the Plaintiff/Applicant
2. Mr. Nyadimo for Mr. Otieno for the Defendants/Respondents
3. Court assistant – Rotich