



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 445 OF 2017

RICHARD KENNEDY MASINDE.....PLAINTIFF

VERSUS

MWANANCHI CREDIT LTD.....DEFENDANT

AND

MARY RITA WANJIRU T/A

MISTAN AUCTIONEERS.....INTERESTED PARTY

RULING

1. In the Application dated 13th January, 2017, the Plaintiff is seeking for the following orders:

a. That the status quo of the suit property be maintained in the interim.

b. That the Interested Party/Respondent be enjoined as a 2nd Defendant in this suit.

c. That the Plaintiff's/Applicant's Application dated 23rd December, 2016 be consolidated with the one herewith.

d. That pending the hearing and determination of this Application inter-partes, the Defendant/Respondent/Principals/Servants/Agents or otherwise howsoever be restrained from interrupting or interfering with Plaintiff's/Applicant's/Agent's/Assign's peaceful and quiet enjoyment of the suit property.

e. That upon the hearing and determination of this Application inter-parts, the Defendant/Respondent/Principals/Servants/Agents or otherwise howsoever be restrained from interruption or interfering with Plaintiff's/Applicant's/Tenant's/Agent's/Assign's peaceful and quiet enjoyment of the suit property.

f. That upon hearing this Application inter-partes, this Honourable Court be and is hereby pleased to issue a temporary order of injunction restraining Defendant/ Respondent/Principal/Servant/Agent/Employees from selling, offering for sale, effecting a transfer or destruction of the suit property to the detriment of the Plaintiff/Applicant/Agent/Tenant/Assign pending the hearing and final determination of this suit.

g. That the orders herein be enforced by the OCS Mlolongo Police Station.

2. According to the Affidavit of the Plaintiff, he entered into an Agreement dated 22nd July, 2016 with the Defendant; that in the said Agreement, the Defendant offered him a credit facility of Kshs. 2,000,000 to be repaid in four (4) monthly instalments of Kshs. 732,050 and that the loan was secured with land known as Mavoko Municipality Block 41/17 (*the suit property*).

3. The Plaintiff deponed that in breach of the Agreement and consumer protection laws, the Defendant failed to advance him the Kshs. 2,000,000; that instead, the Defendant advanced him a sum of Kshs. 1,429, 500 in instalments and that despite having not advanced him the Kshs. 2,000,000, the Defendant demanded for the repayment of the 1st instalment of Kshs. 732,050.

4. When he protested, the Plaintiff has deponed that the Defendant demanded for Kshs. 2,928,200 vide a letter dated 28th June, 2016 before even advancing the contracted amount of Kshs. 2,000,000.

5. The Plaintiff finally deponed that on 19th December, 2016, the Defendant issued him with a notice of sale of the suit land for the purported arrears of Kshs. 4,387,078.50 which in itself is a breach of the *induplum rule*.

6. In response, the Defendant deponed that the Plaintiff is not the registered proprietor of parcel of land known as Mavoko Municipality Block 41/17 and has no locus to institute the suit; that the registered owner of the suit land was the Plaintiff's guarantor for the advanced sum of Kshs. 2,000,000; that the Plaintiff has admitted having borrowed Kshs. 2,000,000 from the Defendant and that the Application should be dismissed. Both the Plaintiff's and the Defendant's advocate filed their respective submissions which I have considered. I have also considered the filed authorities.

7. In his Supplementary Affidavit, the Plaintiff deponed that although he is not the registered proprietor of the suit land, he is a purchaser in possession of the suit land and has an equitable interest in the suit land.

8. According to the Plaintiff, Jane Rose Namaemba Wekesa is not his guarantor; that the Defendant breached one of its fundamental terms and conditions of the loan Agreement which requires the Title Deed to be in the names of the borrower and that the role of the guarantor cannot be implied.

9. It is not in dispute that on 22nd July, 2016, the Defendant entered into a Loan Agreement with the Plaintiff. The Agreement shows that the Plaintiff applied for a loan of Kshs. 2,000,000 from the Defendant. The said loan was to be re-paid in four (4) equal instalments of Kshs. 732,050, which was inclusive of an interest rate of 10% per month.

10. In addition to the Loan Agreement, the Plaintiff has annexed on the Affidavit an Affidavit signed by one Conrad A. Maloba as the "Guarantor". It would appear that the registered proprietor of land known as Mavoko Municipality Block 41/17 which was handed over to the Defendant as security never signed the guarantee document.

11. The Plaintiff has exhibited two letters dated 11th December, 2016 and 19th December, 2016. In the said letters, the Defendant informed the Plaintiff that unless he pays Kshs. 4,387,078.50, the suit land will be sold by way of public auction. The Plaintiff was also served with a forty five (45) days Redemption Notice pursuant to Rule 15 (d) of the Auctioneers Rules, 1997.

12. The Plaintiff has alleged that he was never advanced with the Kshs. 2,000,000 as agreed. Although the Defendant has exhibited a form dated 22nd July, 2016 showing that the Plaintiff acknowledged receipt of Kshs. 2,000,000 from the Defendant, it is not clear if this amount was given to the Plaintiff by way of cash or cheque.

13. The Defendant has issued statutory notices to the Plaintiff with a view of selling land known as Mavoko Municipality Block 41/7 for the advanced money. Indeed, the Title Deed for Mavoko Municipality Block 41/7 shows that the land was charged by the Defendant on 20th July, 2016.

14. The Title Deed for Mavoko Municipality Block 41/7 is registered in favour of Jane Rose Wekesa. However, the said Jane Rose Wekesa neither signed the charge document nor a guarantee document. The issue of how the suit land was charged without the written consent of the registered owner of the land renders the charge unenforceable.

15. The Loan Ledger annexed on the Defendant's Affidavit shows that the principal amount advanced to the Plaintiff was Kshs. 2,000,000. However, on the same day, an interest of Kshs. 928,200 was loaded on the Plaintiff's loan account, bringing the total amount due to Kshs. 928,200. The charged interest seems to be in disparity with the chargeable interest shown in the Agreement of 22nd July, 2016 which was Kshs. 732,050 per month. The Defendant has not bothered to explain the discrepancy.

16. Considering that there is no evidence to show that the registered proprietor of the suit land signed the charge document or the Agreement of 22nd July, 2016, and in the absence of an explanation of how the Defendant charged the Plaintiff the interest of Kshs. 928,000 on the same day he advanced to the Plaintiff the loan of Kshs. 2,000,000, I find that the Plaintiff has established a prima facie case with chances of success.

17. For those reasons, I allow the Application dated 13th January, 2017 as prayed.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 4TH DAY OF OCTOBER, 2019.

O.A. ANGOTE

JUDGE