



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 533 OF 2017

UBUNTU HOLDINGS LIMITED.....PLAINTIFF

VERSUS

HOUSING FINANCE COMPANY LIMITED.....DEFENDANT

RULING

The application for determination is the Plaintiff's Notice of Motion dated the 13th March, 2017 brought pursuant to Order 40(1) and Order 51(1) & (13) of the Civil Procedure Rules, Section 1A, 1B and 3A of the Civil Procedure Act and all the other enabling provisions of the law. It is based on the following grounds, which in summary is that the Applicant is the register proprietor of land parcel number KAJIADO/KAPUTIEI NORTH/6595 (hereinafter referred to as the suit land). The Applicant borrowed Kshs. One (1) million and partially secured it with a legal charge over the suit land. The Applicant has since been issued with the Statutory Notice on 24th February, 2016 and a Notice of Sale on 26th October, 2016 on claims it has defaulted in repaying the outstanding balance of Kshs. 849, 439 as at 31st October, 2016. The circumstances upon which the loan was procured is under investigation and subject of criminal case no. 5191 of 2014 – Republic versus Paul Mwenda Ntalamithe, where the said Paul Mwenda Ntalami, a director to the Plaintiff is charged with forgery of the resignation of ALEX FLORENCE HOMEM also a director to substitute him with one ALAN WAFULA MUTEKHELE for purposes of taking the loan. The Defendant had granted the Plaintiff a 90 days moratorium on sale beginning on 31st December, 2016 which is expiring on 13th March, 2017 and the Respondent has communicated its unwillingness to extend the same. The Applicant will suffer irreparable damage if the property is sold by the Respondent.

The application is supported by the affidavit of ALEX FLORENCE HOMEM who is a co-director of the Plaintiff's company, where he reiterated his claim above.

The application is opposed by the Defendant whose Legal Officer JOSEPH LULE swore an affidavit where he deposes that the Plaintiff first approached the bank on or about 27th October, 2013 and requested a loan application form on behalf of one of its directors ALAN WAFULA MUTEKHELE with another Director PAUL MWENDA NTALAMI presenting a letter of Authority authorizing the Plaintiff company, to borrow the sum of Kshs one (1) million shillings secured by legal charge over the suit land. He avers that through a Search at the Company Registry conducted by the Defendant, confirmed that the borrower and PAUL MWENDA NTALAMI were both directors and shareholders of the Plaintiff's company. Further that on 5th November, 2013, the borrower submitted a loan application form requesting for a loan of Kshs. One (1) million to be secured with a legal charge over the suit land, and he furnished the Defendant with all the requisite documents including Identity Cards; KRA PIN Certificate for both Directors; Certificate of Incorporation and KRA PIN for Plaintiff Company; and the Company's Memorandum and Articles of Association. He claims upon receipt of the application form including the requisite documents and conducting due diligence, the Defendant processed the loan, with a charge being

registered on the suit land 23rd December, 2013 at the Kajiado Lands Registry and the loan being disbursed on 14th January, 2014. He states that the Defendant is a stranger to the complainant in Criminal Case 5191 of 2014, the Republic of Kenya versus Paul Mwenda Ntalimithe and the deponent herein ALEX FLORENCE HOMEM. Further, that the Defendant granted a moratorium over the loan and the same will not be extended. Both parties filed written submissions, which I have considered.

Analysis and Determination

Upon perusal of the Notice of Motion dated the 13th March, 2017 including the supporting, replying and supplementary affidavits as well as the annexures thereon, I note the only issue for determination at this juncture is whether the Plaintiff is entitled to the injunctive orders sought pending the outcome of the suit.

It is not in dispute the two of the Plaintiff's Directors PAUL MWENDA NTALAMI and ALEX WAFULA MUTEKHELE charged the suit land to secure a loan of Kshs. 1 million from the Defendant. The Deponent ALEX HOMEM who is another director of the Plaintiff is seeking for a temporary injunction claiming that that his fellow directors acted unlawfully to secure the loan from the Defendant. He contends that the circumstances upon which the loan was procured is under investigation and subject of criminal case no. 5191 of 2014 – where the fellow director Paul Mwenda Ntalami, was charged with forgery of his resignation. The Defendant on the other hand insists the Plaintiff took a loan facility with it and the two directors legally charged the suit land. Further that before issuing the loan, it conducted due diligence at the Company Registry which did not reveal any anomaly on the part of the Company directors. It denies having any knowledge of the fraud on the part of the directors to the Plaintiff and insists ALAN WAFULA MUTEKHELE and PAUL MWENDA NTALAMI presented a letter of Authority authorizing the Plaintiff company, to borrow the sum of Kshs. One (1) million shillings secured by legal charge over the suit land and provided all the requisite documents including Identity Cards; KRA PIN Certificate for both Directors; Certificate of Incorporation and KRA PIN for Plaintiff Company; and the Company's Memorandum and Articles of Association before the loan was issued. The Defendant further states that it granted the Plaintiff a moratorium for three months over the loan.

It is now established in Kenya that the principles for consideration in determining whether temporary injunction can be granted or not is well settled in the case of **Giella Vs. Cassman Brown & Co. Ltd (1973) EA 358** as follows:

"First, an applicant must show 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 an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."

In relying on the facts above and the Case of **Giella V Casman Brown**, I find that the Plaintiff has indeed not established a prima facie case to warrant the grant of interim injunction pending the outcome of the suit.

On the question as to whether the Plaintiff will suffer irreparable harm which cannot be compensated by way of damages, he claims his resignation was forged and replaced with another director for purposes of taking the loan from the Defendant. However, I note that the records at the Company Registry indicated it was the two directors PAUL NTALAMI and ALEX WAFULA MUTEKHELE who were the legal directors of the Plaintiff at the time of taking the loan. The Plaintiff has not demonstrated what harm he will suffer if the suit land which was charged by his fellow directors is sold in realization of the debt owed to the Defendant. In the case of **Case of Nguruman Ltd. Vs. Jan Bonde Nielsen CA No. 77 of 2012**, it was held that **'...the applicant must establish that he 'might otherwise' suffer irreparable injury which cannot be adequately compensated remedied by damages in the absence of an injunction, this is a threshold requirement and the burden is on the applicant to demonstrate, prima facie, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is**

actual, substantial and demonstrable; injury that cannot ‘adequately’ be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy. ‘

In relying on the case above and based on the circumstances at hand, I find that the Plaintiff has not demonstrated the harm he will suffer if the injunctive orders are denied.

On the question of balance of convenience, I note the Plaintiff’s directors charged the suit land to the Defendant. The Plaintiff is still indebted to the Defendant which holds the suit land as security. In the case of **Andrew M. Wanjohi – Vs- Equity Building Society & 2 other [2006] eKLR** it was expressed that **‘In my considered view if the 1st and 2nd Defendants are restrained from selling off until the suit was heard and determined, there is a very real risk that the debt may outstrip the value of the suit property, as the borrower has never made any repayments for more than three years. That fact, coupled with the status of the 1st Defendant and 2nd Defendants, persuades me that the balance of convenience is in favour of the said defendants. If the property was sold, the Plaintiff can find other accommodation. And if it were finally held that the property should not have been sold, the 1st and 2nd Defendants would be able to compensate the Plaintiff.’**

In relying on the above, I find that the balance of convenience indeed tilts in favour of the Defendant as opposed to the Plaintiff.

It is against the foregoing that I find the Plaintiff’s Notice of Motion dated the 13th March, 2017 is not merited and is dismissed with costs.

Dated signed and delivered in open court at Kajiado this 30th day of January, 2018

CHRISTINE OCHIENG

JUDGE

Present:

Cc Mpoye

Kitulu holding brief for Owino for Defendant/Respondent

N/A for Plaintiff