



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAKURU**

**CASE NO. 306 OF 2016**

**JAMES FRANCIS MAINA THIONGO.....PLAINTIFF**

**VERSUS**

**CHASE BANK (Under Receivership) .....1<sup>ST</sup> DEFENDANT**

**SIMON GACHAGUA.....2<sup>ND</sup> DEFENDANT**

**RULING**

***(Application for injunction to restrain the defendants from interfering with suit property; application dismissed)***

1. The plaintiff filed this suit on 2<sup>nd</sup> August 2016. Prior to filing the suit, the plaintiff obtained leave to file suit against the 1<sup>st</sup> defendant pursuant to orders granted on 20<sup>th</sup> June 2016 by the High Court in Nakuru Miscellaneous Civil Application Number 236 of 2016.

2. Subsequently, the plaintiff filed Notice of Motion dated 13<sup>th</sup> February 2017. This ruling is in respect of the said application. The application is expressed to be brought inter alia under Order 40 rules 1(2), 2 (1), 4 (1) (2) of the Civil Procedure Rules and seeks the following orders:

***1. Spent***

***2. Spent***

***3. That pending the hearing and determination of this suit this honourable court be pleased to issue a temporary injunction restraining the respondent by itself, its agents and or servants from selling, advertising, alienating, disposing and in any other way interfering or dealing with the land parcel number Bahati/Kabatini Block 1/1100.***

***4. That the defendants do bear the costs of this application***

3. The application is supported by an affidavit sworn by the plaintiff on 13<sup>th</sup> February 2017. It is deposed in the affidavit that the plaintiff is the holder of account number 011215031100 with the 1<sup>st</sup> defendant bank. The plaintiff is also a member of Bahati Pioneer Farmers' Co-operative Society, a society formed to assist small scale farmers in Bahati Constituency to grow cash crops and other chain products.

4. The 1<sup>st</sup> defendant came up with a proposal to offer finance to individual farmers for construction of greenhouses. In that regard, the 1<sup>st</sup> defendant issued to the plaintiff letter of offer dated 18<sup>th</sup> May 2015 in

which it offered to the plaintiff a term loan of KShs. 345,000/= to be secured by a charge over the plaintiff's parcel of land known as Bahati/Kabatini Block 1/1100, the suit property. The charge was accordingly registered and the plaintiff paid legal fees for the registration.

5. It is further deposed that there was a precondition that the loans would not be disbursed to the plaintiff and other farmers but would be paid to the contractor who was to supervise the greenhouse projects, market the products and make monthly repayments in respect of the loan. The plaintiff was introduced to the 2<sup>nd</sup> defendant as the contractor by an officer of the 1<sup>st</sup> defendant. The loan having been disbursed by the bank, the plaintiff accordingly transferred Kshs.330, 000/= to the contractor's account on 21<sup>st</sup> August 2015. The contractor failed the complete construction of the greenhouse or even to repay the loan and as a result, the loan account fell into arrears.

6. The 1<sup>st</sup> defendant wrote to the plaintiff a letter dated 10<sup>th</sup> February 2016 warning him that he was in arrears of KShs. 90,438.25 and demanding the full outstanding debt of KShs. 362,951.90. The 1<sup>st</sup> defendant ultimately instructed Garth Auctioneers to collect from the plaintiff an outstanding amount of KShs. 497,862/=.

7. The plaintiff's efforts to get the 2<sup>nd</sup> defendant to complete the greenhouse and to repay the loan failed. The plaintiff blames the 1<sup>st</sup> defendant since it is the 1<sup>st</sup> defendant that approached the plaintiff and other farmers with the contractors. The plaintiff concluded the affidavit by stating that an injunction is necessary so that he does not lose his land through sale and that no prejudice will be occasioned to the defendants if an injunction is granted.

8. The 1<sup>st</sup> defendant opposed the application through a replying affidavit sworn on 19<sup>th</sup> July 2017 by Mr. Kevin Kimani, its Legal Officer. It is deposed in the affidavit that the 1<sup>st</sup> defendant advanced to the plaintiff a term loan of Kshs.345, 000/= secured by a charge dated 6<sup>th</sup> August 2015 over the suit property. That the plaintiff defaulted in the repayment of the loan and was indebted to the 1<sup>st</sup> defendant in the sum of kshs.432, 923.80 as at 27<sup>th</sup> March 2017.

9. The 1<sup>st</sup> defendant demanded payment from the plaintiff but no payment has been forthcoming. It is further deposed that the 1<sup>st</sup> defendant's role in the transaction was purely that of a financier and the 1<sup>st</sup> defendant was not party to the relationship and disagreements between the plaintiff and the 2<sup>nd</sup> defendant. Accordingly the 1<sup>st</sup> defendant urged the court to dismiss the application.

10. The 2<sup>nd</sup> defendant did not file any response to the application. Counsel for 2<sup>nd</sup> defendant told the court that the application does not affect his client. On her part, counsel for the plaintiff told the court that the application only targets the 1<sup>st</sup> defendant.

11. Parties agreed to argue the application by written submissions and the court made orders in that regard. Accordingly, the plaintiff/applicant filed submissions on 23<sup>rd</sup> August 2017 while the 1<sup>st</sup> defendant filed submissions on 6<sup>th</sup> October 2017. The 2<sup>nd</sup> defendant did not file any submissions.

12. I have considered the application, the affidavits, submissions and authorities cited. In an application for an interlocutory injunction, the applicant must satisfy the test in **Giella –vs- Cassman Brown & Co. Ltd [1973] E.A 358**. He must establish a *prima facie* case with a probability of success. Even if a *prima facie* case is established, an injunction would not to issue if damages can adequately compensate him. Finally, if the court is in doubt as to the answers of the above two tests then the court would determine the matter on a balance of convenience. As was recently held by the Court of Appeal in **Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR**, all the three **Giella** conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially and that if *prima facie* case is not established, then irreparable injury and balance of convenience need no consideration.

13. The plaintiff does not deny having defaulted in the repayment of the loan herein. He actually admits default but blames it on the 2<sup>nd</sup> defendant who he says failed to construct the green house in time and also failed to service the loan. He further blames the 1<sup>st</sup> defendant for introducing the 2<sup>nd</sup> defendant to him. The plaintiff bases this apportionment of blame on his annexure JFTI which is a proposal from the 1<sup>st</sup> defendant dated 1<sup>st</sup> September 2014. I have perused the aforesaid proposal. It states in part as follows:

**This proposal is not a commitment to provide financing, nor does it create any liability or obligation on any entity in the lender to provide such. The tariffs set out herein are not exhaustive and shall be incorporated in formal written agreements should we arrive at a mutually satisfactory arrangement as envisaged herein.**

14. Indeed, the plaintiff and the 1<sup>st</sup> defendant subsequently executed letter of offer dated 18<sup>th</sup> May 2015 and charge dated 6<sup>th</sup> August 2015. As clearly stated therein, the proposal dated 1<sup>st</sup> September 2014 was just that, a proposal. It created no legal obligations.

15. It is important to note that the sole parties to both the letter of offer and the charge are the plaintiff on one part and the 1<sup>st</sup> defendant on the other. The 2<sup>nd</sup> defendant features nowhere in the said documents. It is these documents that spell out the lending contract and the repayment obligations. The plaintiff is both the borrower and the chargor. Repayment obligations fall squarely on him and not the 2<sup>nd</sup> defendant.

16. Besides the suggestion that the 1<sup>st</sup> defendant should have looked to the 2<sup>nd</sup> defendant for repayment, the plaintiff has not in any way blamed the 1<sup>st</sup> defendant. He neither disputes being in default nor the extent of the default. In such circumstances, I do not see how the plaintiff can establish a prima facie case against the defendants. I thus find and hold that the plaintiff has failed to establish a prim facie case.

17. The foregoing being the case, I do not need to consider the other limbs of the test for determining an application for interlocutory injunction. Notice of Motion dated 13<sup>th</sup> February 2017 is dismissed with costs to the 1<sup>st</sup> defendant.

**Dated, signed and delivered in open court at Nakuru this 24<sup>th</sup> day of January 2018.**

**D. O. OHUNGO**

**JUDGE**

In the presence of:

No appearance for the plaintiff/applicant

Mr. Akango holding brief for Mr. Kosgei for the 1<sup>st</sup> defendant/respondent

No appearance for the 2<sup>nd</sup> defendant/respondent

Court Assistant: Gichaba